

# YEARBOOK

Volume XXXVI: 2005



UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW

YEARBOOK

Volume XXXVI: 2005



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## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The footnote numbering follows that used in the original documents on which this *Yearbook* is based. Any footnotes added subsequently are indicated by lower-case letters.

Changes of and additions to wording that appeared in earlier drafts of conventions, model laws and other legal texts are in italics, except in the case of headings to articles, which are in italics as a matter of style.

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## INTRODUCTION

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

The present volume consists of three parts. Part one contains the Commission's report on the work of its thirty-eighth session, which was held in Vienna, from 4-15 July 2005, and the action thereon by the United Nations Conference on Trade and Development (UNCTAD) and by the General Assembly.

In part two most of the documents considered at the thirty-eighth session of the Commission are reproduced. These documents include reports of the Commission's Working Groups as well as studies, reports and notes by the Secretary-General and the Secretariat. Also included in this part are selected working papers that were prepared for the Working Groups.

Part three contains the United Nations Convention on the Use of Electronic Communications in International Contracts, the corresponding Summary Records, bibliography of recent writings related to the Commission's work, a list of documents before the thirty-eighth session and a list of documents relating to the work of the Commission reproduced in the previous volumes of the *Yearbook*.

**UNCITRAL secretariat**  
Vienna International Centre  
**P.O. Box 500, 1400 Vienna, Austria**  
**Telephone: (+43-1) 26060-4060 Telex: 135612 Telefax: (+43-1) 26060-5813**  
**E-Mail: [uncitral@uncitral.org](mailto:uncitral@uncitral.org) Internet: <http://www.uncitral.org>**

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

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



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

*Part One*

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



## **I. THE THIRTY-EIGHTH SESSION**

### **A. Report of the United Nations Commission on International Trade Law on its thirty-eighth session (Vienna, 4-15 July 2005)**

**(A/60/17) [Original: English]**

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- II. List of documents before the Commission at its thirty-eighth session

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## I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the thirty-eighth session of the Commission, held in Vienna from 4 to 15 July 2005.
2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, the report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

## II. Organization of the session

### A. Opening of the session

3. The thirty-eighth session of the Commission was opened on 4 July 2005.

### B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the General Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 16 October 2000 and 17 November 2003, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:<sup>1</sup> Algeria (2010), Argentina (2007), Australia (2010), Austria (2010), Belarus (2010), Belgium (2007), Benin (2007), Brazil (2007), Cameroon (2007), Canada (2007), Chile (2007), China (2007), Colombia (2010), Croatia (2007), Czech Republic (2010), Ecuador (2010), Fiji (2010), France (2007), Gabon (2010), Germany (2007), Guatemala (2010), India (2010), Iran (Islamic Republic of) (2010), Israel (2010), Italy (2010), Japan (2007), Jordan (2007), Kenya (2010), Lebanon (2010), Lithuania (2007), Madagascar (2010), Mexico (2007), Mongolia (2010), Morocco (2007), Nigeria (2010), Pakistan (2010), Paraguay (2010), Poland (2010), Qatar (2007), Republic of Korea (2007), Russian Federation (2007), Rwanda (2007), Serbia and Montenegro (2010), Sierra Leone (2007), Singapore (2007), South Africa (2007), Spain (2010), Sri Lanka (2007), Sweden (2007), Switzerland (2010), Thailand (2010), the former Yugoslav Republic of Macedonia (2007), Tunisia (2007), Turkey (2007), Uganda (2010), United Kingdom of Great Britain and Northern Ireland (2007), United States of America (2010), Uruguay (2007), Venezuela (Bolivarian Republic of) (2010) and Zimbabwe (2010).

5. With the exception of Benin, Ecuador, Fiji, Gabon, Israel, Lebanon, Madagascar, Mongolia, Pakistan, Rwanda, the former Yugoslav Republic of Macedonia, Uganda and Uruguay, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Angola, Antigua and Barbuda, Azerbaijan, Bulgaria, Costa Rica, Cuba, Democratic Republic of the Congo, Denmark, El Salvador, Finland, Greece, Hungary, Indonesia, Iraq, Ireland, Kuwait, Latvia, Myanmar, Peru, Philippines, Portugal, Romania, Senegal, Slovakia, Slovenia, Ukraine and Yemen.

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<sup>1</sup> Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 17 were elected by the Assembly at its fifty-fifth session, on 16 October 2000 (decision 55/308) and 43 were elected by the Assembly at its fifty-eighth session, on 17 November 2003 (decision 58/407). By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session of the Commission following their election.

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

(a) *United Nations system*: United Nations Conference on Trade and Development, United Nations Environment Programme, World Bank and International Monetary Fund;

(b) *Intergovernmental organizations*: Association of Law Reform Agencies of Eastern and Southern Africa, Council of Europe, European Commission, Hague Conference on Private International Law and International Institute for the Unification of Private Law;

(c) *Non-governmental organizations invited by the Commission*: American Bar Association, American Bar Foundation, Cairo Regional Centre for International Commercial Arbitration, Center for International Legal Studies, Centro de Estudios de Derecho, Economía y Política, European Law Students' Association, Forum for International Commercial Arbitration, Groupe de réflexion sur l'insolvabilité et sa prévention, INSOL International (INSOL), International Bar Association, International Council for Commercial Arbitration, International Insolvency Institute, International Law Institute, International Swaps and Derivatives Associations, Kuwait Fund for Arab Economic Development, Law Association of Asia and the Pacific, Moot Alumni Association, Union internationale des avocats and W.C. Vis International Commercial Arbitration Moot.

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

### **C. Election of officers**

9. The Commission elected the following officers:

*Chairman*: Jorge Pinzón Sánchez (Colombia)

*Vice-Chairpersons*: Jeffrey Wah Teck Chan (Singapore)  
Petr Havlík (Czech Republic)  
Karen Mosoti (Kenya)

*Rapporteur*: Colin Minihan (Australia)

### **D. Agenda**

10. The agenda of the session, as adopted by the Commission at its 794th meeting, on 4 July 2005, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Finalization and adoption of a draft convention on the use of electronic communications in international contracts.

5. Procurement: progress report of Working Group I.
6. Arbitration: progress report of Working Group II.
7. Transport law: progress report of Working Group III.
8. Security interests: progress report of Working Group VI.
9. Monitoring implementation of the 1958 New York Convention.
10. Case law on UNCITRAL texts, digests of case law.
11. Technical assistance to law reform.
12. Status and promotion of UNCITRAL legal texts.
13. Relevant General Assembly resolutions.
14. Coordination and cooperation:
  - (a) General;
  - (b) Insolvency law;
  - (c) Electronic commerce;
  - (d) Commercial fraud;
  - (e) Reports of other international organizations.
15. Other business.
16. Date and place of future meetings.
17. Adoption of the report of the Commission.

#### **E. Adoption of the report**

11. At its 810th and 811th meetings, on 15 July 2005, the Commission adopted the present report by consensus.

### **III. Finalization and approval of a draft convention on the use of electronic communications in international contracts**

#### **A. Organization of deliberations**

12. The Commission considered the revised version of the draft convention, which included the articles adopted by the Working Group at its forty-fourth session (Vienna, 11-22 October 2004), as well as the draft preamble and final provisions, on which the Working Group had only held a general exchange of views at that time, as contained in annex I of document A/CN.9/577. The Commission took note of the summary of the deliberations on the draft convention since the thirty-ninth session of Working Group IV (Electronic Commerce) and the background information provided in document A/CN.9/577/Add.1. The Commission also took note of the comments on the draft convention that had been submitted by Governments and international organizations, as set out in document A/CN.9/578 and Add.1-17.



13. The Commission agreed to consider the draft preamble after it had settled the operative provisions of the draft convention.

## **B. General comments**

14. It was noted that the draft convention aimed at removing legal obstacles to electronic commerce, including those which arose under other instruments, on the basis of well-established principles such as the principle of functional equivalence. However, the view was expressed that the normative content of the draft convention should be strengthened to enhance confidence in the use of electronic communications and contribute to curbing possible abuses and commercial fraud. In response, it was pointed out that the draft convention offered an effective set of legal rules that would facilitate economic development in all regions and countries at different stages of development.

15. The Commission was informed that many States were taking steps to broaden the use of electronic commerce and actively promote the modernization of business methods. It was observed that the draft convention would serve as a useful basis to allow States to simplify various domestic rules that applied to electronic commerce. The draft convention would further enhance confidence and trust in electronic commerce in cross-border trade.

## **C. Consideration of the draft convention**

### **Article 1. Scope of application**

16. The text of the draft article was as follows:

“1. This Convention applies to the use of electronic communications in connection with the formation or performance of a contract [or agreement] between parties whose places of business are in different States.

“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 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 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.”

17. The Commission agreed that, while considering draft article 1, it should bear in mind the logical relationship between draft articles 1, 18 and 19.

18. It was noted that, unlike other international instruments, such as the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)<sup>2</sup> (the “United Nations Sales Convention”), the draft convention applied to contracts between parties located in two different States, even if not both of them were contracting States. The view was expressed that, in its current form, draft article 1 gave the draft convention an excessively broad scope of application, which was unusual in international trade-related instruments. In particular, it was said that the current text of the draft convention would constitute an unfortunate precedent insofar as it allowed for the application of the

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<sup>2</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567.

convention to States that had not ratified or acceded to it, an approach that would ultimately infringe on State sovereignty.

19. In response, it was stated that no adverse effect on State sovereignty was involved. It was also pointed out that, even if draft article 1 differed from the United Nations Sales Convention, its definition of the scope of application was not entirely new and had been used, for example, in article 1 of the Uniform Law on the International Sale of Goods adopted by the Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1964).<sup>3</sup> Furthermore, it was noted that, as the draft convention contained rules of private law, it applied only to transactions between private parties and not to States. It was pointed out that nothing in the draft convention created any obligation for States that did not ratify or accede to the convention. It was added that the courts in a State that had not ratified the convention would apply its provisions only when that State's own rules of private international law indicated as applicable the law of a contracting State, in which case the convention would apply as part of that foreign State's legal system. The application of foreign law was a common result of any system of private international law and had been traditionally accepted by most States. The draft convention did not introduce any new element to that reality.

20. Nevertheless, it was recognized that the relationship between the rules of private international law and the draft convention's scope of application was not entirely clear. One possible interpretation was that, in its present form, the draft convention applied when the law of a contracting State was the law applicable to the dealings between the parties, which should be determined by the rules of private international law of the forum State, if the parties had not chosen the applicable law. With that understanding, the process for determining the applicability of the convention in any given case would be essentially as follows:

(a) If a party seized the court of a non-contracting State, the court would refer to the private international law rules of the State in which it was located and, if those rules designated the substantive law of any contracting State to the convention, the latter would apply as part of the substantive law of that State, regardless of the fact that the State of the court seized was not a Party to the convention;

(b) If a party seized the court of a contracting State, the court would equally refer to the private international law rules of the State in which it was located and, if those rules designated the substantive law of that State or of any other State Party to the convention, the latter would be applied.

21. However, it was suggested that a different reading would be more appropriate in view of the interplay between draft article 1 and the declarations authorized by draft article 18. Draft article 1 could indeed be understood to the effect that, if the court seized was located in a contracting State, the court would have to apply the convention without regard to the rules of private international law, that is, whether or not the rules of private international law confirmed the application of the laws of the forum or directed to the laws of another State, similar to the "autonomous" application of the United Nations Sales Convention when the requirements of article 1, subparagraph 1 (a), of that Convention were met. If a contracting State wished to avoid having to apply the convention even in cases where the applicable law was that of a non-contracting State, it would have to make a declaration under article 18, subparagraph 1 (b), of the convention that it would apply it

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<sup>3</sup> United Nations publication, Sales No. 71.V.3.

only “when the rules of private international law lead to the application of the law of a Contracting State”. This interpretation, it was said, would seem to be justified by the need to give a meaningful purpose to the exclusion authorized by draft article 18, subparagraph 1 (b). Indeed, a declaration under that provision would be meaningless if the result it intended to achieve (i.e. to subject the application of the convention to the rules of private international law) was already implicit in draft article 1.

22. It was pointed out that both interpretations were possible in view of the current wording of draft article 1. Each of them had its own advantages and disadvantages. Making the convention applicable only if the rules of private international law of the forum led to its application was said to be more in line with the understanding of the Working Group concerning the relationship between the draft convention and the otherwise applicable law (see A/CN.9/571, para. 36). On the other hand, an autonomous scope of application would enhance legal certainty, as it allowed the parties to know beforehand when the convention applied. The prevailing view that emerged in the Commission’s deliberations was that the convention should only apply when the laws of a contracting State applied to the underlying transaction. The Commission decided that no changes were therefore required in draft article 1, paragraph 1, but that a clarifying statement in explanatory notes to the text of the convention (see para. 165 below) (the “explanatory notes”) would be useful and that adjustments might be needed in draft article 18 (see para. 127 below).

23. The Commission noted the proposal to insert the words “or agreement” in draft paragraph 1 so as to make it clear that the convention applied also to arbitration agreements as defined in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)<sup>4</sup> (the “New York Convention”). The Commission decided not to adopt the proposed language as it felt that the draft text was sufficiently clear on that point. The Commission asked the Secretariat to clarify the point in the explanatory notes by explicitly stating that the convention applied also to arbitration agreements as defined in the New York Convention.

24. Subject to that amendment, the Commission approved the substance of draft article 1 and referred the text to the drafting group.

## **Article 2. Exclusions**

25. The text of the draft article was as follows:

“1. This Convention does not apply to electronic communications relating to any of the following:

“(a) Contracts concluded for personal, family or household purposes;

“(b) (i) Transactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) the transfer of security rights in, sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary.

“2. This Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document

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<sup>4</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.

or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.”

26. The Commission recalled that draft article 2 had already been extensively discussed at the Working Group (see A/CN.9/548, paras. 98-111, and A/CN.9/571, paras. 59-69). The Commission noted that subparagraph 1 (a) reflected the decision of the Working Group to exclude consumer contracts, whereas subparagraph 1 (b) excluded particular transactions in the financial service sector for the reason that that sector already contained well-defined rules and inclusion of such transactions within the scope of the draft convention could be disruptive to the operation of those rules.

27. It was further noted that paragraph 2 excluded negotiable instruments and similar documents because the potential consequences of unauthorized duplication of documents of title and negotiable instruments—and generally any transferable instrument that entitled the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money—made it necessary to develop mechanisms to ensure the singularity of those instruments. The Working Group had agreed that finding a solution for that problem required a combination of legal, technological and business solutions, which had not yet been fully developed and tested. For those reasons, the Working Group had agreed that the issues raised by negotiable instruments and similar documents, in particular the need for ensuring their uniqueness, went beyond simply ensuring the equivalence between paper and electronic form, which was the main aim of the draft convention and justified the exclusion provided in paragraph 2 of the draft article (see A/CN.9/571, para. 136).

28. It was proposed that the explanatory notes clarify that subparagraph 1 (a), which excluded “personal, family or household purposes”, was not intended to be restricted to consumer matters but also covered matrimonial property contracts as governed by the Convention on the Law Applicable to Matrimonial Property Regimes (The Hague, 1978).<sup>5</sup> It was also proposed that an express exclusion be made in respect of contracts involving courts, public authorities or professions exercising public authority, such as notaries.

29. The suggestion was made that the explanatory notes should clarify the meaning of subparagraph 1 (a) of draft article 2. It was noted that a similar phrase in the context of the United Nations Sales Convention was understood as referring to consumer contracts. However, in the context of the draft convention, which had a broader scope of application and was not limited to electronic communications related to purchase transactions, the words in subparagraph 1 (a) could be given a broader interpretation, so as to exclude communications related to contracts governed by family law and the law of succession. In support of that suggestion, it was stated that, according to an understanding widely shared at the Working Group, it had always been assumed that the draft convention did not govern matters related to family law and the law of succession, and that the draft convention’s focus on trade transactions was evidenced by the requirement, in draft article 1, that the parties had to have their “places of business” in contracting States. However, there were objections to taking up those suggestions at the current stage on the grounds that they might lead to reopening other matters that had been settled at the Working Group, when it had agreed to delete a large list of matters excluded from the scope of the draft convention. It was agreed that the explanatory notes should reflect the deliberations of the Working Group. Subparagraph 1 (a) of draft article 2 should not be

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<sup>5</sup> For the text of the Convention, see “Final Act of the Thirteenth Session of the Hague Conference on Private International Law”, *Actes et Documents de la Treizième session (1976)*, tome I.

understood in the narrow meaning given to a similar phrase in the context of the United Nations Sales Convention, which meant that the use of electronic communications in connection with contracts governed by family law or the law of succession was outside the scope of the draft convention.

30. The Commission approved the substance of draft article 2 and referred the text to the drafting group.

### **Article 3. Party autonomy**

31. The text of the draft article was as follows:

“The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.”

32. The Commission noted that two issues arose in connection with comments that had been submitted by Governments in respect of draft article 3. The first was whether or not derogation had to be made explicitly or could also be made implicitly, for example by parties agreeing to contract terms at variance with the provisions of the draft convention. Although some concern was expressed that implicit derogation could lead to uncertainty of application, the Commission agreed that derogation could be either explicit or implicit and that that aspect should be reflected in the explanatory notes.

33. The second issue concerned the question whether the scope of party autonomy should be restricted. For example, it was proposed that the parties not be able to derogate from articles 8 and 9, which set out the minimum conditions for meeting form requirements. It was submitted that unrestricted party autonomy could undermine the entire convention and could permit parties to derogate from mandatory national laws. A proposal was made that the scope of article 3 be limited to articles 10-14. However, there was strong support for the view that party autonomy was vital in contractual negotiations and should be recognized by the draft convention, although it was generally accepted that party autonomy did not extend to contracting out of otherwise mandatory national laws. On that basis, the Commission agreed that the principle of party autonomy as expressed in draft article 3 should not be restricted and that aspect should be reflected in the explanatory notes.

34. The Commission approved the substance of draft article 3 and referred the text to the drafting group.

### **Article 4. Definitions**

35. The text of the draft article was as follows:

“For the purposes of this Convention:

“(a) ‘Communication’ means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract;

“(b) ‘Electronic communication’ means any communication that the parties make by means of data messages;

“(c) ‘Data message’ means information generated, sent, received or stored by electronic, magnetic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

“(d) ‘Originator’ of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;

“(e) ‘Addressee’ of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;

“(f) ‘Information system’ means a system for generating, sending, receiving, storing or otherwise processing data messages;

“(g) ‘Automated message 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 person each time an action is initiated or a response is generated by the system;

“(h) ‘Place of business’ means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.”

36. The Commission noted that most of the definitions contained in draft article 4 were based on definitions used in the UNCITRAL Model Law on Electronic Commerce<sup>6</sup> and had been the subject of extensive discussion at the Working Group (see A/CN.9/527, paras. 111-122, A/CN.9/528, paras. 76 and 77, and A/CN.9/571, paras. 78-89).

37. The Commission heard a few suggestions for clarifying definitions or eliminating some of them, in particular the definition of “place of business” in subparagraph (h), which was said to interfere with established law. However, there was little support for amending the draft article, which the Commission approved in substance and referred to the drafting group. The Commission agreed that the definition of “place of business” was not intended to affect other substantive law relating to places of business, and that that understanding should be reflected in the explanatory notes (see also para. 90 below).

## Article 5. Interpretation

38. 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

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<sup>6</sup> For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I. The Model Law and its accompanying Guide to Enactment have been published as a United Nations publication (Sales No. E.99.V.4).

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.”

39. Noting that draft article 5 was a standard provision in UNCITRAL texts, the Commission approved the substance of draft article 5 and referred the text to the drafting group.

#### **Article 6. Location of the parties**

40. The text of the draft article was as follows:

“1. For the purposes of this Convention, a party’s place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.

“2. If a party has not indicated a place of business and has more than one place of business, then [, subject to paragraph 1 of this article,] the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the 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. A location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties.

“5. The sole fact that a party 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 that country.”

41. The Commission recalled that there had been considerable debate on the draft provision during the preparation of the draft convention by the Working Group (see A/CN.9/509, paras. 61-65, and A/CN.9/546, paras. 88-105). The current text of the draft article merely created a presumption in favour of a party’s indication of its place of business, which was accompanied by conditions under which that indication could be rebutted and default provisions that applied if no indication had been made. The draft article was not intended to allow parties to invent fictional places of business that did not meet the requirements of draft article 4, subparagraph (h).

42. Nevertheless, it was proposed that the draft convention include an obligation for a party to indicate its place of business and that not to do so could leave that aspect of the draft convention open to commercial fraud. It was suggested that such a positive obligation would enhance confidence in electronic commerce, support measures to curb illicit uses of electronic means of communications and facilitate determining the scope of application of the draft convention.

43. In response, it was noted that determining the scope of application of the draft convention was a matter dealt with by draft article 1 and that including a positive obligation in draft article 6 had no bearing on that question. It was further noted that earlier versions of the draft convention, which were inspired by article 5, paragraph 1, of

Directive 2000/31/EC of the European Union (the “European Union Directive”),<sup>7</sup> had contemplated a positive duty for the parties to disclose their places of business or provide other information. The Working Group, however, after extensive debate had agreed to delete those provisions, mainly because they were felt to be regulatory in nature, ill-placed in a commercial law instrument, unduly intrusive and potentially harmful to certain existing business practices. Disclosure obligations such as those which had been contemplated by the draft article were typically found in legal texts that were primarily concerned with consumer protection, as was the case in the European Union Directive. In the context of the European Union, however, member States had their own regime for lack of compliance with disclosure obligations. It was recalled that the Working Group had agreed that inclusion of any such obligation would require inclusion of provisions setting out the consequences of failing to comply with such an obligation and the Working Group had agreed that that was outside the scope of the draft convention.

44. In view of those observations, the Commission approved the substance of paragraph 1 unchanged and referred the text to the drafting group.

45. It was noted that paragraph 2 was inspired by a similar provision contained in the United Nations Sales Convention and was based on the principle that if a party had more than one place of business, the party should be able to designate one place to be the place of business and, in the absence of such a designation, the place of business bearing the closest relationship to the contract should be taken to be the place of business. A proposal was made to delete the bracketed text in paragraph 2 and also delete the words “and has more than one place of business” for the reason that those words were unnecessary. The proposal to delete the bracketed text was supported. However, the words “and has more than one place of business” were retained. With that change, the Commission approved the substance of draft paragraph 2 and referred the text to the drafting group.

46. Clarification was sought as to whether paragraph 2 of the draft article also applied to cases where a party with several places of business had in fact indicated a place of business but that indication was rebutted under paragraph 1. In response, it was stated that the application of paragraph 2 of the draft article would be triggered by the absence of a valid indication of a place of business and that the default rule provided in that provision would apply not only in the event that a party failed to indicate its place of business, but also when such indication was rebutted under paragraph 1. It was agreed that the explanatory notes should contain an explanation to that effect.

47. The Commission approved the substance of paragraphs 3 and 4 of the draft article unchanged and referred the text to the drafting group. In respect of paragraph 5, it was suggested that, for purposes of technological neutrality, reference should also be made to the use of “other electronic means of communication”, in addition to the expressions “domain name” and “electronic mail address”, so as to include other commonly used media, such as, for example, a short message service (SMS). While the Commission was initially inclined to accept that suggestion, it was eventually agreed to retain the text of paragraph 5 of the draft article as it currently stood. It was observed that domain names and electronic mail addresses were not strictly speaking “means of communication” and that, therefore, the proposed addition would not fit well in the current draft paragraph.

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<sup>7</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”). *Official Journal of the European Union*, No. L 178, 17 July 2000, p. 1.



Furthermore, it was pointed out that the current text was concerned with existing technology in respect of which the Commission was of the view that they did not offer, in and of themselves, a sufficiently reliable connection to a country so as to authorize a presumption of a party's location. However, it would be unwise for the Commission, by using such a broad formulation, to rule out the possibility that new as yet undiscovered technologies might appropriately create a strong presumption as to a party's location in a country to which the technology used would be connected. Therefore, the Commission approved the substance of draft paragraph 5 unchanged and referred the text to the drafting group.

#### **Article 7. Information requirements**

48. The text of the draft article was as follows:

“Nothing in this Convention affects the application of any rule of law that may require the parties to disclose their identities, places of business or other information, or relieves a party from the legal consequences of making inaccurate or false statements in that regard.”

49. The Commission recalled that the text of draft article 7 was the result of extensive deliberations by the Working Group (A/CN.9/546, paras. 88-105, and A/CN.9/571, paras. 115 and 116). Having regard to the persisting objections within the Working Group to the addition of provisions whereby the parties would have a duty to disclose their places of business, the Working Group had agreed to address the matter from a different angle, namely by a provision that recognized the possible existence of disclosure requirements under the substantive law governing the contract and reminded the parties of their obligations to comply with such requirements. Nothing in the draft article allowed the parties to rely on fictitious places of business and thereby avoid other legal obligations.

50. A suggestion was made that the reference to “inaccurate or false” might not cover situations where there was an omission to make a statement that was required to be made under law. To address that situation it was proposed to add the term “incomplete” after the term “inaccurate”. With that amendment, the Commission approved the substance of draft article 7 and referred the text to the drafting group.

#### **Article 8. Legal recognition of electronic communications**

51. The text of the draft article was as follows:

“1. A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.

“2. Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.”

52. The Commission noted that paragraph 1 of draft article 8 embodied the principle of functional equivalence and was inspired by a similar provision contained in article 5 of the UNCITRAL Model Law on Electronic Commerce. It was noted that paragraph 2, while not similarly reflected in the Model Law, had been included in a number of national laws relating to electronic commerce to highlight the principle of party autonomy and recognize that parties were not obliged to use or accept electronic communications.

53. The Commission approved the substance of draft article 8 and referred the text to the drafting group.

#### **Article 9. Form requirements**

54. The text of the draft article was as follows:

“1. Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form.

“2. Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

“3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

“(a) A method is used to identify the party and to indicate that party’s approval of the information contained in the electronic communication; and

“(b) That method is as reliable as appropriate to the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement.

“4. Where the law requires that a communication or a contract should be presented or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

“(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and

“(b) Where it is required that the information it contains be presented, that information is capable of being displayed to the person to whom it is to be presented.

“5. For the purposes of paragraph 4 (a):

“(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and

“(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

“[6. Paragraphs 4 and 5 do not apply where a rule of law or the agreement between the parties requires a party to present certain original documents for the purpose of claiming payment under a letter of credit, a bank guarantee or a similar instrument.]”

#### *Paragraph 1*

55. The Commission approved the substance of draft paragraph 1 and referred the text to the drafting group.

*Paragraph 2*

56. The view was expressed that the word “law” in paragraph 2 of the draft article could lead to confusion in certain legal systems and it was suggested that the text should instead refer to the “applicable law” or “applicable rules of law”, as appropriate. It was noted that draft article 9 was based largely on the UNCITRAL Model Law on Electronic Commerce, which set out criteria to recognize the functional equivalence between data messages and paper documents. It was said, in that connection, that the use of the words “the law” in articles 6-8 of the UNCITRAL Model Law on Electronic Commerce did not give rise to difficulties, as the Model Law was intended to be incorporated into the legal system of enacting States and the meaning of the expression “the law” would in that context be clear. However, as one of the purposes of the draft convention was to remove possible obstacles to the use of electronic communications under existing international conventions and treaties, the words “the law” might not always be given a sufficiently broad interpretation so as to also cover legislative texts of an international origin.

57. Another suggestion was that the words “the law” might be understood as covering only the domestic law of the contracting States to the convention and not accepted trade practices and trade usages, which would be typically referred to by a broader term such as “rules of law”. A better formulation, it was said, would be a phrase such as “the applicable international conventions, international trade rules and practices or the law”. Alternatively, if the draft article only referred to the domestic law of a contracting State, the words “the applicable law” should be used.

58. In response, it was observed that the matter had already been considered by the Working Group, which had agreed to use the words “the law” essentially in the same sense in which those words had been used in the UNCITRAL Model Law on Electronic Commerce (see A/CN.9/571, para. 125). In the context of the draft article, the words “the law” were to be understood as encompassing not only statutory or regulatory law, including international conventions or treaties ratified by a contracting State, but also judicially created law and other procedural law. However, as used in the draft article, the words “the law” did not include areas of law that had not become part of the law of a State and were sometimes referred to by expressions such as “*lex mercatoria*” or “law merchant”.

59. The Commission approved the substance of draft paragraph 2 and referred the text to the drafting group. The Commission asked the Secretariat to illustrate the intended meaning of the word “law” in paragraph 2 in the explanatory notes along the lines of what was indicated in paragraph 68 of the Guide to Enactment of UNCITRAL Model Law on Electronic Commerce.<sup>6</sup>

*Paragraph 3*

60. It was noted that paragraph 3 of the draft article was based on article 7 of the UNCITRAL Model Law on Electronic Commerce. However, it was suggested that paragraph 3 should instead be reformulated along the lines of article 6 of the UNCITRAL Model Law on Electronic Signatures,<sup>8</sup> which provided greater legal certainty by setting out more detailed standards for determining the reliability of an electronic signature. As

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<sup>6</sup> For the text of the Model Law, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* (A/56/17), annex II. The Model Law and its accompanying Guide to Enactment have been published as a United Nations publication (Sales No. E.02.V.8).

there was not sufficient support for that proposal, the Commission confirmed the Working Group's preference for using the more general requirements in article 7 of the UNCITRAL Model Law on Electronic Commerce as a basis for the paragraph.

61. The view was expressed that the text of subparagraph 3 (a) did not provide for cases in which the signature was affixed to the message for the sole purpose of associating a party with an electronic communication, without any intended approval of the information contained therein, and for cases in which no content was associated with the signature. It was said, however, that there might be instances where the law required a signature, but that signature did not have the function of indicating the signing party's approval of the information contained in the electronic communication. For example, many States had requirements of law for notarization of a document by a notary or attestation by a commissioner for oath. In such cases, it was not the intention of the law to require the notary or commissioner, by signing, to indicate approval of the information contained in the electronic communication. In such cases, the signature of the notary or commissioner merely identified the notary or commissioner and associated the notary or commissioner with the contents of the document, but did not indicate the approval by the notary or commissioner of the information contained in the document. Similarly, there might be laws that required the execution of a document to be witnessed by witnesses, who might be required to append their signatures to that document. The signature of the witnesses merely identified them and associated the witnesses with the contents of the document witnessed, but did not indicate their approval of the information contained in the document.

62. It was suggested that subparagraph 3 (a) should therefore be amended to recognize that electronic signatures were sometimes required by law only for the purpose of identifying the person who signed an electronic communication and associating the information with that person, but not necessarily to indicate that person's "approval" of the information contained in the electronic communication. To that end, it was proposed that the subparagraph be revised to read along the following lines:

“(a) A method is used to identify the party and to associate that party with the information contained in the electronic communication, and as may be appropriate in relation to that legal requirement, to indicate that party's approval of the information contained in the electronic communication; and”

63. There was general agreement within the Commission that subparagraph 3 (a) should not be understood to the effect that an electronic signature always implied a party's approval of the entire content of the communication to which the signature was attached. The views differed, however, as to whether the proposed new text improved the understanding of the draft article, or, on the contrary, rendered the draft article unnecessarily complex. Furthermore, it was said that the act of assigning a document typically signified consent at least to part of the information contained in a document. As an alternative, it was suggested that paragraph 3 of the draft article could instead refer to a party's approval “of the information to which the signature related”. However, that proposal, too, was criticized on the grounds that, in practice, signatures could be used for different purposes. For example, there could be a mere signature on a page without an accompanying text, such as a signature to express an acknowledgement of receipt of goods; even if signed in blank, such a signature might still be evidence of receipt.

64. After extensive debate, and having considered various alternative formulations, the Commission eventually agreed that the words “that party's approval of the information

contained in the electronic communication” should be replaced with the words “that party’s intention in respect of the information contained in the electronic communication”.

65. Turning to subparagraph 3 (b), the Commission heard expressions of concern that under the present formulation of that provision the satisfaction by an electronic signature of a legal signature requirement depended on whether the signature method was appropriately reliable for the purpose of the electronic communication in the light of all the circumstances. As such a determination could only be made *ex post* by a court or other trier of fact, the parties to the electronic communication or contract would not be able to know with certainty in advance whether the electronic signature used would be upheld by a court or other trier of fact as “appropriately reliable” or whether it would be denied legal validity for not having met such requirement. Furthermore, subparagraph 3 (b) also meant that, even if there was no dispute about the identity of the person signing or the fact of signing (i.e. no dispute as to authenticity of the electronic signature), a court or trier of fact might still rule that the electronic signature was not appropriately reliable and therefore invalidate the entire contract. That result would be particularly unfortunate, as it would allow a party to a transaction in which a signature was required to try to escape its obligations by denying that its signature (or the other party’s signature) was valid—not on the ground that the purported signer did not sign or that the document it signed had been altered, but only on the ground that the method of signature employed was not as reliable as appropriate in the circumstances. The language of the draft convention would thus permit a bad-faith undermining of the contract. It was also mentioned that that problem would be more apparent in cases where third parties challenged a commercial transaction, as it might be the case where trustees in bankruptcy or regulatory and enforcement government entities were involved. For those reasons, it was suggested that draft article 9, subparagraph 3 (b), should be deleted.

66. In response, it was indicated that the identity requirement contained in draft article 9, subparagraph 3 (a), could be insufficient to ensure the correct interpretation of the principle of functional equivalence in electronic signatures, since the “reliability test” of subparagraph 3 (b), while indicating the minimum requirements for the validity of the signature, would also remind courts of the need to take into account factors other than technology, such as the purpose for which the electronic communication was generated or communicated, or a relevant agreement of the parties, in ascertaining the validity of the signature. Without subparagraph 3 (b), the courts in some States might be inclined to consider that only signature methods that employed high-level security devices were adequate to identify a party, despite an agreement of the parties to use simpler signature methods. It was further observed that the *post facto* judicial control over the validity of the signature was an element common to handwritten signatures, as was the risk of possible malicious challenges to the validity of the signature. It was also indicated that the reliability test that appeared in the UNCITRAL Model Law on Electronic Commerce had not given rise to particular problems in the jurisdictions where the Model Law had been enacted.

67. The Commission considered extensively the various views that had been expressed. There was strong support for retaining the “reliability test” contained in subparagraph 3 (b) of the draft article. However, the Commission was also sensitive to the arguments that had been made in favour of deleting that provision. There was general agreement that the draft convention should prevent the recourse to the “reliability test” in those cases when the actual identity of the party and its actual intention could be proved. After considering

various proposals for additional language to achieve that result, the Commission eventually agreed to reformulate paragraph 3 of the draft article along the following lines:

“3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

“(a) A method is used to identify the party and to indicate that party’s intention in respect of the information contained in the electronic communication; and

“(b) The method used is either:

“(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

“(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.”

68. The Commission approved the substance of the revised version of draft paragraph 3 and referred the text to the drafting group.

#### *Paragraphs 4 and 5*

69. It was observed that the word “presented” in paragraph 4 could be misleading, as the term as used in some jurisdictions had a narrow technical meaning, limited, for instance, to the law of negotiable instruments. The Commission thus decided to replace the word “presented” with the words “made available” in paragraph 4.

70. It was proposed that paragraphs 4 and 5 of draft article 9 be deleted because they did not satisfactorily address the question of the electronic equivalent of an original document. It was observed that the particular problem involved in creating an electronic equivalent for the transfer of a paper-based original was how to provide a guarantee of uniqueness equivalent to possession of the original of a document of title or negotiable instrument and that thus far it had not been possible to develop a wholly satisfactory solution to ensure this “singularity” or “originality”. Under such circumstances, it was surprising that draft article 9, in paragraphs 4 and 5, should purport to define the electronic equivalent of an original when it did not make such equivalence subject to the requirement of singularity of the original, which was intrinsically linked to the very function and nature of an original. The provision would thus be unable to address the question of the transfer of a negotiable instrument. Paragraphs 4 and 5 should, therefore, be deleted or, at the very least, limited only to arbitration agreements. In response, it was noted that the Commission had decided to exclude documents of title and negotiable instruments from the scope of the convention in draft article 2, paragraph 2 (see paras. 25-30 above).

71. The Commission recalled that the Working Group had initially decided to include a provision on electronic equivalents of “original” documents in the draft convention in the light of its decision to add the New York Convention to the list of instruments in draft article 19, paragraph 1, because article IV, paragraph (1) (b), of the New York Convention required that the party seeking recognition and enforcement of a foreign arbitral award must submit, *inter alia*, an original or a duly certified copy of the arbitration agreement. At the same time, however, the Working Group had noted that, although draft paragraphs 4 and 5 had been inserted to address a particular problem raised by arbitration agreements,

the usefulness of those provisions extended beyond that limited field in view of possible obstacles to electronic commerce that might result from various other requirements concerning original form. Despite differing views as to the appropriateness of that conclusion, the Working Group had not agreed to limit the scope of draft paragraphs 4 and 5 to arbitration agreements (A/CN.9/571, para. 132).

72. Another argument in support of retaining draft paragraphs 4 and 5 was that, whereas uniqueness was in fact an important condition for an effective system of negotiability in connection with transport documents or negotiable instruments, documents could retain their condition as “original” documents even if they were issued in several “original” copies. The essential requirement for all purposes other than transfer and negotiation of rights evidenced by or embodied in a document was the integrity of the document and not its uniqueness.

73. Having considered the views expressed, and noting that there was little support for deleting paragraphs 4 and 5 of the draft article, the Commission approved their substance, with the amendments it had accepted earlier, and referred them to the drafting group. The Commission noted, however, that, when it reached draft article 18, it could consider whether that article gave States the possibility to exclude the application of paragraphs 4 and 5 of draft article 9.

#### *Paragraph 6*

74. The Commission noted that paragraph 6 appeared within square brackets because the Working Group had not been able, for lack of time, to complete its review at its forty-fourth session. As an alternative to the draft paragraph, it had been suggested that the draft convention could give States the possibility to exclude the application of paragraphs 4 and 5 of draft article 9 in respect of the documents referred to in paragraph 6 by declarations made under draft article 18 (A/CN.9/571, para. 138).

75. Questions were raised concerning the purpose of paragraph 6, which appeared to duplicate the exclusion contained in draft article 2, paragraph 2. In response, it was noted that paragraph 6 of draft article 9 related to documents and evidence that needed to be submitted in writing to substantiate claims for payments under a letter of credit or a bank guarantee, but not to the bank guarantee or letter of credit itself, which would not be excluded from the scope of the convention. It was pointed out that article 2, paragraph 2, was not intended to cover letters of credit or bank guarantees, since it was limited to “transferable” documents or instruments. It was, however, recognized that the explanatory notes should clarify the import of that exclusion.

76. There was some support for retaining paragraph 6 of draft article 9, in part for the comfort it provided to the issuers of and obligees under the instruments it referred to, and in part because it was felt that an outright exclusion under draft article 9 would better suit the purpose of attaining the broadest possible uniformity in the application of the convention than the alternative of corresponding exclusions at the national level by means of declarations under draft article 18, paragraph 2. The prevailing view, however, was that States that wished to facilitate the submission of electronic communications in support of payment claims under letters of credit and bank guarantees should not be deprived of that possibility by the existence of a general exclusion under paragraph 6 of draft article 9. Unilateral exclusions for those States which did not want to promote that possibility, however undesirable from the perspective of uniform law, would nevertheless be a better

option than the current paragraph 6 of the draft article. The Commission therefore agreed to delete paragraph 6 of draft article 9.

#### **Article 10. Time and place of dispatch and receipt of electronic communications**

77. The text of the draft article was as follows:

“1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.

“2. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee’s electronic address.

“3. An electronic communication 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 6.

“4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.”

##### *Paragraph 1*

78. The Commission noted that paragraph 1 followed in principle the rule set out in article 15 of the UNCITRAL Model Law on Electronic Commerce, although it provided that the time of dispatch was when the electronic communication left an information system under the control of the originator rather than the time when the electronic communication entered an information system outside the control of the originator.

79. The Commission approved the substance of draft paragraph 1 and referred the text to the drafting group.

##### *Paragraph 2*

80. With respect to paragraph 2, a proposal was made that, in order to address the concerns raised by the increasing use of security filters (such as “spam” filters and other technologies restricting the receipt of problem electronic mail), the explanatory notes should clarify that the principle contained therein, namely that the time of receipt of an electronic communication was the time when it became capable of being retrieved by the addressee at an electronic address designated by the addressee, was a rebuttable presumption. This was supported by many delegations.



81. It was also proposed that the explanatory notes highlight that draft article 10 did not preclude sending electronic communications referring to information that was available to be retrieved by the receiver at a particular location, such as a web address. The concern was raised that the proposal could in effect lead to the creation of a technology-specific rule, especially given that, even in written communications, reference was often made to information that was contained in another separately available document, such as a record in a registry. While some support was expressed for that proposal, concerns were expressed that recognition of such practices by way of the explanatory notes might unwittingly raise the legal status of a posting of information on a website. It was noted that, as the text of the paragraph stood, it did not encompass notification of information contained in a website. It was suggested that a distinction ought to be drawn between a situation where an electronic communication referred to and included a link to a website containing further information relating to the electronic communication and a situation where an electronic communication simply contained a link to a website. The first posting could be taken as forming part of the electronic communication based on the principle of incorporation by reference (as enunciated, for example, in article 5 bis of the Model Law on Electronic Commerce), but the second could not be taken to be included within the electronic communication. Following discussion, the Commission decided that there was no consensus to include the proposed clarification in the explanatory notes.

82. The suggestion was made that the condition for the presumption of receipt of electronic communications at a non-designated address created legal uncertainty, as it would be difficult for the originator to prove a subjective circumstance such as when the addressee had in fact become aware that the electronic communication had been sent to a particular non-designated address. It was therefore proposed that the second sentence of paragraph 2 be deleted and that paragraph 2 no longer distinguish between designated and non-designated electronic addresses. In response, it was stated that such awareness could be proven by other objective evidence. The Commission recalled that paragraph 2 was a provision that had been arrived at after extensive deliberation and that the current text represented a finely balanced compromise reached in the Working Group, which had acknowledged that many persons had more than one electronic address and could not be reasonably expected to anticipate receiving legally binding communications at all addresses they maintained. After discussion, the Commission approved the substance of draft paragraph 2 without change and referred the text to the drafting group.

### *Paragraph 3*

83. It was proposed that the current wording of paragraph 3, which referred to a communication being “deemed to be received” at particular places should be a presumption, rebuttable by appropriate evidence. To achieve that, it was proposed to replace the word “deemed” with the word “presumed”. It was said that that formulation was more consistent with other presumptions contained in the draft convention and also respected the principle of party autonomy. There was little support for that proposal. It was noted that the concern of the Working Group had been to avoid a duality of regimes for online and offline transactions and, taking the United Nations Sales Convention as a precedent, where the focus was on the actual place of business of the party, the reference to the term “deemed” had been chosen deliberately to avoid attaching legal significance to the use of a server in a particular jurisdiction that differed from the jurisdiction where the place of business was located simply because that was the place where an electronic communication had reached the information system where the addressee’s electronic address was located.

84. The Commission approved the substance of draft article 10 and referred the text to the drafting group.

#### **Article 11. Invitations to make offers**

85. The text of the draft article was as follows:

“A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.”

86. It was suggested that a new paragraph should be incorporated into draft article 11 to address unsolicited commercial communications (“spam”). While concern was expressed regarding the impact of “spam”, the Commission agreed that it was not a matter that should be dealt with in the present text.

87. Clarification was sought as to the meaning of “interactive applications” and whether it was equivalent to the term “automated message system” as defined in article 4, subparagraph (g), of the draft convention. The Commission noted that the term “interactive applications” had been used in preference to “automated message system” as it was considered to provide an appropriately objective term that better described the situation that was apparent to any person accessing a system, namely, that it was prompted to exchange information through that system by means of immediate actions and responses having an appearance of automaticity (A/CN.9/546, para. 114).

88. The Commission approved the substance of draft article 11 and referred the text to the drafting group.

#### **Article 12. Use of automated message systems for contract formation**

89. The text of the draft article was as follows:

“A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed each of the individual actions carried out by the systems or the resulting contract.”

90. It was suggested that the language in draft article 12 should be aligned with the language used in the definition of “automated message system” contained in draft article 4, subparagraph (g), of the draft convention in two respects. Firstly, it was proposed that the term “natural person” contained in draft article 12 should also be used in draft article 4, subparagraph (g). That proposal was agreed to by the Commission.

91. Secondly, it was proposed that the reference to “or intervention” contained in draft article 4, subparagraph (g), be repeated in draft article 12. That proposal was also agreed to.

92. The Commission approved the substance of draft article 12, as modified, and referred the text to the drafting group.

**Article 13. Availability of contract terms**

93. The text of the draft article was as follows:

“Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other party those electronic communications that contain the contractual terms in a particular manner, or relieves a party from the legal consequences of its failure to do so.”

94. Clarification was sought as to whether the reference to “any rule of law” should be aligned with language used elsewhere in the text, such as in draft article 9, paragraph 2, which referred to “the law”. In response, the Commission took note that the use of the term “any rule of law” instead of “law” had been chosen because of the phrasing of particular paragraphs that did not lend themselves to inclusion of the term “law”. The phrase “any rule of law” in the draft article had however the same meaning as the words “the law” in draft article 9 and encompassed statutory, regulatory and judicially created laws as well as procedural laws, but did not cover laws that had not become part of the law of the State, such as *lex mercatoria*, even though the expression “rules of law” was sometimes used in that broader meaning. The Commission approved the substance of draft article 13 and referred the text to the drafting group.

**Article 14. Error in electronic communications**

95. The text of the draft article was as follows:

“1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the electronic communication in which the input error was made if:

“(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication;

“(b) The person, or the party on whose behalf that person was acting, takes reasonable steps, including steps that conform to the other party’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 the goods or services; and

“(c) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

“2. Nothing in this article affects the application of any rule of law that may govern the consequences of any errors made during the formation or performance of the type of contract in question other than an input error that occurs in the circumstances referred to in paragraph 1.”

*Paragraph 1*

96. Support was expressed for the principle that, except for the particular situation dealt with in the draft article, the conditions for withdrawal of electronic communications

vitiated by error should be better left for domestic legislation, as they related to general principles of contract law and not to issues specific to electronic commerce.

97. The suggestion was made that the draft provision should contain an additional condition for withdrawal to the effect that the withdrawal of an electronic communication would only be possible when it could be assumed, in the light of all circumstances, that a reasonable person in the position of the originator would not have issued the electronic communication, had that person been aware of the error at that time. Such an addition, it was said, was justified by the need to ensure that the possibility of withdrawing an electronic communication would not be misused by parties acting in bad faith who wished to nullify what would otherwise be valid legal commitments accepted by them. There was little support for that proposal, as it was felt that it added a subjective element that would require a determination of the intent of the party who sent the allegedly erroneous message. It was pointed out that the draft article dealt with the allocation of risks concerning errors in electronic communications in a fair and sensible manner. An electronic communication could only be withdrawn if the automated message system did not provide the originator with an opportunity to correct the error before sending the message. If the operator of the automated message system failed to offer such means, despite the clear incentive to do so in the draft article, it was reasonable to make such party bear the risk of errors being made in electronic communications exchanged through the automated message system. Limiting the right of the party in error to withdraw the messages would not further the intended goal of the provision to encourage parties to provide for an error-correction method in automated message systems.

98. The view was expressed that the term “correct” should replace the term “withdraw”, or, alternatively, that both terms should be used, for the reasons that had already been put forward during the deliberations of the Working Group (see A/CN.9/571, para. 193). There were objections to that proposal for the following reasons: (a) the typical consequence of an error in most legal systems was to make it possible for the party in error to avoid the effect of the transaction resulting from its error, but not necessarily to restore the original intent and enter into a new transaction; (b) withdrawal equated to nullification of a communication, while correction required the possibility to modify the previous communication (a provision mandating the right to correct would introduce additional costs for system providers and give remedies with no parallel in the paper world, a result that the Working Group had previously agreed to avoid); and (c) the proposed amendment might cause practical difficulties, as operators of automated message systems might more readily provide an opportunity to nullify a communication already recorded than an opportunity to correct errors after a transaction was concluded. It was further indicated that a right to correct errors might entail that an offeror who received an electronic communication later alleged to contain errors must keep its original offer open since the other party had effectively replaced the communication withdrawn.

99. It was observed that draft article 14, paragraph 1, required the withdrawal of the entire communication also when the error vitiated only a part of the electronic communication. It was indicated that the right to withdraw should not affect those portions of a message not vitiated by the error. It was added that the provision for a partial withdrawal would also assist in preventing abuses in the exercise of the right to withdraw.

100. After discussion, the Commission decided to add the words “the portion of” between the words “the right to withdraw” and the words “the electronic communication” in draft article 14, paragraph 1, of the draft convention. The Commission requested the Secretariat to clarify in the explanatory notes how the withdrawal of a portion of the electronic

communication might affect the validity of the whole message. The Commission approved the substance of the *chapeau* and subparagraph 1 (a) of draft paragraph 1 and referred the text to the drafting group.

*Subparagraph (b)*

101. It was suggested that subparagraph (b) should be deleted, since it related to the consequences of the error, which should be left for national law to determine, and not with the conditions for the exercise of the right of withdrawal. After discussion, the Commission decided to delete subparagraph (b) of paragraph 1.

*Subparagraph (c)*

102. It was also suggested that subparagraph (c) should be deleted, for the same reasons as for subparagraph (b) in the same draft article (see para. 101 above). However, the contrary view was also expressed, that draft subparagraph (c) related to the conditions for the exercise of the right of withdrawal. It was added that the rationale of the draft provision was to bar withdrawal when the party making an error had already received material benefits or value from the vitiated communication. The Commission decided to retain subparagraph (c) paragraph 1 and referred the text to the drafting group.

*Paragraph 1: time limit*

103. It was indicated that the draft convention should contain a provision indicating a time limit of two years to exercise the right of withdrawal in case of input error. It was observed that such time limit would give certainty to legal transactions, which would otherwise indefinitely be subject to withdrawal until discovery of the error. In response, it was indicated that time limits were a matter of public policy in many legal systems and that the draft convention should not deal with them. It was added that the combined impact of subparagraphs (a) and (c) already resulted in limiting the time within which an electronic communication could be withdrawn, since indeed withdrawal had to occur “as soon as possible”, but in any event not later than the time when the party had used or received any material benefit or value from the goods or services received from the other party. After discussion, the Commission decided not to insert a time limit to exercise the right of withdrawal in case of input error.

*Paragraph 2*

104. It was submitted that the underlying purpose of draft article 14 was to provide that the specific remedy provided for in respect of input errors was not intended to interfere with the general doctrine on error that existed in national laws. To better express that purpose it was proposed that paragraph 2 be amended to delete the words “in question other than an input error that occurs in the circumstances referred to” and substitute wording along the following lines: “on grounds or for purposes other than providing a special remedy for input errors having occurred in the circumstances referred to in paragraph 1”. There was support for that proposal, although it was suggested that the amended words should be shortened to simply provide “other than as provided for in paragraph 1”. Another suggestion was made to delete the words “made during the formation or performance of the type of contract in question” since those words were unnecessary given the reference to paragraph 1. That proposal was accepted. A proposal to include a reference to “special remedy” in paragraph 2 did not receive support. The Commission agreed to amend paragraph 2 along the following lines: “Nothing in this

article affects the application of any rule of law that may govern the consequences of any errors other than as provided for in paragraph 1.” The Commission approved the substance of draft paragraph 2, as revised, and referred the text to the drafting group.

### **General remarks on the final provisions**

105. The Commission noted that draft articles 15-21, 22, variant A, 23 and 25 had already appeared in the last version of the draft convention considered by the Working Group. Draft articles 16 bis, 19 bis, 22, variant B, and 24 reflected proposals for additional provisions that had been made at the forty-fourth session of the Working Group. At that time, the Working Group had considered and approved draft articles 18 and 19 and had held an initial exchange of views on the other final clauses, which, for lack of time, the Working Group had not formally approved. In the light of its deliberations on chapters I, II and III and draft articles 18 and 19, the Working Group had requested the Secretariat to make consequential changes in the draft final provisions in chapter IV, as contained in the version of the draft convention considered by the Working Group. The Working Group had also requested the Secretariat to insert within square brackets in the final draft to be submitted to the Commission the draft additional provisions that had been proposed during its forty-fourth session (A/CN.9/571, para. 10).

### **Article 15. Depositary**

106. The text of the draft article was as follows:

“The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.”

107. No comments were made on the draft article, which the Commission approved in substance and referred to the drafting group.

### **Article 16. Signature, ratification, acceptance or approval**

108. The text of the draft article was as follows:

“1. This Convention is open for signature by all States [at [...] from [...] to [...] and thereafter] at the United Nations Headquarters in New York from [...] to [...].

“2. This Convention is subject to ratification, acceptance or approval by the signatory States.

“3. This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

“4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.”

109. The Commission noted that, in the absence of concrete proposals for convening a diplomatic conference to adopt the draft convention, no recommendation for convening such a conference would be made to the General Assembly. The Commission therefore agreed to delete the first set of words within square brackets. As regards the period during which the convention should be open for signature, the Commission agreed that States should have the possibility to sign the convention for a period of two years after its adoption by the Assembly. The Commission requested the Secretariat to consider the possibility of organizing a special ceremony to give States the possibility of signing the convention, possibly during the Commission’s thirty-ninth session, in 2006, as recent

experience had demonstrated the usefulness of signing ceremonies for the purpose of promoting signature of newly adopted international conventions.

110. The Commission approved the substance of the draft article, as amended, and referred the text to the drafting group.

**Article 16 bis. Participation by regional economic integration organizations**

111. The text of the draft article was as follows:

“[1. A Regional Economic Integration Organization which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The Regional Economic Integration Organization shall in that case have the rights and obligations of a Contracting State, to the extent that that Organization has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organization shall not count as a Contracting State in addition to its Member States which are Contracting States.

“[2. The Regional Economic Integration Organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that Organization by its Member States. The Regional Economic Integration Organization shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

“[3. Any reference to a ‘Contracting State’ or ‘Contracting States’ or ‘State Party’ or ‘States Parties’ in this Convention applies equally to a Regional Economic Integration Organization where the context so requires.]”

112. The Commission noted that the draft article reflected a proposal that had been made at the forty-fourth session of the Working Group. There was strong support for retaining the draft article, as it was felt that such a provision, which also appeared in other recent international conventions in the field of international commercial law, such as the Unidroit Convention on International Interests in Mobile Equipment (Cape Town, 2001)<sup>9</sup> (the “Cape Town Convention”), would facilitate wider participation in the convention. Nevertheless, a number of questions were raised concerning the formulation of the draft article.

113. There was no support for the proposal to broaden the draft article so as to cover international organizations generally and not only regional economic integration organizations. It was noted that, at the current stage, most international organizations did not have the power to enact legally binding rules having a direct effect on private contracts, since that function typically required the exercise of certain attributes of state sovereignty that only few regional economic integration organizations had received from their member States. However, some delegations stated that, in their view, the draft article should not be considered as excluding such international organizations that did have the necessary competence.

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<sup>9</sup> Available at <http://www.unidroit.org/english/conventions/mobile-equipment/main.htm>.

114. The suggestion was made that the draft article should only permit ratification by a regional economic integration organization when its member States had expressly authorized the organization to ratify the convention. It was also said that a regional economic integration organization should not have the right to ratify the convention if none of its member States had decided to do so. In response, it was observed that the extent of powers given to a regional economic integration organization was an internal matter concerning the relations between the organization and its own member States. The draft article, it was agreed, should not prescribe the manner in which regional economic integration organizations and their member States divided competences and powers among themselves.

115. As regards the phrase “has competence over certain matters governed by this Convention” in paragraph 1, the view was expressed that ratification or accession by a regional economic integration organization should only be possible to the extent that the organization in question had competence over all the matters covered by the draft convention. Another concern, in that connection, related to the interplay between draft articles 16 bis and 18. The question was asked whether a regional economic integration organization could submit declarations that differed from the declarations submitted by its member States. Such a situation was said to be highly undesirable, as it would create considerable uncertainty in the application of the convention and deprive private parties of the ability to easily ascertain beforehand to which matters the convention applied in respect of which States. Clarification was also sought concerning matters in which a regional economic integration organization might share competence with its member States and how private parties in third countries might know when the member States and when the organization had the power to make a declaration.

116. In response, it was observed that regional economic integration organizations typically derived their powers from their member States and that by their very nature, as international organization, they only had competences in the areas that had been expressly or implicitly transferred to their sphere of activities. Several provisions of the draft convention, in particular those of chapter IV, implied the exercise of full state sovereignty and the draft convention was not in its entirety capable of being applied by a regional economic integration organization. Furthermore, the legislative authority over the substantive matters dealt with in the draft convention might to some extent be shared between the organization and its member States. The draft article would not provide a basis for ratification if the regional economic integration organization had no competence on the subject matter covered by the convention, but in cases where the organization had some competence, the draft article was a useful provision.

117. As regards the declarations that a regional economic integration organization and its member States might submit, it was suggested that, in practice, it was unlikely that conflicting declarations might be submitted by the organization and its member States. Paragraph 2 of the draft article already required a high standard of coordination by requiring that the regional economic integration organization declare the specific matters for which it was competent. Under normal circumstances, careful consultations would take place, as a result of which, if declarations under draft article 18 were found to be necessary, there would be a set of common declarations for the matters in respect of which the regional economic integration organization was competent, which would be mandatory for all member States of the organization. Differing declarations from member States would thus be limited to matters in which no exclusive competence had been transferred from member States to the regional economic integration organization, or matters



particular to the State making a declaration, as might be the case, for example, of declarations under draft article 19, paragraphs 2-4, since not all member States of regional economic integration organizations were necessarily contracting States to the same international conventions or treaties.

118. The Commission took note of those comments. There was general agreement on the paramount need for ensuring consistency between declarations made by regional economic integration organizations and declarations made by their member States. The Commission acknowledged, that, in view of the flexibility needed to take into account the peculiarities of regional economic integration organizations, it would not be possible to formulate provisions in the draft convention that effectively eliminated the risk, at least in theory, of a regional economic integration organization and its member States making conflicting declarations. Nevertheless, there was a strong consensus within the Commission that contracting States to the convention would be entitled to expect that a regional economic integration organization that ratified the convention, and its own member States, would take the necessary steps to avoid conflicts in the manner in which they applied the convention.

119. It was said that some regional economic integration organizations had the power to enact rules aimed at harmonizing private commercial law with a view to facilitating the establishment of an internal market among its member States. Those cases were analogous to the situation in some countries in which sub-sovereign jurisdictions, such as states or provinces, had legislative authority over private law matters. Therefore, for matters subject to regional legal harmonization, a regional economic integration organization showed some features of a domestic legal system and deserved similar treatment. For those reasons, it was proposed that a new paragraph should be added to the draft article to the effect that, in their mutual relations, contracting States to the convention should apply the rules emanating from the regional economic integration organization, rather than the provisions of the convention.

120. While there were several expressions of support for the proposed new provision, there were also strong objections to it. The main reason for those widely shared objections was that it would be inappropriate for an instrument prepared by the United Nations to prescribe to member States of regional economic integration organizations what rules they should apply as a result of their membership in such an organization. It was noted that other instruments prepared by the Commission, such as the United Nations Sales Convention, acknowledged the right of States with similar laws in respect of matters covered by the instrument to declare that their domestic laws took precedence over the provisions of the international instrument in respect of contracts concluded between parties located in their territories. It would not be acceptable, however, for the international convention itself to dictate how States had to apply their domestic laws or regional commitments.

121. The Commission considered the proposal and its supporting arguments extensively, as well as alternative provisions that were suggested to meet the concerns of those who had raised objections to it. The Commission eventually agreed that a new paragraph 4 should be inserted in the draft article with wording along the following lines:

“This Convention shall not prevail over any conflicting rules of any regional economic integration organization as applicable to parties whose respective places of business are located in Member States of any such organization, as set out by declaration made in accordance with article 20.”

122. In response to questions raised in connection with the new provision, it was observed that the declaration contemplated therein would be submitted by the regional economic integration organization itself and was distinct from, and without prejudice to, declarations by States under draft article 18, paragraph 2. If no such organization ratified the convention, their member States who wished to do so would still have the right to include, among the other declarations that they might wish to make, a declaration of the type contemplated in the new paragraph 4 of the draft article in view of the broad scope of draft article 18, paragraph 2. It was understood that if a State did not make such a declaration, paragraph 4 of the draft article would not automatically apply.

123. The Commission approved the substance of the draft article, with the addition it had accepted, and referred the text to the drafting group.

#### **Article 17. Effects in domestic territorial units**

124. The text of the draft article was as follows:

“1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

“2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

“3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

“4. If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.”

125. The Commission noted that the draft article reflected the wording of similar provisions in other instruments it had prepared. However, the words “according to its constitution”, which had appeared after the words “two or more territorial units in which”, had been deleted in other instruments. The Commission took note of those new practices, approved the substance of draft article 17 unchanged and referred the text to the drafting group.

#### **Article 18. Declarations on the scope of application**

126. The text of the draft article was as follows:

“1. Any State may declare, in accordance with article 20, that it will apply this Convention only:

“(a) When the States referred to in article 1, paragraph 1 are Contracting States to this Convention;

“(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. Any State may exclude from the scope of application of this Convention the matters it specifies in a declaration made in accordance with article 20.”

127. The Commission agreed that the provision contained in draft article 18, paragraph 1 (b), should be deleted to reflect the understanding of the Commission that the application of the convention would in any event be subject to the rules of private international law and that, therefore, paragraph 1 (b) was redundant (see paras. 21 and 22 above).

128. It was suggested that the provision contained in draft article 18, paragraph 1 (c), should be deleted as it would give rise to significant uncertainties on the application of the convention in non-party States whose rules of private international law directed the courts to the application of the laws of a contracting State that had made such a declaration. Furthermore, it was argued that any declaration under draft article 18, paragraph 1 (c), would, in practice, radically restrict the applicability of the convention and deprive it of its primary function, which was to provide default rules for the use of electronic communications by parties that had not agreed on detailed contract rules for the matters covered by the draft convention. However, it was also observed that the provision would give those States which might have difficulties in accepting the general application of the convention under its article 1, paragraph 1, the possibility to allow their nationals to choose the convention as applicable law. The Commission agreed to retain the draft provision.

129. The question was raised as to whether draft article 18, paragraph 2, allowed States to make a declaration whereby the application of the convention would be limited only to the use of electronic communications in connection with contracts covered by some of the international conventions listed in draft article 19, paragraph 1, for example, to the New York Convention and to the United Nations Sales Convention, to the extent that the State making such a declaration was bound by those Conventions. The Commission agreed that under the broad terms of draft article 18, paragraph 2, such a declaration would be possible. However, it was also noted that, while any form of participation in the convention would contribute to the development of the use of electronic commerce in international trade, such a declaration would not further the equally desired goal of ensuring the broadest possible application of the convention and should not be encouraged.

130. The Commission approved the substance of the draft article, as amended, and referred the text to the drafting group.

#### **Article 19. Communications exchanged under other international conventions**

131. The text of the draft article was as follows:

“1. The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract or agreement to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);

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, 19 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).

“2. The provisions of this Convention apply further to electronic communications in connection with the formation or performance of a contract or agreement to which another international convention, treaty or agreement not specifically referred to in paragraph 1 of this article, and to which a Contracting State to this Convention is or may become a Contracting State, applies, unless the State has declared, in accordance with article 20, that it will not be bound by this paragraph.

“3. A State that makes a declaration pursuant to paragraph 2 of this article may also declare that it will nevertheless apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of any contract or agreement to which a specified international convention, treaty or agreement applies to which the State is or may become a Contracting State.

“4. Any State may declare that it will not apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract or agreement to which any international convention, treaty or agreement specified in that State’s declaration, to which the State is or may become a Contracting State, applies, including any of the conventions referred to in paragraph 1 of this article, even if such State has not excluded the application of paragraph 2 of this article by a declaration made in accordance with article 20.”

132. Noting the extensive deliberations held on the draft article in the Working Group (A/CN.9/571, paras. 47-58), the Commission approved its substance and referred the text to the drafting group.

#### **Article 19 bis. Procedure for amendments to article 19, paragraph 1**

133. The text of the draft article was as follows:

“[1. The list of instruments in article 19, paragraph 1, may be amended by the addition of [other conventions prepared by UNCITRAL] [relevant conventions, treaties or agreements] that are open to the participation of all States.

“2. After the entry into force of this Convention, any State Party may propose such an amendment. Any proposal for an amendment shall be communicated to the depositary in written form. The depositary shall notify proposals that meet the requirements of paragraph 1 to all States Parties and seek their views on whether the proposed amendment should be adopted.

“3. The proposed amendment shall be deemed adopted unless one third of the States Parties object to it by a written notification not later than 180 days after its circulation.]”

134. The Commission noted that the entire draft article appeared within square brackets, as it reflected a proposal that had been made at the forty-fourth session of the Working Group but that the Working Group had not had time to consider.

135. It was observed that the draft provision would further the application of the convention to other UNCITRAL instruments, whose implementation was particularly favoured in view of their origin, as reflected in the text of draft article 19. In response, concerns were raised on the mechanism of tacit acceptance of the amendments envisaged in draft paragraph 3, insofar as this would bind States that did not explicitly express their consent to be bound by the amendment. It was added that, in the absence of a dedicated provision, the amendment of the relevant article would be possible according to the general rules applicable to the convention.

136. After discussion, the Commission decided to delete draft article 19 bis from the text of the draft convention.

#### **Article 20. Procedure and effects of declarations**

137. The text of the draft article was as follows:

“1. Declarations under articles 17, paragraph 1, 18, paragraphs 1 and 2 and 19, paragraphs 2, 3 and 4, may be made at any time. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

“2. Declarations and their confirmations are to be in writing and be formally notified to the depositary.

“3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

“4. Any State which makes a declaration under this Convention may modify or withdraw it at any time by a formal notification in writing addressed to the depositary. The modification or withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.”

138. The Commission agreed that the reference to draft article 17, paragraph 1, should be deleted from draft article 20, paragraph 1, since the declaration contained in draft article 17, paragraph 1, was typically made upon expression of consent to be bound by the State, as stated in the same draft provision.

139. The Commission agreed that a reference to draft article 16 bis, paragraph 4, should be inserted in draft article 20, paragraph 1. It was suggested that, unlike the declaration provided for in draft article 16 bis, paragraph 2, which was typically made upon expression of participation by the regional economic integration organization, the declaration in draft article 16 bis, paragraph 4, could be made at any time.

140. It was further suggested that declarations lodged after the entry into force of the convention should enter into force three months after the date of receipt by depositary, as provided for in other international trade law agreements. However, it was also noted that three months might not be adequate time to allow for adjustment in certain business practices and that for this purpose the period of six months should be retained.

141. Subject to those amendments, the Commission approved the substance of the draft article and referred the text to the drafting group.

#### **Article 21. Reservations**

142. The text of the draft article was as follows:

“No reservations may be made under this Convention.”

143. Having noted the Working Group’s understanding as to the practical difference between declarations and reservations in the context of the draft convention (see A/CN.9/571, para. 30), the Commission approved the substance of the draft article and referred the text to the drafting group.

#### **Article 22. Amendments**

144. The text of the draft article was as follows:

“[Variant A

“1. Any Contracting State may propose amendments to this Convention. Proposed amendments shall be submitted in writing to the Secretary-General of the United Nations, who shall circulate the proposal to all States Parties, with the request that they indicate whether they favour a conference of States Parties. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Proposals for amendment shall be circulated to the Contracting States at least ninety days in advance of the conference.

“2. Amendments to this Convention shall be adopted by [two thirds] [a majority of] the Contracting States present and voting at the conference of Contracting States and shall enter into force in respect of States which have ratified, accepted or approved such amendment on the first day of the month following the expiration of six months after the date on which [two thirds] of the Contracting States as of the time of the adoption of the amendment at the conference of the Contracting States have deposited their instruments of acceptance of the amendment.]

“[Variant B

“1. The [Office of Legal Affairs of the United Nations] [secretariat of the United Nations Commission on International Trade Law] shall prepare reports [yearly or] at such [other] time as the circumstances may require for the States Parties as to the manner in which the international regimen established in this Convention has operated in practice.

“2. At the request of [not less than twenty-five per cent of] the States Parties, review conferences of Contracting States shall be convened from time to time by the

[Office of Legal Affairs of the United Nations] [secretariat of the United Nations Commission on International Trade Law] to consider:

“(a) The practical operation of this Convention and its effectiveness in facilitating electronic commerce covered by its terms;

“(b) The judicial interpretation given to, and the application made of, the terms of this Convention; and

“(c) Whether any modifications to this Convention are desirable.

“3. Any amendment to this Convention shall be approved by at least a two-thirds majority of States participating in the conference referred to in the preceding paragraph and shall then enter into force in respect of States which have ratified, accepted or approved such amendment when ratified, accepted, or approved by three States in accordance with the provisions of article 23 relating to its entry into force.]”

145. The Commission noted that variant A of the draft article had already appeared in the last version of the draft convention that the Working Group had reviewed, whereas variant B reflected a proposal which had been made at the forty-fourth session of the Working Group, and which the Working Group had not had the time to consider. The Commission was advised that variant B presented a more flexible means for assessing the needs for amendment of the draft convention. The Commission was also advised that the references to the “Office of Legal Affairs of the United Nations” and the “secretariat of the United Nations Commission on International Trade Law” might need to be replaced with references to the “Secretary-General of the United Nations” or “the depositary” for consistency with the practices in respect of administrative services provided by the United Nations to its Member States.

146. While some support was expressed for variant A, the prevailing view of the Commission was to adopt variant B as a working assumption. There was strong support for the idea of requesting the Secretariat to keep the practical application of the convention under review and to report to Member States, from time to time, as to problems or new developments that might warrant a revision of the convention. There was also support for envisaging a simplified amendment procedure that might obviate the need for convening ad hoc diplomatic conferences and that might take advantage of the existing framework offered by the Commission, its Working Groups and the Secretariat for the purpose of considering proposals for revision of the convention. However, there was considerable disagreement as to the level of detail with which those objectives should be reflected in the draft convention and to the extent to which the draft convention should deal with amendment procedures. In particular, there were strong objections to making express reference in the draft convention to an amendment procedure requiring formal voting by contracting States, as it was suggested that the practice of taking decisions by consensus, which the Commission had consistently applied throughout the years, was more appropriate for the formulation of uniform rules on private law matters.

147. It was stated that the Commission could propose changes by a protocol or otherwise through its procedures and that contracting States could still modify provisions at any time inter se under existing treaty law. It was also noted that most conventions that the Commission had prepared did not contain provisions on their amendment. In the absence of any provision relating to amendment of the draft convention, the principles for amendment of the draft convention would be found by reference to the Vienna Convention

on the Law of Treaties<sup>10</sup> between States that were party to that Convention and principles of customary international law. After extensive debate on those conflicting views and having considered various proposals to address the concerns that had been expressed, the Commission decided to delete draft article 22.

### Article 23. Entry into force

148. The text of the draft article was as follows:

“1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the [...] instrument of ratification, acceptance, approval or accession.

“2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the [...] instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.”

149. The Commission noted that existing UNCITRAL conventions required as few as three and as many as 10 ratifications for entry into force. A proposal was made that the number of ratifications to be included in the draft article should be 20. However, the Commission did not accept that proposal, as the prevailing view was in favour of entry into force after ratification of three States. It was noted that that approach was in keeping with the modern trend in commercial law conventions, which promoted their application as early as possible to those States which sought to apply such rules to their commerce.

150. The Commission agreed to include the words “the third” in the open bracketed text in paragraphs 1 and 2. The Commission approved the substance of the draft article and referred the text to the drafting group.

### Article 24. Transitional rules

151. The text of the draft article was as follows:

“[1. This Convention applies only to electronic communications that are made after the date when the Convention enters into force.

“[2. In Contracting States that make a declaration under article 18, paragraph 1, this Convention applies only to electronic communications that are made after the date when the Convention enters into force in respect of the Contracting States referred to in paragraph 1 (a) or the Contracting State referred to in paragraph 1 (b) of article 18.

“[3. This Convention applies only to the electronic communications referred to in article 19, paragraph 1, after the date when the relevant Convention among those listed in article 19, paragraph 1, has entered into force in the Contracting State.

“[4. When a Contracting State has made a declaration under article 19, paragraph 3, this Convention applies only to electronic communications in connection with the formation or performance of a contract falling within the scope of the declaration after the date when the declaration takes effect in accordance with article 20, paragraph 3 or 4.

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<sup>10</sup> United Nations, *Treaty Series*, vol. 1155, No. 18232.



“[5. A declaration under article 18, paragraphs 1 or 2, or article 19, paragraphs 2, 3 or 4, or its withdrawal or modification, does not affect any rights created by electronic communications made before the date when the declaration takes effect in accordance with article 20, paragraph 3 or 4.]”

152. The Commission noted that the last version of the draft convention that the Working Group had considered had contained only paragraph 1 of the draft article. In its current form, the draft article reflected a proposal that had been made at the forty-fourth session of the Working Group.

153. Some support was expressed for inclusion of a provision in the draft convention to ensure that the convention only applied prospectively. However, clarification was sought as to whether what was intended to be covered by the words “when the Convention enters into force” was when the convention entered into force generally or when it entered into force in respect of the contracting State in question. It was noted that, if it was intended to refer to the time when the convention entered into force generally, that could have the effect of giving retrospective application in respect of States that became party to the convention thereafter. To address that ambiguity, it was agreed to include a reference to “in respect of each Contracting State” in paragraph 1.

154. It was proposed that paragraphs 2-5 of the draft article be deleted because they were unnecessarily complex and detailed. It was suggested that the issues dealt with therein might be more appropriately addressed by the general rule set out in paragraph 1, which could be extended to refer also to declarations. The Commission agreed to that proposal.

155. The Commission agreed to amend the draft article to read as follows:

“This Convention and any declaration apply only to electronic communications that are made after the date when the Convention or the declaration enters into force or takes effect in respect of each Contracting State.”

The Commission also agreed to change the title of the draft article to “Time of application”. The Commission approved the substance of the draft article, as amended, and referred the text to the drafting group.

#### **Article 25. Denunciations**

156. The text of the draft article was as follows:

“1. A Contracting State may denounce this Convention by a formal notification in writing addressed to the depositary.

“2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.”

157. The Commission approved the substance of the draft article and referred the text to the drafting group.

#### **Signature clause**

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

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

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

159. The Commission approved the substance of the draft signature clause and referred the text to the drafting group.

### Preamble

160. The text of the draft preamble was as follows:

*“The States Parties to this Convention,*

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

*“Noting* that the increased use of electronic communications improves the efficiency of commercial activities, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

*“Considering* that problems created by uncertainty as to the legal value of the use of electronic communications in international contracts constitute an obstacle to international trade,

*“Convinced* that the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and may help States gain access to modern trade routes,

*“Being of the opinion* that uniform rules should respect the freedom of parties to choose appropriate media and technologies, [taking account of their interchangeability,] to the extent that the means chosen by the parties comply with the purpose of the relevant rules of law,

*“Desiring* to provide a common solution to remove legal obstacles to the use of electronic communications in a manner acceptable to States with different legal, social and economic systems,

*“Have agreed as follows:”*

161. It was suggested that the draft preamble was too long and could be shortened to indicate only the two main objectives envisaged in the draft convention, namely the encouragement of the use of electronic communications in international trade and the creation of the conditions required to establish confidence in electronic communications. In response, it was observed that the length and content of the draft preamble were generally in line with previous UNCITRAL instruments. It was added that the current draft of the preamble highlighted the relationship between the draft convention and the broader regulatory framework for electronic commerce.

162. The Commission decided that the bracketed language contained in paragraph 5 of the draft preamble should be replaced with the words “taking into account of principles of technological neutrality and functional equivalence”.

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

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

164. Noting that the title of the draft convention, “Convention on the Use of Electronic Communications in International Contracts” reflected accurately the scope of application of the convention, the Commission approved the title.

### **D. Explanatory notes**

165. The Commission asked the Secretariat to prepare the explanatory notes to the text of the convention and, after their completion, to present those notes to the Commission at its thirty-ninth session, in 2006.

### **E. Report of the drafting group**

166. The Commission requested a drafting group established by the Secretariat to review the draft convention, with a view to ensuring consistency between the various language versions. At the close of its deliberations on the draft convention, the Commission considered the report of the drafting group and approved the draft convention. The Commission requested the Secretariat to review the text of the draft convention from a purely linguistic and editorial point of view before its adoption by the General Assembly.

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

167. At its 810th meeting, on 15 July 2005, the Commission adopted by consensus the following decision and recommendation to the General Assembly:

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

*“Recalling that at its thirty-fourth session, in 2001, it entrusted Working Group IV (Electronic Commerce) with the preparation of an international instrument dealing with issues of electronic contracting,<sup>11</sup> which should also aim at removing obstacles to electronic commerce in existing uniform law conventions and trade agreements,*

*“Noting that the Working Group devoted six sessions, held from 2002 to 2004, to the preparation of the draft convention on the use of electronic communications in international contracts,<sup>12</sup>*

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<sup>11</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr.3), paras. 291-293.*

<sup>12</sup> For the reports of the Working Group, see A/CN.9/509, A/CN.9/527, A/CN.9/528, A/CN.9/546, A/CN.9/548 and A/CN.9/571.

*“Having considered the draft convention at its thirty-eighth session, in 2005,<sup>13</sup>*

*“Drawing attention to the fact that all States and interested international organizations were invited to participate in the preparation of the draft convention at all the sessions of the Working Group and at the thirty-eighth session of the Commission, either as member or as observer, with full opportunity to speak and make proposals,*

*“Also drawing attention to the fact that the text of the draft convention was circulated for comments before the thirty-eighth session of the Commission to all Governments and international organizations invited to attend the meetings of the Commission and the Working Group as observers and that such comments were before the Commission at its thirty-eighth session,<sup>14</sup>*

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

*“1. Submits to the General Assembly the draft convention on the use of electronic communications in international contracts, as set forth in annex I to the report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session;<sup>15</sup>*

*“2. Recommends that the General Assembly, taking into account the extensive consideration given to the draft convention by the Commission and its Working Group IV (Electronic Commerce), consider the draft convention with a view to adopting, at its sixtieth session, on the basis of the draft convention approved by the Commission, a United Nations convention on the use of electronic communications in international contracts.”*

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

168. At its thirty-sixth session, in 2003, the Commission considered a note by the Secretariat on possible future work in the area of public procurement (A/CN.9/539 and Add.1). It was observed that the UNCITRAL Model Law on Procurement of Goods, Construction and Services<sup>16</sup> contained procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process and that it had become an important international benchmark in procurement law reform. Observing that, despite the widely recognized value of the Model Law, novel issues and practices had arisen since its adoption that might justify an effort to adjust its text, the Commission requested the Secretariat to prepare for its further consideration detailed studies and proposals on how to address those issues and practices.<sup>17</sup>

169. At its thirty-seventh session, in 2004, based on a note by the Secretariat (A/CN.9/553) submitted pursuant to that request, the Commission agreed that the Model Law would benefit from being updated to reflect new practices, in particular those which

<sup>13</sup> *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17)*, paras. 12-166.

<sup>14</sup> A/CN.9/478 and Add.1-17.

<sup>15</sup> *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17)*.

<sup>16</sup> *Ibid.*, *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

<sup>17</sup> *Ibid.*, *Fifty-eighth Session, Supplement No. 17 (A/58/17)*, paras. 225-230.

resulted from the use of electronic communications in public procurement, and the experience gained in the use of the Model Law as a basis for law reform in public procurement as well as possible additional issues. The Commission decided to entrust the preparation of proposals for the revision of the Model Law to its Working Group I (Procurement) and gave the Working Group a flexible mandate to identify the issues to be addressed in its considerations. The Commission also requested the Secretariat to present to the Working Group appropriate notes further elaborating upon issues discussed in the note by the Secretariat (A/CN.9/553) in order to facilitate the considerations of the Working Group.<sup>18</sup> The Commission recalled its earlier statements that, in updating the Model Law, care should be taken not to depart from the basic principles of the Model Law and not to modify the provisions whose usefulness had been proven.

170. At its thirty-eighth session, the Commission took note of the reports of the sixth (Vienna, 30 August-3 September 2004) and seventh (New York, 4-8 April 2005) sessions of the Working Group (A/CN.9/568 and A/CN.9/575, respectively).

171. The Commission was informed that the Working Group had begun its work on the preparation of proposals for the revision of the Model Law at its sixth session, with the preliminary consideration of the following topics: (a) electronic publication of procurement-related information; (b) the use of electronic communications in the procurement process; (c) controls over the use of electronic communications in the procurement process; (d) electronic reverse auctions; (e) the use of suppliers' lists; (f) framework agreements; (g) procurement of services; (h) evaluation and comparison of tenders and the use of procurement to promote industrial, social and environmental policies; (i) remedies and enforcement; (j) alternative methods of procurement; (k) community participation in procurement; (l) simplification and standardization of the Model Law; and (m) legalization of documents (A/CN.9/WG.I/WP.31 and A/CN.9/WG.I/WP.32). The Commission was further informed that the Working Group at its sixth session had decided to proceed with the in-depth consideration of those topics in sequence at its future sessions (A/CN.9/568, para. 10) and accordingly, at its seventh session, had started the in-depth consideration of the topics related to the use of electronic communications and technologies in the procurement process: (a) electronic publication and communication of procurement-related information; (b) other issues arising from the use of electronic means of communication in the procurement process, such as controls over their use, including the electronic submission of tenders; (c) electronic reverse auctions; and (d) abnormally low tenders (A/CN.9/WG.I/WP.34 and Add.1-2, A/CN.9/WG.I/WP.35 and Add.1 and A/CN.9/WG.I/WP.36). The Commission noted the Working Group's decision to accommodate the use of electronic communications and technologies (including electronic reverse auctions) as well as the investigation of abnormally low tenders in the Model Law and to continue at its eighth session the in-depth consideration of those topics and the revisions to the Model Law that would be necessary in that regard and, time permitting, to take up the topic of framework agreements (A/CN.9/575, para. 9).

172. The Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law. (For the next two sessions of the Working Group, see paragraph 240 (a) below.)

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<sup>18</sup> Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 80-82.

## V. Arbitration: progress report of Working Group II

173. At its thirty-second session, in 1999, the Commission, having exchanged views on its future work in the area of international commercial arbitration, decided to entrust that work to one of its working groups. It agreed that the priority items for consideration by the working group should be, *inter alia*, requirement of written form for the arbitration agreement and enforceability of interim measures of protection.<sup>19</sup> The Working Group, subsequently named Working Group II (Arbitration and Conciliation), commenced its work pursuant to that mandate at its thirty-second session (Vienna, 20-31 March 2000).

174. At its thirty-eighth session, the Commission took note of the progress made by the Working Group at its forty-first (Vienna, 13-17 September 2004) and forty-second (New York, 10-14 January 2005) sessions (see A/CN.9/569 and A/CN.9/573, respectively). The Commission noted that the Working Group had continued its discussions on a draft text for a revision of article 17, paragraph 7, of the UNCITRAL Model Law on International Commercial Arbitration<sup>20</sup> (the "Arbitration Model Law") on the power of an arbitral tribunal to grant interim measures of protection on an *ex parte* basis. The Commission noted also that the Working Group had discussed a draft provision on the recognition and enforcement of interim measures of protection issued by an arbitral tribunal (for insertion as a new article of the Arbitration Model Law, tentatively numbered 17 bis) and a draft article dealing with interim measures issued by state courts in support of arbitration (for insertion as a new article of the Arbitration Model Law, tentatively numbered 17 ter).

175. The Commission noted the Working Group's progress made so far regarding the issue of interim measures of protection. The Commission also noted that, notwithstanding the wide divergence of views, the Working Group had agreed, at its forty-second session, to include a compromise text of the revised draft of paragraph 7 in draft article 17, on the basis of the principles that that paragraph would apply unless otherwise agreed by the parties, that it should be made clear that preliminary orders had the nature of procedural orders and not of awards and that no enforcement procedure would be provided for such orders in article 17 bis. The Commission noted that the issue of *ex parte* interim measures remained contentious. Some delegations expressed the hope that the compromise text reached was the final one. Other delegations expressed doubts as to the value of the proposed compromise text, in particular in view of the fact that it did not provide for enforcement of preliminary orders. Concerns were also expressed that the inclusion of such a provision was contrary to the principle of equal access of the parties to the arbitral tribunal and could expose the revised text of the Arbitration Model Law to criticism. A proposal was made that, if the provision were to be included, it should be drafted in the form of an opting-in provision, applying only where the parties had expressly agreed to its application.

176. The Commission noted that the Working Group had yet to finalize its work on draft articles 17, 17 bis and 17 ter, including the issue of the form in which the current and the revised provisions could be presented in the Arbitration Model Law. In respect of the structure of draft article 17, it was proposed that the issue of preliminary orders should be dealt with in a separate article in order to facilitate the adoption of draft article 17 by States that did not wish to adopt provisions relating to preliminary orders. As a matter of drafting,

<sup>19</sup> Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 380.

<sup>20</sup> Ibid., *Fortieth Session, Supplement No. 17* (A/40/17), annex I. The Model Law has been published as a United Nations publication (Sales No. E.95.V.18).

the Commission also took note of a proposal that the revised text of draft articles 17, 17 bis and 17 ter should not be included in the body of the Model Law but in an annex. Also, the Commission noted that the Working Group was expected to complete its work on draft article 7 of the Model Law on the form requirement for an arbitration agreement and on its relation to article II, paragraph 2, of the New York Convention.

177. The Commission expressed its expectation that the Working Group would be able, with two additional sessions, to present its proposals for final review and adoption to the Commission at its thirty-ninth session, in 2006.

178. With respect to future work in the field of settlement of commercial disputes, the Commission took note of the suggestion of the Working Group made at its forty-second session that, once the existing projects currently being considered had been completed, priority consideration might be given to the issues of arbitrability of intra-corporate disputes and other issues relating to arbitrability, for example, arbitrability in the fields of immovable property, insolvency or unfair competition. Another suggestion was that issues arising from online dispute resolution (ODR) and the possible revision of the UNCITRAL Arbitration Rules<sup>21</sup> might also need to be considered (A/CN.9/573, para. 100). Those proposals were supported by the Commission.

179. The Commission was informed that 2006 would mark the thirtieth anniversary of the UNCITRAL Arbitration Rules and that conferences to celebrate that anniversary were expected to be organized in different regions to exchange information on the application and possible areas of revision of the Rules. One such conference would be held in Vienna on 6 and 7 April 2006, under the auspices of the International Arbitral Centre of the Austrian Federal Economic Chamber. (For the next two sessions of the Working Group, see paragraph 240 (b) below.)

## **VI. Transport law: progress report of Working Group III**

180. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) to prepare, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods by sea, such as the scope of application, the period of responsibility of the carrier, the obligations of the carrier, the liability of the carrier, the obligations of the shipper and transport documents.<sup>22</sup> At its thirty-fifth session, in 2002, the Commission approved the working assumption that the draft instrument on transport law should cover door-to-door transport operations.<sup>23</sup> At its thirty-sixth and thirty-seventh sessions, in 2003 and 2004, respectively, the Commission noted the complexities involved in the preparation of the draft instrument, and authorized the Working Group, on an exceptional basis, to hold its twelfth, thirteenth,<sup>24</sup> fourteenth and fifteenth<sup>25</sup> sessions on the basis of two-week sessions. (For the consideration of the matter at the current session, see paragraph 238 below.) Further, at its thirty-seventh session, the Commission reaffirmed its appreciation of the magnitude of the project and expressed its support for the efforts of the Working Group to

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<sup>21</sup> *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, para. 57.

<sup>22</sup> *Ibid.*, *Fifty-sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr.3)*, para. 345.

<sup>23</sup> *Ibid.*, *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, para. 224.

<sup>24</sup> *Ibid.*, *Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 208.

<sup>25</sup> *Ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 133.

accelerate the progress of its work, in particular in view of the Commission's agreement that 2006 would be a desirable goal for completion of the project, but that the issue of establishing a deadline for such completion should be revisited at its thirty-eighth session, in 2005.<sup>26</sup>

181. At its thirty-eighth session, the Commission took note of the progress made by the Working Group at its fourteenth (Vienna, 29 November-10 December 2004) and fifteenth (New York, 18-28 April 2005) sessions (see A/CN.9/572 and A/CN.9/576, respectively).

182. The Commission noted with appreciation the progress that the Working Group had made in its consideration of the draft instrument on the carriage of goods [wholly or partly] [by sea]. The Commission was informed that, at its fourteenth and fifteenth sessions, the Working Group had proceeded with its second reading of the draft instrument and had made good progress regarding a number of difficult issues, including those regarding the basis of liability pursuant to the draft instrument, as well as scope of application of the instrument and related freedom of contract issues. In addition, the Commission also heard that the Working Group had considered during its fourteenth and fifteenth sessions the chapters in the draft instrument on jurisdiction and arbitration and had had an initial exchange of views regarding the topics of right of control and transfer of rights. The Commission was also informed that, following consultations with Working Group IV (Electronic Commerce), the Working Group had considered for the first time, at its fifteenth session, provisions in the draft instrument relating to electronic commerce. The Commission was also informed that, with a view to continuing the acceleration of the exchange of views, the formulation of proposals and the emergence of consensus in preparation for a third and final reading of the draft instrument, a number of delegations participating in the fourteenth and fifteenth sessions of the Working Group had continued their initiative of holding informal consultations for the continuation of discussion between sessions of the Working Group. The Working Group had considered the issue of the time frame for concluding its work on the draft instrument and a number of delegations supported the view that, while the completion of the work at the end of 2005 was unlikely, with the valuable assistance of the informal consultation process, the Working Group was hoping to complete its work at the end of 2006, with a view to presenting a draft instrument for possible adoption by the Commission in 2007.

183. The Commission commended the Working Group for the progress it had made and reiterated its appreciation of the magnitude of the project and of the difficulties involved in the preparation of the draft instrument, given, in particular, the nature of the interests and complex legal issues involved that required the striking of a delicate balance and consistent and considered treatment of the issues in the text. Several delegations expressed concern with respect to the informal meetings convened between some members of the Working Group and interested parties to discuss issues being considered by the Working Group. While such meetings had enabled the Working Group to make good progress in its work, concern was expressed that many members of the Working Group were not informed of these meetings and were thus unable to participate in substantive discussions on many issues being considered by the Working Group. There was much support for the view that more information should be made available to all members of the Working Group about these meetings, including their time and location. It was suggested that the UNCITRAL website would be a good means of providing such information. Contrary views were expressed. It was also stated that absent from the Commission's meeting, and their views

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<sup>26</sup> Ibid., paras. 64-66.



therefore not before that body, were the International Maritime Committee and representatives of shippers, carriers, cargo insurers, freight forwarders and others, all of whose interests were affected by the draft instrument and who had participated in the ad hoc meetings. In addition, it was stated that experts from many States participating in the Commission's meeting were also involved in the ad hoc meetings.

184. The Commission's attention was drawn to the view set out in the report of the fifteenth session of the Working Group (A/CN.9/576, para. 216) that there was support in the Working Group regarding its current working methods, including informal consultation work between sessions and the use of small drafting groups within the Working Group. It was noted that the process should be compatible with the production of official documents in all official languages. While it was clarified that some informal meetings that considered issues on the agenda of UNCITRAL had been convened by other organizations and not by the Secretariat, there was agreement that, in meetings convened by the Secretariat, care should be exercised with respect to allowing experts to express themselves in the working languages of the United Nations and with respect to the translation into all official languages of official documents to be considered by the Working Group. Further, there was agreement that substantive decisions regarding the work should continue to be made only in the Working Group and in the Commission. With respect to a possible time frame for completion of the draft instrument, there was support for the view that it would be desirable to complete a third reading of the draft text as quickly as possible and with a view to its adoption by the Commission in 2007. After discussion, the Commission agreed that 2007 would be a desirable goal for completion of the project, but that the issue of establishing a deadline for such completion should be revisited at its thirty-ninth session, in 2006. (For the next two sessions of the Working Group, see paragraph 240 (c) below.)

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

185. At its thirty-fourth session, in 2001, the Commission entrusted Working Group VI (Security Interests) with the task of developing an efficient legal regime for security interests in goods involved in a commercial activity, including inventory.<sup>27</sup> At its thirty-fifth session, in 2002, the Commission confirmed the mandate given to the Working Group and that the mandate should be interpreted widely to ensure an appropriately flexible work product, which should take the form of a legislative guide.<sup>28</sup> At its thirty-sixth session, in 2003, the Commission confirmed that it was up to the Working Group to consider the exact scope of its work and, in particular, whether trade receivables, letters of credit, deposit accounts and intellectual property rights should be covered in the draft legislative guide.<sup>29</sup> At its thirty-seventh session, in 2004, the Commission welcomed the preparation of additional chapters for inclusion in the draft legislative guide on various types of asset, such as negotiable instruments, deposit accounts and intellectual property rights.<sup>30</sup>

186. At its thirty-eighth session, the Commission took note of the reports of the Working Group on the work of its sixth (Vienna, 27 September-1 October 2004) and seventh (New York, 24-28 January 2005) sessions (A/CN.9/570 and A/CN.9/574, respectively). The

<sup>27</sup> Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 358.

<sup>28</sup> Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 204.

<sup>29</sup> Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 222.

<sup>30</sup> Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 77.

Commission commended the Working Group for the progress achieved so far. In particular, the Commission noted with appreciation that a complete consolidated set of legislative recommendations, which included, in addition to recommendations on inventory, equipment and trade receivables, recommendations on negotiable instruments, negotiable documents, bank accounts and proceeds from independent undertakings, would be before the Working Group at its eighth session (see para. 240 (f) below). In that connection, the Commission noted that informal expert group meetings were useful in providing advice to the Secretariat with respect to documents to be prepared by the Secretariat but were not meant to involve any negotiations or to result in any decisions binding on the Working Group or the Commission.

187. In addition, the Commission noted with interest the progress made by the Working Group in the coordination of its work with: (a) the Hague Conference on Private International Law, which had prepared the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary (The Hague, 2002);<sup>31</sup> (b) the International Institute for the Unification of Private Law (Unidroit), which was preparing a draft convention on security and other rights in intermediated securities; (c) the World Bank, which was revising its Principles and Guidelines for Effective Insolvency and Creditor Rights Systems; and (d) the World Intellectual Property Organization. After discussion, the Commission confirmed the mandate given to the Working Group at the thirty-fourth session of the Commission and subsequently confirmed at its thirty-fifth to thirty-seventh sessions (see para. 185 above). The Commission also requested the Working Group to expedite its work so as to submit the draft legislative guide to the Commission, at least for approval in principle, in 2006, and for final adoption in 2007. (For the next two sessions of the Working Group, see paragraph 240 (f) below.)

## VIII. Monitoring implementation of the 1958 New York Convention

188. The Commission recalled that, at its twenty-eighth session, in 1995, it had approved a project, undertaken jointly with Committee D of the International Bar Association, aimed at monitoring the legislative implementation of the New York Convention.<sup>32</sup> At its thirty-seventh session, in 2004, the Commission requested the Secretariat, subject to the availability of the necessary resources, to undertake its best efforts to produce for consideration by the Commission at its thirty-eighth session a preliminary analysis of the replies received by the Secretariat in response to the questionnaires circulated in connection with the project.<sup>33</sup>

189. In accordance with that request, the Secretariat presented an interim report to the Commission at its thirty-eighth session (A/CN.9/585), which set out the issues raised by the replies received and also set out additional questions that the Commission might request the Secretariat to put to States in order to obtain more comprehensive information regarding implementation practice. The Commission expressed its appreciation to those States parties which had provided replies since its thirty-seventh session and reiterated its appeal to the remaining States parties to send replies.

<sup>31</sup> Available at [http://hcch.e-vision.nl/index\\_en.php?act=conventions.text&cid=72](http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=72).

<sup>32</sup> *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17), paras. 401-404.

<sup>33</sup> *Ibid.*, *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 84.

190. The Commission welcomed the progress reflected in the interim report, noting that the general outline of replies received served to facilitate discussions as to the next steps to be taken and highlighted areas of uncertainty where more information could be sought from States parties or further studies could be undertaken. It was pointed out that, taking into account that questionnaires had been circulated since 1995, the work should be finalized in due course. It was also noted that, given the limited resources of the Secretariat, care should be taken to ensure that the work undertaken by the Secretariat in relation to the project did not duplicate the extensive research on the implementation of the New York Convention that already existed and was ongoing. In that respect, the Commission was informed that the Secretariat's ongoing work on the project had not had a negative impact on other work, including servicing of Working Group II (Arbitration and Conciliation).

191. The Commission considered the approach taken in preparing the interim report, including the style and presentation and level of detail, to be appropriate, but considered that it might be helpful to provide more detailed indications, including the naming of States, as appropriate. It was suggested that one possible future step could be the development of a legislative guide to limit the risk that state practice would diverge from the spirit of the New York Convention. The Commission was generally of the view that appointing national experts on international arbitration would be of assistance to the Secretariat in completing its work. Concern was expressed that it would be difficult to identify experts who could provide a comprehensive overview of national practice. However, it was recommended that relevant arbitration centres or academic organizations, as might be appointed by States, also assist the Secretariat in its work. After discussion, the Commission agreed that a level of flexibility should be left to the Secretariat in determining the time frame for completion of the project, the level of detail that should be reflected in the report that the Secretariat would present for the consideration by the Commission in due course, whether or not individual States should be identified by name in that report and the extent to which references to case law should be made in the report, and in ensuring that the work by the Secretariat on the project was not duplicative of work undertaken in other forums with respect to the survey of the implementation of the New York Convention.

## **IX. Case law on UNCITRAL texts, digests of case law**

192. The Commission noted with appreciation the continuing work under the system established for the collection and dissemination of case law on UNCITRAL texts (CLOUT), consisting of the preparation of abstracts of court decisions and arbitral awards relating to UNCITRAL texts, compilation of the full texts of those decisions and awards, as well as of the preparation of research aids and analytical tools. As at 13 July 2005, 46 issues of CLOUT had been prepared for publication, dealing with 530 cases, relating mainly to the United Nations Sales Convention and the Arbitration Model Law.

193. It was widely agreed that CLOUT continued to be an important tool of the overall training and technical assistance activities undertaken by UNCITRAL and that the wide distribution of CLOUT in both paper and electronic formats, in all the six official languages of the United Nations, promoted the uniform interpretation and application of UNCITRAL texts by facilitating access to decisions and awards from many jurisdictions. The Commission expressed its appreciation to the national correspondents for their work in selecting decisions and preparing case abstracts.

194. The Commission noted that the digest of the case law on the United Nations Sales Convention, prepared pursuant to the Commission's request at its thirty-fourth session,<sup>34</sup> had been published in December 2004. It also noted that the first draft of a digest of case law related to the Arbitration Model Law had been prepared pursuant to the Commission's request at its thirty-fifth session<sup>35</sup> and taking into account the relevant discussion at its thirty-seventh session.<sup>36</sup> The Commission was informed that the draft digest would be before the CLOUT national correspondents at their meeting on 14 and 15 July 2005.

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

195. The Commission had before it a note by the Secretariat (A/CN.9/586) describing the technical assistance activities undertaken since its thirty-seventh session and the direction of future activities. The Commission expressed its appreciation for the technical assistance activities undertaken by the Secretariat since the thirty-seventh session of the Commission (A/CN.9/586, para. 8) and noted, in addition, the seminars, conferences and courses where UNCITRAL texts had been presented and in which members of the Secretariat had participated as speakers (A/CN.9/586, para.15).

196. The Commission noted the establishment of the legislative and technical assistance units within its secretariat and the administrative arrangements for conducting the work of the two units. With respect to the technical assistance unit, the Commission also noted that its secretariat had identified the goals of that unit and had taken steps to draft guidelines addressing the requirements for organizing, implementing and reporting of technical assistance activities requested by States and by international and regional organizations. It further noted that its secretariat was beginning to identify national and regional needs for technical assistance, in conjunction with national, regional and international organizations and permanent missions to the United Nations, as well as opportunities for the development of joint programmes with, and participation in existing programmes of, organizations providing technical assistance to trade law reform.

197. The Commission reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, if possible in the form of multi-year contributions, or as purpose-specific contributions, so as to facilitate planning and enable the Secretariat to meet the increasing demands from developing countries and States with economies in transition for training and technical legislative assistance. The Commission expressed its appreciation to those States which had contributed to the fund since the thirty-seventh session, namely, Mexico, Singapore and Switzerland, and also to organizations that had contributed to the programme by providing funds or staff or by hosting seminars.

198. The Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that were members of the Commission. The Commission noted that no contributions to the trust fund for travel assistance had been received since the thirty-seventh session.

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<sup>34</sup> Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 395.

<sup>35</sup> Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 243.

<sup>36</sup> Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 88, 89 and 91.

## XI. Status and promotion of UNCITRAL legal texts

199. The Commission considered the status of the conventions and model laws emanating from its work, as well as the status of the New York Convention, on the basis of a note by the Secretariat (A/CN.9/583). The Commission noted with appreciation the new actions and enactments of States and jurisdictions since its thirty-seventh session regarding the following instruments:

(a) United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). New actions by Cyprus and Gabon; number of States parties: 65;

(b) United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988).<sup>37</sup> New action by Gabon; number of States parties: 4;

(c) United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991).<sup>38</sup> New action by Gabon; number of States parties: 3;

(d) United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995).<sup>39</sup> New action by Gabon; number of States parties: 7;

(e) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). New action by Afghanistan; number of States parties: 135;

(f) UNCITRAL Model Law on International Commercial Arbitration (1985). New jurisdictions that had enacted legislation based on the Model Law: Chile and Philippines;

(g) UNCITRAL Model Law on Electronic Commerce (1996). New jurisdictions that had enacted legislation based on the Model Law:<sup>40</sup> Chile and, within the United States, the State of Wisconsin;

(h) UNCITRAL Model Law on Cross-Border Insolvency (1997).<sup>41</sup> New jurisdictions that had enacted legislation based on the Model Law: British Virgin Islands, overseas territory of the United Kingdom, and United States;

(i) UNCITRAL Model Law on Electronic Signatures (2001). New jurisdiction that had enacted legislation based on the Model Law: Republic of Korea.

200. It was noted that one State enacting the UNCITRAL Model Law on Cross-Border Insolvency (see para. 199 (h) above) into its bankruptcy code had changed the format of its legislation to make clear that it originated from the UNCITRAL text.

201. It was noted that the UNCITRAL Model Law on International Commercial Conciliation (2002)<sup>42</sup> would be included in the next revision of the report on the status and promotion of UNCITRAL texts.

<sup>37</sup> United Nations publication, Sales No. E.95.V.16.

<sup>38</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.

<sup>39</sup> United Nations publication, Sales No. E.97.V.12.

<sup>40</sup> The Republic of Korea stated that the reference to the Republic of Korea in paragraph 9 of document A/CN.9/583 should have been accompanied by a footnote explaining that in 1999 the Republic of Korea enacted legislation implementing provisions of the UNCITRAL Model Law on Electronic Commerce except for its provisions on certification of electronic signatures.

<sup>41</sup> United Nations publication, Sales No. E.99.V.3.

202. The Commission requested States that had enacted or were about to enact legislation based on a model law prepared by the Commission or that were considering legislative action regarding a convention resulting from the work of the Commission to inform the secretariat of the Commission accordingly. The Commission noted with appreciation reports by a number of States that official action was being considered with a view to adherence to various conventions and the adoption of legislation based on various model laws prepared by UNCITRAL. The Commission was informed that, pursuant to its request at its thirty-seventh session,<sup>43</sup> the Secretariat would include copies of national enactments of UNCITRAL model laws on the UNCITRAL website in the original language and, where available, in a translation, even if unofficial, into one or more of the official languages of the United Nations.

203. The Commission was informed that a series of conferences were being held in different countries to celebrate the twenty-fifth anniversary of the United Nations Sales Convention and the twentieth anniversary of the Arbitration Model Law, and that efforts would be made to publish their proceedings.

204. The Commission had before it a note by the Secretariat (A/CN.9/580 and Add.2) outlining developments in the area of cross-border insolvency, including enactments of the UNCITRAL Model Law on Cross-Border Insolvency and the interpretation in the European Union of certain concepts common to both the Model Law and law of the European Union. The Commission took note with satisfaction of the report on developments with enactments of the Model Law. It was noted that the Secretariat would continue to monitor those decisions of the courts of the European Union which were relevant to interpretation of concepts used in the Model Law.

## **XII. Relevant General Assembly resolutions**

205. The Commission took note with appreciation of General Assembly resolutions 59/39, on the report of the Commission on the work of its thirty-seventh session, and 59/40, on the UNCITRAL Legislative Guide on Insolvency Law, both of 2 December 2004.

206. The Commission took particular note of those parts of resolution 59/39 in which the General Assembly expressed its concern that activities undertaken by other bodies in the field of international trade law without adequate coordination with the Commission might lead to undesirable duplication of efforts and would not be in keeping with the aim of promoting efficiency, consistency and coherence in the unification and harmonization of international trade law, and in which the Assembly reaffirmed the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in this field. Note was taken with appreciation of paragraph 4 of the resolution, in which the Assembly endorsed the efforts and initiatives of the Commission aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law.

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<sup>42</sup> United Nations publication, Sales No. E.05.V.4.

<sup>43</sup> *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 98.

### **XIII. Coordination and cooperation**

#### **A. General**

207. The Commission had before it a note by the Secretariat (A/CN.9/584) providing a brief survey of the work of international organizations related to the harmonization of international trade law, focusing upon substantive legislative work, as well as two additional notes addressing specific areas of activity, electronic commerce (A/CN.9/579) (see paras. 213-215 below) and insolvency law (A/CN.9/580/Add.1). The Commission commended the Secretariat for the preparation of those reports, recognizing their value to coordination of the activities of international organizations in the field of international trade law, and noted with appreciation that the survey contained in the note by the Secretariat (A/CN.9/584) was the first in a series that would be updated and revised on an annual basis. A number of suggestions for additional information were made. The Commission noted that the first of a series of parallel reports on the activities of international organizations providing technical assistance to law reform in the areas of international trade law of interest to the Commission would be prepared for its thirty-ninth session in 2006.

208. It was recalled that the Commission had generally agreed at its thirty-seventh session that it should adopt a more proactive attitude, through its secretariat, to fulfilling its coordination role.<sup>44</sup> The Commission, recalling the statement by the General Assembly in its resolution 59/39 regarding the importance of coordination (see para. 206 above), noted with appreciation that the Secretariat was taking steps to engage in a dialogue, on both legislative and technical assistance activities, with a number of organizations, including the World Bank, the International Monetary Fund (IMF), the Common Market for Eastern and Southern Africa, the Hague Conference on Private International Law, the International Council for Commercial Arbitration, the International Development Law Organization, the Organization of American States and Unidroit. The Commission noted that that work often involved travel to meetings of those organizations and the expenditure of funds allocated for official travel. The Commission reiterated the importance of coordination work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and supported the use of travel funds for that purpose.

#### **B. Insolvency law**

##### **1. Future work on insolvency law**

209. The Commission had before it a series of proposals, on which it heard presentations, for future work in the area of insolvency law (A/CN.9/582 and Add.1-7), specifically on treatment of corporate groups in insolvency, cross-border insolvency protocols in transnational cases, post-commencement financing in international reorganizations, directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases, and commercial fraud and insolvency. The Commission recalled that several of those topics had arisen in the context of the development of the *UNCITRAL Legislative Guide on Insolvency Law*,<sup>45</sup> but that the treatment in the *Legislative Guide* was either limited to a brief introduction, as in the case of treatment of corporate groups in

<sup>44</sup> Ibid., para. 114.

<sup>45</sup> United Nations publication, Sales No. E.05.V.10.

insolvency, or limited to domestic insolvency law, as in the case of post-commencement financing. It was acknowledged that undertaking further work on those two topics would build upon and complement the work already completed by the Commission. Similarly, the Commission agreed that the proposal on cross-border insolvency protocols was closely related and complementary to the promotion and use of a text already adopted by the Commission, the Model Law on Cross-Border Insolvency. It was recalled that a study on commercial fraud was being undertaken by the United Nations Office on Drugs and Crime (UNODC) in cooperation with the UNCITRAL secretariat and that, in addition to issues of criminal law, that work included aspects of civil law that would be relevant to insolvency. The Commission was of the view that any future work on commercial fraud in the area of insolvency should be coordinated with the results of that study (see para. 218 below). The Commission noted that, while the topic of directors' and officers' liability was an important one, it might involve questions of criminal law that would be outside the mandate of the Commission or questions for which it might be difficult to find harmonized solutions. For those reasons, that topic might not be as susceptible as other topics to future work at that time.

210. After discussion, some preference for the topics of corporate groups, cross-border protocols and post-commencement financing was expressed. The Commission agreed that to facilitate further consideration and obtain the views and benefit from the expertise of international organizations and insolvency experts, an international colloquium should be held, similar to the UNCITRAL/INSOL International/International Bar Association Global Insolvency Colloquium (Vienna, 4-6 December 2000), which had been a key part of the work on the development of the *UNCITRAL Legislative Guide on Insolvency Law* (see A/CN.9/495). The Commission agreed that in preparing the programme for that colloquium, to be held in Vienna from 14 to 16 November 2005, the Secretariat should take into account the discussion in the Commission in determining priorities.

## **2. Coordination with the World Bank and the International Monetary Fund**

211. The Commission recalled that, at its thirty-seventh session, in its decision adopting the *UNCITRAL Legislative Guide on Insolvency Law*, it had confirmed its intention to continue coordination and cooperation with the World Bank and IMF to facilitate the development of a unified international standard in the area of insolvency law.<sup>46</sup> That standard was being developed in the context of the joint World Bank/IMF initiative on standards and codes (Reports on Standards and Codes (ROSC)), insolvency being one of the 12 areas that was identified as useful for the operational work of the Bank and IMF and for which standard assessments had been, and were to continue to be, undertaken. Those assessments were designed to assess a country's institutional practices against an internationally recognized standard and, if needed, provide recommendations for improvement. They were conducted on a voluntary basis and at the request of a country, the results being confidential unless the country agreed to publication of an executive summary. The uniform standard was to be based upon a framework that included both the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems and the *UNCITRAL Legislative Guide on Insolvency Law* as independent texts. It was not expected that the two texts would be combined as a single publication.

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<sup>46</sup> *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 55.



212. The Commission was informed that staff of the World Bank and IMF would recommend that their respective executive boards recognize those documents as constituting the unified standard for insolvency and creditor rights systems for use in the two institutions' operational work. Recognition by the two executive boards would allow ROSC assessments to be conducted on the basis of the unified standard on insolvency and creditor rights systems. The unified standard forms the basis of a methodology document that is being developed by the Bank, in coordination with IMF and UNCITRAL, within the parameters of the joint World Bank/IMF initiative on standards and codes.

### **C. Electronic commerce**

213. The Commission considered the possibility of undertaking future work in the area of electronic commerce in the light of a note submitted by the Secretariat in pursuance of the Commission's mandate to coordinate international legal harmonization efforts in the area of international trade law, in which the Secretariat summarized the work undertaken by other organizations in various areas related to electronic commerce (A/CN.9/579). It was pointed out that the range of issues currently being dealt with by various organizations were indicative of the various elements required to establish a favourable legal framework for electronic commerce. The UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures, as well as the draft convention on the use of electronic communications in international contracts, which the Commission had approved in its current session (see para. 166 above), provided a good basis for States to facilitate electronic commerce, but only addressed a limited number of issues. Much more needed to be done to enhance confidence and trust in electronic commerce, such as appropriate rules on consumer and privacy protection, cross-border recognition of electronic signatures and authentication methods, measures to combat computer crime and cybercrime, network security and critical infrastructure for electronic commerce and protection of intellectual property rights in connection with electronic commerce, among various other aspects. At present, there was no single international document providing guidance to which legislators and policymakers around the world could refer for advice on those various aspects. The task of legislators and policymakers, in particular in developing countries, might be greatly facilitated if such a comprehensive reference document were to be formulated.

214. The Commission welcomed the information provided in the note by the Secretariat and confirmed the usefulness of such cross-sectoral overview of activities from the viewpoint both of its coordination activities and of the information requirements of Member States. There was general agreement that it would be useful for the Secretariat to prepare a more detailed study, in cooperation and in consultation with the other international organizations concerned, for consideration by the Commission at its thirty-ninth session, in 2006. Such a detailed overview, with proposals as to the form and nature of the reference document that would be envisaged, would be useful to allow the Commission to consider possible areas in which it could undertake legislative work in the future, as well as areas in which legislators and policymakers might benefit from comprehensive information, which did not necessarily need to take the form of specific legislative guidance. In considering that matter, the Commission should bear in mind the need to ensure appropriate coordination and consultation with other organizations and to avoid duplicating or overlapping work. It was also suggested that the overview should

provide more detail on the work of some regional organizations than was contained in the note by the Secretariat.

215. As regards the range of issues to be considered in such a detailed overview, the following areas were suggested: transfer of rights in tangible goods or other rights through electronic communications, intellectual property rights, information security, cross-border recognition of electronic signatures, electronic invoicing and online dispute resolution. The Commission's attention was also drawn to the recommendations for future work that had been made by the Working Group (see A/CN.9/571, para. 12). It was agreed that those recommendations should also be considered in the context of the detailed overview to be prepared by the Secretariat, to the extent that some of them would not be reflected in the explanatory notes to the convention on the use of electronic communications in international contracts (see para. 165 above), or in separate information activities undertaken by the Secretariat, such as monitoring the implementation of the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures, and compiling judicial decisions on the matters dealt with in those Model Laws.

#### **D. Commercial fraud**

216. The Commission recalled its consideration of the subject at its thirty-fifth to thirty-seventh sessions, in 2002 to 2004, respectively.<sup>47</sup> At its thirty-seventh session, in 2004, the Commission had agreed that it would be useful if, wherever appropriate, examples of commercial fraud were to be discussed in the particular contexts of projects worked on by the Commission so as to enable delegates involved in those projects to take the problem of fraud into account in their deliberations. In addition, the Commission agreed that the preparation of lists of common features present in typical fraudulent schemes could be useful as educational material for participants in international trade and other potential targets of perpetrators of frauds to the extent they would help them protect themselves and avoid becoming victims of fraudulent schemes. While it was not proposed that the Commission itself or its intergovernmental working groups be directly involved in those efforts, it was agreed that the Secretariat would keep the Commission informed regarding such activity.<sup>48</sup>

217. In that regard, the Commission's attention was drawn to Economic and Social Council resolution 2004/26 of 21 July 2004, entitled "International cooperation in the prevention, investigation, prosecution and punishment of fraud, the criminal misuse and falsification of identity and related crimes", in which the Council requested the Secretary-General to convene an intergovernmental expert group to prepare a study on fraud and the criminal misuse and falsification of identity and to develop on the basis of the study useful practices, guidelines or other materials, taking into account in particular the relevant work of UNCITRAL, and recommended that the Secretary-General designate UNODC to serve as secretariat for the intergovernmental expert group, in consultation with the secretariat of UNCITRAL.

218. At its thirty-eighth session, the Commission heard an oral report from the Secretariat regarding the results of the intergovernmental expert group meeting, organized by

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<sup>47</sup> Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 279-290; *ibid.*, *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 234-241; and *ibid.*, *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 110-112.

<sup>48</sup> Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 110-112.

UNODC from 17 to 18 March 2005, which were reported to the Commission on Crime Prevention and Criminal Justice at its fourteenth session (Vienna, 23-27 May 2005; see E/CN.15/2005/11). The United Nations Commission on International Trade Law was informed that the participants at the expert group meeting had indicated that fraud was a serious concern for their Governments and represented a problem that was rapidly expanding, both in the range of frauds being committed and their geographical scope and diversity, owing in part to developments in technology. Participants had agreed that a study of the problem should be undertaken, based on information received from Member States in response to a questionnaire on fraud and the criminal misuse and falsification of identity (identity fraud) to be circulated by UNODC. The Commission was informed that the UNCITRAL secretariat had participated in the expert group meeting and that the group had taken note of the willingness expressed by the UNCITRAL secretariat to assist UNODC in the preparation of the study and the drafting and dissemination of the questionnaire.

219. The Commission took note of the Economic and Social Council resolution and support was expressed for the assistance of the UNCITRAL secretariat in the UNODC project. The view was expressed that the commercial and criminal law aspects of the topic of fraud provided a solid basis for the UNCITRAL secretariat cooperation with UNODC and could provide for more prophylactic coverage of the topic, in particular in the light of the suggestion that fraudulent activity was taking advantage of the gap between the commercial and criminal treatment of fraud. However, as had been expressed at previous sessions, several delegations stressed that, given the Commission's mandate to harmonize trade law and enhance expertise in that area, work on this topic should stay within the parameters of commercial fraud and not stray into criminal law concerns, especially as there were numerous other international agencies working in the area of crime and law enforcement. Another view was that civil aspects of commercial fraud appeared often to fall outside the usual areas of work by other international bodies. It was suggested that commercial fraud should remain a potential topic for future work, pending the outcome of the UNODC study, and any future decisions of the Commission in that regard.

220. In response to an inquiry, it was clarified that the insolvency colloquium planned for November 2005 (see para. 210 above) could consider an aspect of fraud in relation to insolvency, but only insofar as considering a targeted legislative response to deter fraudulent practices in cases of insolvency, rather than serving the educational and preventive goals of general work on commercial fraud. The Commission reiterated the mandate given to its secretariat, operating within existing resources and operational requirements, for an initiative to develop lists of common features present in typical fraudulent schemes (see para. 216 above) and requested its secretariat to consider how best to coordinate that work with the preparation of the UNODC study entrusted to the intergovernmental expert group.

## **E. Reports of other international organizations**

### **1. Council of Europe**

221. The Commission heard a statement on behalf of the Council of Europe on the Convention on Cybercrime (Budapest, 2001),<sup>49</sup> which entered into force on 1 July 2004.

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<sup>49</sup> Available at <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>.

The Commission was informed that the Convention obliged Governments to introduce a harmonized notion of computer-related offences in their national legal systems; to establish certain harmonized procedures of investigation and prosecution; to establish an institutional capacity permitting judicial organs to combat computer-related offences; to establish appropriate conditions for direct cooperation between public institutions as well as between them and entities from the private sector; to establish effective regimes for judicial assistance that would permit direct cross-border cooperation; and to create an intergovernmental system for urgent intervention.

222. It was emphasized that the Convention on Cybercrime was not limited to the European continent; a number of non-European States had participated in its negotiations and, in addition to signature by 31 member States of the Council of Europe, it had been signed by non-members such as Canada, Japan, South Africa and the United States.

223. Noting that declarations in support of the Convention had been adopted in several organizations such as Asia-Pacific Economic Cooperation, the Commonwealth and the Organization of American States and endorsed at a summit of the Group of Eight and that the Convention presented a useful complement to the draft convention on the use of electronic communications in international contracts, it was suggested on behalf of the Council of Europe that the Commission might wish to join the movement to encourage Governments to adhere to the Convention on Cybercrime or to enact its principles in their national laws.

224. The Commission, having expressed its appreciation to the representative of the Council of Europe for the presentation of the Convention on Cybercrime, recalled its plan to consider at its next session a proposal for a coordinated legislative reference document on electronic commerce (see paras. 214 and 215 above) and agreed that the Convention might usefully be included in that context, in view of the increasing vulnerability of international trade to abusive or fraudulent use of Internet technology and the potential of the Convention to provide Governments and the private sector with useful tools to fight cybercrime.

## **2. International Council for Commercial Arbitration**

225. The Commission heard a statement on behalf of the International Council for Commercial Arbitration on the importance of the role of courts in the arbitral process and of activities undertaken by the Council to provide technical assistance to judges in that regard. The Commission was informed that the Council was willing to assist and cooperate with UNCITRAL in that area of technical assistance, including with the development of materials that might be used to facilitate that technical assistance.

## **3. Hague Conference on Private International Law**

226. The Commission heard a statement on behalf of the Hague Conference on Private International Law reporting on progress with a number of projects, including:

(a) The conclusion of the diplomatic conference in June 2005 with the adoption of a new Convention on Choice of Court Agreements<sup>50</sup> (an explanatory report to be published later in 2005);

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<sup>50</sup> Available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98).

(b) An international forum held in May 2005 on e-Notarization and e-Apostille, in particular with respect to application of the Convention Abolishing the Requirement of Legalization for Foreign Public Documents (The Hague, 1961);<sup>51</sup>

(c) A conference held in October 2004 on the practical interplay of existing instruments in international trade law and dispute resolution with regard to electronic transactions, the proceedings of which were to be published in 2005.

227. The Commission was also informed that Paraguay had become a member of the Hague Conference and that the Statute of the Hague Conference<sup>52</sup> had been amended to permit economic integration organizations to become members.<sup>53</sup>

#### 4. International Institute for the Unification of Private Law

228. The Secretary-General of the International Institute for the Unification of Private Law (Unidroit) reported on progress with a number of different projects, including:

(a) The expected entry into force, in the next few months, of the Protocol to the Cape Town Convention on Matters Specific to Aircraft Equipment (Cape Town, 2001)<sup>54</sup> and the establishment, within the International Civil Aviation Organization, of the registry function under that Convention;

(b) The proposal to convene a diplomatic conference in 2006 on the second protocol to the Cape Town Convention, dealing with the financing of railway rolling stock, the continuing negotiation of the third protocol, dealing with space assets, and with proposals for further protocols on agricultural, construction and mining equipment;

(c) The addition, in 2004, of six chapters to the Uniform Principles of International Commercial Contracts<sup>55</sup> and proposals for further additions;

(d) The adoption in 2004 of the Principles of Transnational Civil Procedure;<sup>56</sup>

(e) Continuing negotiation of a draft convention on substantive rules regarding securities held with intermediaries;

(f) Development of a uniform contract law for States parties to the Treaty on the Harmonization of Business Law in Africa;<sup>57</sup>

(g) Planning for future projects on a legislative guide on capital markets law and a model law on international financial leasing, as follow-up to the Convention on International Financial Leasing (Ottawa, 1988).<sup>58</sup>

<sup>51</sup> Available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=41](http://www.hcch.net/index_en.php?act=conventions.text&cid=41).

<sup>52</sup> Entered into force on 15 July 1955. The text is available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=29](http://www.hcch.net/index_en.php?act=conventions.text&cid=29).

<sup>53</sup> For information on the work of the Hague Conference on Private International Law, see [http://www.hcch.net/index\\_en.php?act=home.splash](http://www.hcch.net/index_en.php?act=home.splash).

<sup>54</sup> Available at <http://www.unidroit.org/english/conventions/mobile-equipment/main.htm>.

<sup>55</sup> Available at <http://www.unidroit.org/english/principles/contracts/main.htm>.

<sup>56</sup> Available at <http://www.unidroit.org/english/principles/civilprocedure/main.htm>.

<sup>57</sup> Available at <http://www.ohada.com/traite.php?categorie=10>.

<sup>58</sup> *Acts and Proceedings of the Diplomatic Conference for the adoption of the draft UNIDROIT Conventions on International Factoring and International Financial Leasing, Ottawa, 9-28 May 1988*, vol. I (Rome, Unidroit, 1991-1992) (also available at <http://www.unidroit.org/english/conventions/1988leasing/main.htm>).

229. The Commission was informed that Unidroit would, at some future date, seek endorsement by the Commission of the Principles of International Commercial Contracts.<sup>59</sup>

#### **5. International Monetary Fund**

230. The Commission heard a statement on behalf of IMF on the coordination of its legal work, in particular technical assistance, with other organizations. It was noted that technical assistance was generally delivered at the request of States, with the demand for assistance generally exceeding capacity. Most technical assistance was directed at assisting States with economic development and financial stability reform, including with respect to central banking and banking regulation; fiscal issues; anti-money-laundering and financing of terrorism; creditor rights, including insolvency, secured transactions and enforcement of financial claims; and governance of public institutions. Technical assistance generally involved drafting of legislation and regulations; seminars and training for lawyers and judges; and participation in the development of international best practices and standards, such as the *UNCITRAL Legislative Guide on Insolvency Law*. Delivery of the Fund's technical assistance programme was informed by coordination with other organizations active in those fields.

#### **F. Congress 2007**

231. The Commission approved the plan, in the context of the fortieth annual session of the Commission in Vienna, in 2007, to hold a congress similar to the UNCITRAL Congress on Uniform Commercial Law in the Twenty-first Century (New York, 18-22 May 1992).<sup>60</sup> The Commission envisaged that the congress would review the results of the past work programme of UNCITRAL, as well as related work of other organizations active in the field of international trade law, assess current work programmes and consider and evaluate topics for future work programmes.

### **XIV. Other business**

#### **A. Willem C. Vis International Commercial Arbitration Moot**

232. It was noted that the Institute of International Commercial Law at Pace University School of Law in White Plains, New York, had organized the Twelfth Willem C. Vis International Commercial Arbitration Moot in Vienna from 18 to 24 March 2005. As in previous years, the Moot had been co-sponsored by the Commission. It was noted that legal issues dealt with by the teams of students participating in the Twelfth Moot had been based on the United Nations Sales Convention, the Swiss Rules of International Arbitration,<sup>61</sup> the Arbitration Model Law and the New York Convention. Some 151 teams from law schools in 46 countries had participated in the Twelfth Moot. The best team in oral arguments was that of Stetson University, Florida, United States, followed by the University of Vienna, Austria. The Commission noted that its secretariat had also

<sup>59</sup> For information about the work of Unidroit, see <http://www.unidroit.org>.

<sup>60</sup> For the proceedings of the Congress, see document A/CN.9/SER.D/1; also published as a United Nations publication (Sales No. E.94.V.14).

<sup>61</sup> Available at <http://www.swissarbitration.ch/rules.php>.

organized lectures relating to its work coinciding with the period in which the Moot had been held. The Thirteenth Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 7 to 13 April 2006.

233. The Commission heard a report about the history, growth and features of the Moot. Statements were made highlighting the importance of the Moot as a means of introducing law students to the work of UNCITRAL and to its uniform legal texts, in particular in the areas of contract law and arbitration. The Commission noted the positive impact that the Moot had on law students, professors and practitioners around the world. It was widely felt that the annual Moot, with its extensive oral and written competition, and its broad international participation, presented an excellent opportunity to disseminate information about UNCITRAL, its legal texts and for teaching international trade law. The suggestion was made that information about the Moot should be circulated more widely in law schools and universities and that the Moot should be considered an important part of the UNCITRAL technical assistance programme.

234. The Commission expressed its gratitude to the organizers and sponsors of the Moot for their efforts to make it successful and hoped that the international outreach and positive impact of the Moot would continue to grow. Special appreciation was expressed to Eric E. Bergsten, former Secretary of the Commission, for the development and direction of the Moot since its inception in 1993-1994.

## **B. UNCITRAL information resources**

235. The Secretariat presented to the Commission the new UNCITRAL website ([www.uncitral.org](http://www.uncitral.org)) launched in June 2005. The Commission welcomed the new website and noted with appreciation the extended implementation of the principle of multilingualism in the website, as well as its enhanced functionality, which further facilitated delegates' access to documents. The Commission considered the UNCITRAL website an important component of the Commission's overall programme of information activities and training and technical assistance and encouraged the Secretariat to further maintain and upgrade the website in accordance with the existing guidelines.

## **C. Bibliography**

236. The Commission noted with appreciation the bibliography of recent writings related to its work (A/CN.9/581). The Commission was informed that the bibliography was being updated on the UNCITRAL website on an ongoing basis. The Commission stressed that it was important for the bibliography to be as complete as possible and, for that reason, requested Governments, academic institutions, other relevant organizations and individual authors to send copies of relevant publications to its secretariat.

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

## **A. General discussion on the duration of sessions**

237. The Commission recalled that, at its thirty-sixth session, it had agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could be allocated from the unused entitlement of another working group

provided that such an arrangement would not result in the increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time would result in the increase of the 12-week allotment, it should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.<sup>62</sup>

238. At its thirty-eighth session, for the reasons noted by the Commission at its thirty-sixth session,<sup>63</sup> the Commission decided to accommodate again the need of Working Group III (Transport Law) for two-week sessions, utilizing the entitlement of Working Group IV (Electronic Commerce), which was not expected to meet in the second half of 2005 or in 2006. In addition, the Commission noted that Working Group V (Insolvency Law) was not expected to meet before the Commission's thirty-ninth session. Meeting dates from 1 to 5 May 2006 reserved for that Working Group would therefore be available for another working group that might need to hold a longer or an additional session.

## **B. Thirty-ninth session of the Commission**

239. The Commission approved the holding of its thirty-ninth session in New York, from 19 June to 7 July 2006. The duration of the session might be shortened, should a shorter session become advisable in view of the draft texts produced by the various working groups.

## **C. Sessions of working groups up to the thirty-ninth session of the Commission**

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

(a) Working Group I (Procurement) would hold its eighth session in Vienna from 7 to 11 November 2005 and its ninth session in New York from 24 to 28 April 2006;

(b) Working Group II (Arbitration and Conciliation) would hold its forty-third session in Vienna from 3 to 7 October 2005 and its forty-fourth session in New York from 23 to 27 January 2006;

(c) Working Group III (Transport Law) would hold its sixteenth session in Vienna from 28 November to 9 December 2005 and its seventeenth session in New York from 3 to 13 April 2006 (the United Nations will be closed on 14 April);

(d) Working Group IV (Electronic Commerce). No session of the Working Group was envisaged;

(e) Working Group V (Insolvency Law). No session of the Working Group was envisaged;

(f) Working Group VI (Security Interests) would hold its eighth session in Vienna from 5 to 9 September 2005 and its ninth session in New York from 30 January to 3 February 2006.

<sup>62</sup> *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 275.

<sup>63</sup> *Ibid.*, para. 272.



#### **D. Sessions of working groups in 2006 after the thirty-ninth session of the Commission**

241. The Commission noted that tentative arrangements had been made for working group meetings in 2006 after its thirty-ninth session (the arrangements were subject to the approval of the Commission at its thirty-ninth session):

(a) Working Group I (Procurement) would hold its tenth session in Vienna from 4 to 8 December 2006;

(b) Working Group II (Arbitration and Conciliation) would hold its forty-fifth session in Vienna from 11 to 15 September 2006;

(c) Working Group III (Transport Law) would hold its eighteenth session in Vienna from 6 to 17 November 2006;

(d) Working Group IV (Electronic Commerce). No session of the Working Group was envisaged;

(e) Working Group V (Insolvency Law) would hold its thirty-first session in Vienna from 11 to 15 December 2006;

(f) Working Group VI (Security Interests) would hold its tenth session in Vienna from 18 to 22 September 2006.

#### **ANNEXES**

Annexes I and II to the report of UNCITRAL at its thirty-eighth session are reproduced in Part Three of the present Yearbook.

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

**(TD/B/52/10 (Vol. I))**

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

At its 975<sup>th</sup> plenary meeting, on 13 October 2005, the Board took note of the report of UNCITRAL on its thirty-eighth session (A/60/17).

## **C. General Assembly: Report of the Sixth Committee on the report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session (A/60/515)**

*Rapporteur:* Ms. Shermain Jeremy (Antigua and Barbuda)

### **I. Introduction**

1. At its 17th plenary meeting, on 20 September 2005, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its sixtieth session the item entitled “Report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session” and to allocate it to the Sixth Committee.
2. The Sixth Committee considered the item at its 1st, 2nd, 10th and 14th meetings, on 3, 4, 21 and 26 October 2005. The views of the representatives who spoke during the Committee’s consideration of the item are reflected in the relevant summary records (A/C.6/60/SR.1, 2, 10 and 14).
3. For its consideration of the item, the Committee had before it the report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session.<sup>1</sup>
4. At the 1st meeting, on 3 October, the Chairman of the United Nations Commission on International Trade Law at its thirty-eighth session introduced the report of the Commission on the work of that session.

### **II. Consideration of proposals**

#### **A. Draft resolution A/C.6/60/L.7**

5. At the 10th meeting, on 21 October, the representative of Austria, on behalf of Algeria, Argentina, Australia, Austria, Azerbaijan, Belarus, Belgium, Belize, Brazil, Bulgaria, Canada, Chile, China, Colombia, Cyprus, the Czech Republic, the Democratic Republic of the Congo, Denmark, Ecuador, Estonia, Ethiopia, Fiji, Finland, France, Germany, Greece, Guatemala, Haiti, Hungary, India, Iran (Islamic Republic of), Ireland, Israel, Italy, Japan, Jordan, Kenya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malaysia, Mexico, Mongolia, Morocco, the Netherlands, New Zealand, Norway, the Philippines, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation, Serbia and Montenegro, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine and the United Kingdom of Great Britain and Northern Ireland and Uruguay, subsequently joined by Bolivia, the Dominican Republic, the Gambia and Latvia, introduced a draft resolution entitled “Report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session” (A/C.6/60/L.7).
6. At its 14th meeting, on 26 October, the Committee adopted draft resolution A/C.6/60/L.7 without a vote (see para. 10, draft resolution I).

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<sup>1</sup> *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17).*

## **B. Draft resolution A/C.6/60/L.8**

7. At the 10th meeting, on 21 October, the Chairman of the Committee introduced a draft resolution entitled “United Nations Convention on the Use of Electronic Communications in International Contracts” (A/C.6/60/L.8).
8. At its 14th meeting, on 26 October, the Committee adopted draft resolution A/C.6/60/L.8 without a vote (see para. 10, draft resolution II).
9. After the adoption of the draft resolution, the representative of France made a statement in explanation of position (see A/C.6/60/SR.14).

## **III. Recommendations of the Sixth Committee**

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

[The text of the draft resolutions is not reproduced in this section. The draft resolutions were adopted, with editorial changes, as General Assembly resolutions 60/20 and 60/21 (see section D below).]

## **D. General Assembly resolutions 60/20 and 60/21 of 23 November 2005**

### **Resolutions adopted by the General Assembly on the report of the Sixth Committee (A/60/515)**

#### **60/20. Report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session**

*The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

*Reaffirming its belief* that the progressive modernization and harmonization of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity and common interest and to the elimination of discrimination in international trade and, thereby, to the well-being of all peoples,

*Having considered* the report of the Commission on the work of its thirty-eighth session,<sup>1</sup>

*Reiterating its concern* that activities undertaken by other bodies in the field of international trade law without adequate coordination with the Commission might lead to undesirable duplication of efforts and would not be in keeping with the aim of promoting efficiency, consistency and coherence in the unification and harmonization of international trade law,

*Reaffirming* the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in this field, in particular to avoid duplication of efforts, including among organizations formulating rules of international trade, and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law, and to continue, through its secretariat, to maintain close cooperation with other international organs and organizations, including regional organizations, active in the field of international trade law,

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session;<sup>1</sup>

2. *Commends* the Commission for the finalization and approval of a draft convention on the use of electronic communications in international contracts;<sup>2</sup>

3. *Also commends* the Commission for the progress made in its work on a revision of its Model Law on Procurement of Goods, Construction and Services,<sup>3</sup> on

<sup>1</sup> *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17).*

<sup>2</sup> *Ibid.*, chap. III and annex I.

<sup>3</sup> *Ibid.*, *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

model legislative provisions on interim measures in international commercial arbitration, on a draft instrument on transport law and on a draft legislative guide on secured transactions;

4. *Endorses* the efforts and initiatives of the Commission, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law, and in this regard appeals to relevant international and regional organizations to coordinate their legal activities with those of the Commission, to avoid duplication of efforts and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law;

5. *Reaffirms* the importance, in particular for developing countries, of the work of the Commission concerned with technical assistance in the field of international trade law reform and development, and in this connection:

(a) Welcomes the initiatives of the Commission towards expanding, through its secretariat, its technical assistance programme;

(b) Expresses its appreciation to the Commission for carrying out technical assistance activities in Azerbaijan, Brazil, China, Ethiopia (for the Common Market for Eastern and Southern Africa), Serbia and Montenegro, Slovenia, South Africa (for the Association of Law Reform Agencies of Eastern and Southern Africa) and Thailand;

(c) Expresses its appreciation to the Governments whose contributions enabled the seminars and briefing missions to take place, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the United Nations Commission on International Trade Law Trust Fund for Symposia and, where appropriate, to the financing of special projects, and otherwise to assist the secretariat of the Commission in carrying out technical assistance activities, in particular in developing countries;

(d) Reiterates its appeal to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and regional development banks, as well as to Governments in their bilateral aid programmes, to support the technical assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission;

6. *Takes note with regret* that, since the thirty-sixth session of the Commission, no contributions have been made to the trust fund established to provide travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General,<sup>4</sup> stresses the need for contributions to the trust fund in order to increase expert representation from developing countries at sessions of the Commission and its working groups, and reiterates its appeal to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund;

7. *Decides*, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to continue, in the competent Main Committee during the sixtieth session of the General Assembly, its consideration of

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<sup>4</sup> Resolution 48/32, para. 5.

granting travel assistance to the least developed countries that are members of the Commission, at their request and in consultation with the Secretary-General;

8. *Recalls* that the responsibility for the work of the Commission lies with the meetings of the Commission and its intergovernmental working groups, and stresses in this regard that information should be provided regarding meetings of experts, which bring an essential contribution to the work of the Commission;

9. *Also recalls* its resolutions on partnerships between the United Nations and non-State actors, in particular the private sector,<sup>5</sup> and in this regard encourages the Commission to further explore different approaches to the use of partnerships with non-State actors in the implementation of its mandate, in particular in the area of technical assistance, in accordance with the applicable principles and guidelines and in cooperation and coordination with other relevant offices of the Secretariat, including the Global Compact Office;

10. *Reiterates its request* to the Secretary-General, in conformity with the General Assembly resolutions on documentation-related matters,<sup>6</sup> which, in particular, emphasize that any reduction in the length of documents should not adversely affect either the quality of the presentation or the substance of the documents, to bear in mind the particular characteristics of the mandate and work of the Commission in implementing page limits with respect to the documentation of the Commission;

11. *Requests* the Secretary-General to continue providing summary records of the Commission's meetings relating to the formulation of normative texts;

12. *Stresses* the importance of bringing into effect the conventions emanating from the work of the Commission for the global unification and harmonization of international trade law, and, to this end, urges States that have not yet done so to consider signing, ratifying or acceding to those conventions;

13. *Takes note with appreciation* of the preparation of digests of case law relating to the texts of the Commission, in particular a digest of case law relating to the United Nations Convention on Contracts for the International Sale of Goods<sup>7</sup> and a digest of case law relating to the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law,<sup>8</sup> which will assist in dissemination of information on those texts and promote their use, enactment and uniform interpretation;

14. *Welcomes* the Commission's decision to hold, in the context of its fortieth session in 2007, a congress on international trade law in Vienna, with a view to reviewing the results of the past work of the Commission as well as related work of other organizations active in the field of international trade law, assessing current work programmes and considering topics and areas for future work, and acknowledges the importance of holding such a congress for the coordination and promotion of activities aimed at the modernization and harmonization of international trade law;

15. *Notes* that 2006 will mark the thirtieth anniversary of the adoption by the Commission of the Arbitration Rules of the United Nations Commission on International

<sup>5</sup> Resolutions 55/215, 56/76 and 58/129.

<sup>6</sup> Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

<sup>7</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567.

<sup>8</sup> *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I.

Trade Law,<sup>9</sup> used worldwide in the settlement of disputes concerning international trade and investment, and in this regard welcomes initiatives being undertaken to organize conferences and other similar events to provide a forum for assessing the experience with the Rules, as well as discussing their possible revision;

16. *Recalls* its resolutions affirming the importance of high-quality, user-friendly and cost-effective United Nations websites and the need for their multilingual development, maintenance and enrichment,<sup>10</sup> commends the Commission's restructured website in the six official languages of the United Nations, and welcomes the continuous efforts of the Commission to maintain and improve its website in accordance with the applicable guidelines.

*53rd plenary meeting  
23 November 2005*

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<sup>9</sup> United Nations publication, Sales No. E.77.V.6.

<sup>10</sup> Resolutions 52/214, sect. C, para. 3, 55/222, sect. III, para. 12, 56/64 B, sect. X, 57/130 B, sect. X, 58/101 B, sect. V, paras. 61-76, and 59/126 B, sect. V, paras. 76-95.



## 60/21. United Nations Convention on the Use of Electronic Communications in International Contracts

*The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

*Considering* that problems created by uncertainties as to the legal value of electronic communications exchanged in the context of international contracts constitute an obstacle to international trade,

*Convinced* that the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and may help States gain access to modern trade routes,

*Recalling* that, at its thirty-fourth session, in 2001, the Commission decided to prepare an international instrument dealing with issues of electronic contracting, which should also aim at removing obstacles to electronic commerce in existing uniform law conventions and trade agreements, and entrusted its Working Group IV (Electronic Commerce) with the preparation of a draft,<sup>11</sup>

*Noting* that the Working Group devoted six sessions, from 2002 to 2004, to the preparation of the draft Convention on the Use of Electronic Communications in International Contracts, and that the Commission considered the draft Convention at its thirty-eighth session in 2005,<sup>12</sup>

*Being aware* that all States and interested international organizations were invited to participate in the preparation of the draft Convention at all the sessions of the Working Group and at the thirty-eighth session of the Commission, either as members or as observers, with a full opportunity to speak and make proposals,

*Noting with satisfaction* that the text of the draft Convention was circulated for comments before the thirty-eighth session of the Commission to all Governments and international organizations invited to attend the meetings of the Commission and the Working Group as observers, and that the comments received were before the Commission at its thirty-eighth session,<sup>13</sup>

*Taking note with satisfaction* of the decision of the Commission at its thirty-eighth session to submit the draft Convention to the General Assembly for its consideration,<sup>14</sup>

*Taking note* of the draft Convention approved by the Commission,<sup>15</sup>

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<sup>11</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr. 3), paras. 291–295.

<sup>12</sup> *Ibid.*, *Sixtieth Session, Supplement No. 17* (A/60/17), chap. III.

<sup>13</sup> A/CN.9/578 and Add.1-17.

<sup>14</sup> *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 167.

<sup>15</sup> *Ibid.*, annex I.

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for preparing the draft Convention on the Use of Electronic Communications in International Contracts;<sup>5</sup>
2. *Adopts* the United Nations Convention on the Use of Electronic Communications in International Contracts, which is contained in the annex to the present resolution, and requests the Secretary-General to open it for signature;
3. *Calls upon* all Governments to consider becoming party to the Convention.

*53rd plenary meeting  
23 November 2005*

## ANNEX

### UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

*The States Parties to this Convention,*

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

*Noting* that the increased use of electronic communications improves the efficiency of commercial activities, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

*Considering* that problems created by uncertainty as to the legal value of the use of electronic communications in international contracts constitute an obstacle to international trade,

*Convinced* that the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and help States gain access to modern trade routes,

*Being of the opinion* that uniform rules should respect the freedom of parties to choose appropriate media and technologies, taking account of the principles of technological neutrality and functional equivalence, to the extent that the means chosen by the parties comply with the purpose of the relevant rules of law,

*Desiring* to provide a common solution to remove legal obstacles to the use of electronic communications in a manner acceptable to States with different legal, social and economic systems,

*Have agreed* as follows:

## **Chapter I**

### **Sphere of application**

#### **Article 1**

##### **Scope of application**

1. This Convention applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States.

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 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 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**

1. This Convention does not apply to electronic communications relating to any of the following:

(a) Contracts concluded for personal, family or household purposes;

(b) (i) Transactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) the transfer of security rights in sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary.

2. This Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.

#### **Article 3**

##### **Party autonomy**

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.

## **Chapter II**

### **General provisions**

#### **Article 4**

##### **Definitions**

For the purposes of this Convention:

(a) “Communication” means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract;

(b) “Electronic communication” means any communication that the parties make by means of data messages;

(c) “Data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy;

(d) “Originator” of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;

(e) “Addressee” of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;

(f) “Information system” means a system for generating, sending, receiving, storing or otherwise processing data messages;

(g) “Automated message 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;

(h) “Place of business” means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.

## **Article 5**

### **Interpretation**

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.

## **Article 6**

### **Location of the parties**

1. For the purposes of this Convention, a party’s place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.

2. If a party has not indicated a place of business and has more than one place of business, then the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the 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. A location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties.

5. The sole fact that a party 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 that country.

#### **Article 7**

##### **Information requirements**

Nothing in this Convention affects the application of any rule of law that may require the parties to disclose their identities, places of business or other information, or relieves a party from the legal consequences of making inaccurate, incomplete or false statements in that regard.

### **Chapter III**

#### **Use of electronic communications in international contracts**

#### **Article 8**

##### **Legal recognition of electronic communications**

1. A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.

2. Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.

#### **Article 9**

##### **Form requirements**

1. Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form.

2. Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

(a) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

4. Where the law requires that a communication or a contract should be made available or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and

(b) Where it is required that the information it contains be made available, that information is capable of being displayed to the person to whom it is to be made available.

5. For the purposes of paragraph 4 (a):

(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display; and

(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

## **Article 10**

### **Time and place of dispatch and receipt of electronic communications**

1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.

2. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

3. An electronic communication 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 6.

4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.

**Article 11****Invitations to make offers**

A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

**Article 12****Use of automated message systems for contract formation**

A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.

**Article 13****Availability of contract terms**

Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other party those electronic communications which contain the contractual terms in a particular manner, or relieves a party from the legal consequences of its failure to do so.

**Article 14****Error in electronic communications**

1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if:

(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and

(b) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

2. Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1.

## **Chapter IV**

### **Final provisions**

#### **Article 15**

##### **Depositary**

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

#### **Article 16**

##### **Signature, ratification, acceptance or approval**

1. This Convention is open for signature by all States at United Nations Headquarters in New York from 16 January 2006 to 16 January 2008.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

#### **Article 17**

##### **Participation by regional economic integration organizations**

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the regional economic integration organization shall not count as a Contracting State in addition to its member States that are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over any conflicting rules of any regional economic integration organization as applicable to parties whose respective places of business are located in States members of any such organization, as set out by declaration made in accordance with article 21.



**Article 18****Effect in domestic territorial units**

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. If a Contracting State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

**Article 19****Declarations on the scope of application**

1. Any Contracting State may declare, in accordance with article 21, that it will apply this Convention only:

(a) When the States referred to in article 1, paragraph 1, are Contracting States to this Convention; or

(b) When the parties have agreed that it applies.

2. Any Contracting State may exclude from the scope of application of this Convention the matters it specifies in a declaration made in accordance with article 21.

**Article 20****Communications exchanged under other international conventions**

1. The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);

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, 19 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).

2. The provisions of this Convention apply further to electronic communications in connection with the formation or performance of a contract to which another international convention, treaty or agreement not specifically referred to in paragraph 1 of this article, and to which a Contracting State to this Convention is or may become a Contracting State, applies, unless the State has declared, in accordance with article 21, that it will not be bound by this paragraph.

3. A State that makes a declaration pursuant to paragraph 2 of this article may also declare that it will nevertheless apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of any contract to which a specified international convention, treaty or agreement applies to which the State is or may become a Contracting State.

4. Any State may declare that it will not apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract to which any international convention, treaty or agreement specified in that State's declaration, to which the State is or may become a Contracting State, applies, including any of the conventions referred to in paragraph 1 of this article, even if such State has not excluded the application of paragraph 2 of this article by a declaration made in accordance with article 21.

## **Article 21**

### **Procedure and effects of declarations**

1. Declarations under article 17, paragraph 4, article 19, paragraphs 1 and 2, and article 20, paragraphs 2, 3 and 4, may be made at any time. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

4. Any State that makes a declaration under this Convention may modify or withdraw it at any time by a formal notification in writing addressed to the depositary. The modification or withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

## **Article 22**

### **Reservations**

No reservations may be made under this Convention.

**Article 23****Entry into force**

1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.
2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

**Article 24****Time of application**

This Convention and any declaration apply only to electronic communications that are made after the date when the Convention or the declaration enters into force or takes effect in respect of each Contracting State.

**Article 25****Denunciations**

1. A Contracting State may denounce this Convention by a formal notification in writing addressed to the depositary.
2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York, this [...] day of [...], 2005, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

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

*Part Two*

STUDIES AND REPORTS ON  
SPECIFIC SUBJECTS



## I. ELECTRONIC COMMERCE

### A. Report of the Working Group on Electronic Commerce on the work of its forty-fourth session (Vienna, 11-22 October 2004) (A/CN.9/571) [Original: English]

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## I. Introduction

1. At its thirty-fourth session (Vienna, 25 June-13 July 2001), the Commission endorsed a set of recommendations for future work that had been made by the Working Group on Electronic Commerce at its thirty-eighth session (New York, 12-23 March 2001). They included, among other topics, the preparation of an international instrument dealing with selected issues on electronic contracting and a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments.
2. The draft instrument has tentatively been prepared in the form of a preliminary draft convention entitled “the draft convention on the use of electronic communications in international contracts”. The most recent summary of the discussions of the Working Group on the draft convention can be found in document A/CN.9/WG.IV/WP.109, paras. 5-34.

## II. Organization of the session

3. The Working Group on Electronic Commerce, which was composed of all States members of the Commission, held its forty-fourth session in Vienna, from 11 to 22 October 2004. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Colombia, Croatia, Czech Republic, France, Germany, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Morocco, Nigeria, Republic of Korea, Russian Federation, Singapore, Spain, Sweden, Thailand, Tunisia, Turkey, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.
4. The session was attended by observers from the following States: Congo, Denmark, Egypt, Finland, Indonesia, Iraq, Ireland, New Zealand, Peru, Philippines, Romania, Sudan, Ukraine and Yemen.
5. The session was further attended by observers from the following international organizations: (a) intergovernmental organizations: African Development Bank, Asian Clearing Union, European Commission and the Hague Conference on Private International Law; (b) non-governmental organizations invited by the Commission: American Bar Association, Centre for International Legal Studies, International Chamber of Commerce and the European Law Students’ Association.
6. The Working Group elected the following officers:  
*Chairman:* Jeffrey CHAN Wah Teck (Singapore);  
*Rapporteur:* Marco Antonio PEREZ USECHE (Colombia).
7. The Working Group had before it a newly revised version of the preliminary draft convention, which reflected the deliberations at the Working Group’s forty- third session (A/CN.9/WG.IV/WP.110). The Working Group also had before it comments received from the Treaty Section of the United Nations Office of Legal Affairs (A/CN.9/WG.IV/WP.111), a proposal to amend draft article 10, paragraph 2, of the preliminary draft convention (A/CN.9/WG.IV/WP.112) and a note by the Secretariat reproducing the text of the document “ICC eTerms 2004 and ICC Guide to electronic contracting” (A/CN.9/WG.IV/WP.113).

8. The Working Group adopted the following agenda:
  1. Opening of the session.
  2. Election of officers.
  3. Adoption of the agenda.
  4. Electronic contracting: provisions for a draft convention.
  5. Other business.
  6. Adoption of the report.

### **III. Deliberations and decisions**

9. The Working Group resumed its deliberations on the newly revised preliminary draft convention contained in annex I of the note by the Secretariat A/CN.9/WG.IV/WP.110. The decisions and deliberations of the Working Group with respect to the draft convention are reflected in chapter IV below (see paras. 13-206).

10. The Working Group reviewed and adopted draft articles 1 to 14, 18 and 19 of the draft convention, as set out in the annex to this report. The Working Group further held an initial exchange of views on the preamble and the final clauses of the draft convention, including proposals for additional provisions in chapter IV. In the light of its deliberations on chapters I, II and III and articles 18 and 19 of the draft convention, the Working Group requested the Secretariat to make consequential changes in the draft final provisions in chapter IV. The Working Group also requested the Secretariat to insert within square brackets in the final draft to be submitted to the Commission the draft provisions that had been proposed for addition to the text considered by the Working Group (A/CN.9/WG.IV/WP.110). The Secretariat was requested to circulate the revised version of the draft convention to Governments for their comments, with a view to consideration and adoption of the draft convention by the Commission at its thirty-eighth session.

11. The Working Group considered a note by the Secretariat reproducing the text of the document “ICC eTerms 2004 and ICC Guide to electronic contracting” (A/CN.9/WG.IV/WP.113) and expressed its appreciation to the International Chamber of Commerce for having submitted that document for the information of the Working Group. The Working Group noted the different nature of the work done by the ICC, which was in the form of contractual advice to private parties, and its own work on the draft convention, which had legislative character. The Working Group was of the view that the levels of work were complementary, rather than conflicting. As for the substance, the Working Group noted that, despite varying terminology in the ICC eTerms and the draft convention, as revised by the Working Group, such as the provisions on time and place of dispatch and receipt of electronic communications (see paras. 140-166), there was no substantial contradiction between the instruments. However, given the limited time available, that discussion should not be understood as an endorsement of those documents by the Working Group or by the Commission at the present time.

12. Subject to approval by the Commission, the Working Group requested the Secretariat to prepare explanatory notes or a draft official commentary on the draft convention. The Working Group also recommended that the Commission consider preparing draft contractual clauses to facilitate the parties’ choice of the draft convention



referred to in draft article 18, paragraph 1 (c). The Working Group requested the Secretariat to continue monitoring issues related to electronic substitutes for documents of title and negotiable instruments with a view to making recommendations, in due course, for possible work by the Commission and to ensure consistency with the work of the Working Group on Transport Law. The Working Group further requested the Secretariat, subject to the availability of resources, to monitor the implementation of the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures, including issues related to cross-border recognition of electronic signatures, and to compile judicial decisions on the matters dealt with in those Model Laws, even from jurisdictions that had not adopted them, and to publish the results of its research with a view to making recommendations to the Commission as to whether future work in those areas would be possible.

## IV. Electronic contracting: provisions for a draft convention

### *Organization of deliberations*

13. The Working Group agreed that, given the logical relationship between draft articles 1, 18 and 19, it should consider those provisions together. The Working Group further agreed to consider the preamble only after it had settled the operative provisions of the draft convention.

### **Article 1. Scope of application**

14. The text of the draft article was as follows:

“1. This Convention applies to the use of electronic communications in connection with the [negotiation] [formation] or performance of a contract between parties whose places of business are in 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 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 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.

“[Variant A

“4. Without prejudice to article 19 [Y], the provisions of this Convention do not apply to electronic communications relating to the [negotiation] [formation] or performance of a contract which is governed by an international convention, treaty or agreement which is not referred to in paragraph 1 of article 19 [Y], or has not been the subject of a declaration made by a Contracting State under paragraph 2 of article 19 [Y].]

“[Variant B

“4. The provisions of this Convention apply further to electronic communications in connection with the [negotiation] [formation] or performance of a contract that is governed by an international convention, treaty or agreement, even if such international convention, treaty or agreement is not specifically referred to in paragraph 1 of article 19 [Y], unless the Contracting State has excluded this provision by way of a declaration made in accordance with paragraph 3 of article 18 [X].]”

*Paragraph 1 and draft article 18*

15. With respect to the text in square brackets, it was suggested that the terms “negotiation” and “formation” should both be retained to encompass instances when negotiation did not lead to the formation of contracts. An alternative suggestion was to state in the opening sentence that the draft convention covered the use of all electronic communications relevant to contracting process, including negotiation, formation and performance of a contract. The Working Group agreed, however, to retain only the word “formation” as it was felt to be sufficiently broad to cover all contracting stages, including negotiation as well as invitations to make offers under draft article 11. It was suggested that explanatory notes or an official commentary on the draft convention could explain that the term “formation” was to be interpreted broadly.

16. The Working Group did not accept a suggestion to delete the phrase “in connection with the formation or performance of a contract” in the opening sentence of the paragraph. It was felt that those words were not superfluous, even if they appeared in the definition of the term “communication” in draft article 4 (a), as they helped the reader understand the scope of application of the draft convention already from its opening provision.

17. The need for draft sub-paragraphs (a), (b) and (c) was questioned in light of the enabling nature of the draft convention. In support of the current formulation, it was noted that the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (“the United Nations Sales Convention”) only applied to international contracts if both parties were located in contracting States of the Convention or the rules of private international law led to the application of the law of a Contracting State. In order to ensure consistency between the two texts, it was suggested that similar wording should be used in the draft paragraph. In response, it was stated that it would be incongruous for a State to use the rules of the draft convention to interpret existing law only when a given transaction met the requirements of the draft paragraph, while using other rules in connection with transactions that did not meet those requirements. That result would create a duality of regime for the use of electronic communications in international contracts, which was said to be contrary to the aim of uniformity pursued by the draft convention. In view of those observations, the Working Group agreed that there was a close relationship between those subparagraphs and the exclusions provided under draft article 18 and decided to consider the matter in connection with its discussion of draft article 18.

18. The Working Group reverted to draft article 1, paragraph 1, after it concluded its deliberations on draft article 18 (see paragraphs 28-46). The Working Group then agreed that all qualifying elements to the scope of application of the draft convention, which were currently contained in paragraph 1 of draft article 1, should be moved to current draft article 18, and that draft paragraph 1 should read:

“This Convention applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States.”

19. It was noted that under the revised formulation, the draft convention would apply to electronic messages exchanged between parties whose places of business were in different States even if those States were not both Contracting States of the Convention, so long as the law of a Contracting State applied to the dealings of the parties.

20. The Working Group approved the substance of the draft paragraph, as revised, and referred it to the drafting group.

#### *Paragraph 2*

21. The Working Group approved the substance of the draft paragraph and referred it to the drafting group.

#### *Paragraph 3*

22. The Working Group approved the substance of the draft paragraph and referred it to the drafting group.

#### *Paragraph 4 and draft article 19*

23. The Working Group noted that both variants A and B were intended to clarify the relationship between draft articles 1 and 19 in the light of earlier deliberations of the Working Group on the matter (A/CN.9/548, paras. 42-46 and 72-81). Variant A reflected the understanding that the draft convention would only apply to the exchange of electronic communications in connection with a contract that was covered by an existing uniform law convention (other than one of those listed in draft article 19, paragraph 1) if the relevant convention had been the subject of a declaration made by a Contracting State under paragraph 2 of article 19. Variant B, in turn, was intended to widen the scope of application of the draft convention by making it clear that its provisions might also apply to the exchange of electronic communications covered by other treaties beyond those specifically listed in draft article 19, paragraph 1. The latter reflected the view that the list of instruments in draft article 19, paragraph 1, or any declaration made under paragraph 2 of that article, should be regarded as non-exhaustive clarifications intended to remove doubts as to the application of the draft convention, but not as effective limitations on its reach (see A/CN.9/548, para. 75).

24. Strong support was expressed for retaining variant A. In particular, it was said that:

(a) Variant A provided greater legal certainty than variant B, as parties to a contract to which another international instrument applied would immediately know whether the provisions of the draft convention applied to their contracts by reading draft article 1(4), draft article 19(1) and any declaration submitted by Contracting States under draft article 19(2); and

(b) Variant A made it easier for States to adhere to the draft convention, as it obviated the need for the treaty services of States to assess the compatibility of the provisions of the draft convention with other instruments ratified by them, without precluding the possibility of extending the provisions of the draft convention to other treaties at a later stage by declarations under draft article 19(2).

25. The prevailing view within the Working Group, however, was in favour of variant B, mainly for the following reasons:

(a) Variant B expanded the scope of application of the draft convention and allowed the parties to a contract to which another legal instrument applied automatically to benefit from the enhanced legal certainty for the exchange of electronic communications that the draft convention provided;

(b) Given the enabling nature of the provisions of the draft convention, States would be more likely inclined to extend its provisions to trade-related instruments than to exclude their application to other instruments. To the extent that such an expansion under variant B operated automatically, without the need for individual declarations under draft article 19(2), variant B facilitated the application of the draft convention better than variant A, which, it was said, would require States to submit numerous opt-in declarations to achieve the same result.

26. The suggestion was made, however, that if variant B were retained, the Working Group should attempt to qualify the types of contracts to which the provisions of the draft convention could apply by virtue of paragraph 4 of article 1, by adding qualifications such as “on commercial law matters” or “pertaining to international trade”, which were contained in square brackets in draft article 19, paragraph 2. The Working Group did not accept that suggestion, however, in view of the difficulty of formulating a universally acceptable definition of the intended subject matter. It was further felt that the reference to contracts in the draft article already provided sufficient indication of the relevant subject matter and that any further attempt to clarify the nature of the instruments contemplated by paragraph 4 might unduly limit the flexibility of States in the application of the draft convention.

27. Having tentatively agreed to retain variant B, the Working Group agreed that it should proceed to consider draft article 19 so as to ascertain better whether variant B provided a sound basis for dealing with the relationship between the draft convention and other instruments. After it had concluded its deliberations on draft article 19 (see paras. 47-58), the Working Group confirmed its preference for retaining only variant B, but agreed that the provision would be better placed as a new subparagraph in the current draft article 19 (see para. 54).

#### **Article 18 [X]. Reservations and declarations**

28. The text of the draft article was as follows:

“1. No reservations are permitted except those expressly authorized in this article.

“2. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by paragraph 1 (a) of article 1 of this Convention.

“3. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by paragraph 1 (b) of article 1 of this Convention.

“4. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by paragraph 4 of article 1 of this Convention.

“[5. Any State may declare in writing at any time that it will not apply this Convention to the matters specified in its declaration.]

“6. A State making a reservation in writing under paragraphs 2, 3 and 4 of this article shall not be bound by the matters specified in such reservation.”

*General comments*

29. The Working Group took note of the comments made by the Treaty Section of the United Nations Office of Legal Affairs on draft article 18 and final clauses (A/CN.9/WG.IV/WP.111), most of which had been incorporated in the new draft, including a change in the title of the article. The Working Group took note, in particular, of the comment that the declarations contemplated in the draft article were in fact reservations and should be treated as such.

30. The Working Group noted that those comments were in line with the practice of the Secretary-General as depositary of multilateral treaties. Nevertheless, the Working Group was of the view that the specific needs of the draft convention might require a solution different from the one currently envisaged in the draft article. It was pointed out that, unlike most instruments negotiated by the United Nations, which were typically concerned with the relations between States and other public international law matters, the draft convention dealt with law that would apply not to State actions, but to private business transactions. In that connection, it was pointed out that treating the matters dealt with in the draft article, and in draft article 19, as declarations would serve the purpose of the draft convention better than treating them as reservations. The reason for that view was that declarations would not trigger a formal system of acceptances and objections, which was typical for reservations to international treaties, for instance as provided in articles 20 and 21 of the Vienna Convention on the Law of Treaties, of 1969. Moreover, declarations supported the goal of flexibility that was crucial in areas in which practice was still developing, such as electronic commerce. Recent provisions in UNCITRAL instruments supported those conclusions, such as articles 25 and 26 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995) and articles 35 to 43 (38 excluded) of the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001), in the same way as final clauses in private international law instruments prepared by other international organizations, such as articles 54 to 58 of the UNIDROIT Convention on International Interests in Mobile Equipment (Cape Town, 2001) and articles 21 and 22 of the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (The Hague, 2002) concluded by the Hague Conference on Private International Law.

31. For the above reasons, the Working Group generally agreed that the text of the draft convention should distinguish between declarations pertaining to the scope of application, which the draft convention admitted and did not subject to a system of acceptances, and objections by other Contracting States, on the one hand, and reservations, on the other hand, which the draft convention did not admit.

32. It was generally suggested that the draft article should allow for declarations to be lodged at any time and not only at the time of the deposit of its instrument of ratification, acceptance, approval or accession. That change, it was said, would provide for greater flexibility in the application of the draft convention, as States would be able to exclude its application to certain other conventions at a moment later than the expression of the consent to be bound. In response, it was noted that the proposed change would introduce

an excessive element of flexibility to the draft convention that in the end would be detrimental for legal certainty, and would dilute the contribution of the draft convention to harmonization of law. The Working Group nevertheless approved the proposal, as it was generally felt that in an area as rapidly evolving as the area of electronic commerce, in which technological developments rapidly changed existing patterns of business and trade practices, it was essential to afford States the flexibility required for the application of the draft convention. A rigid system of declarations that required decisions to be made by States prior to the deposit of instruments of ratification, acceptance, approval or accession might either deter States from joining the Convention, or might prompt them to act in an overly cautious manner, thereby leading States to exclude automatically the application of the draft convention in various areas.

33. The Working Group took note, in that connection, of a suggestion that matters relating to the time and form of declarations in the draft convention could be dealt with in a uniform manner in draft article 20, and decided that such a possibility might be considered once the Working Group had completed its deliberations on all declarations authorized by the draft convention.

#### *Paragraph 1*

34. In view of its general deliberations on the draft article, the Working Group agreed that the substance of draft paragraph 1, with appropriate adjustments, should become a separate provision and should be placed after the current draft article 20. The Working Group further agreed that the title of article 18 should be along the lines of “Declarations on the scope of application”.

#### *Paragraphs 2 and 3*

35. In response to a question, it was observed that the intended effect of a declaration under draft paragraph 2 would be that, for transactions subject to the laws of a Contracting State, the provisions of the draft convention would apply to exchanges of data messages in connection with the formation or performance of contracts between parties whose places of business were in different States, even if those States were not both parties to the Convention. However, it was suggested that the current text could also be read so as to narrow the scope of application of the draft convention. Another view was that such a possibility should instead become the general rule for determining the application of the Convention under draft article 1, as had been suggested at the Working Group’s forty-third session (see A/CN.9/548, para. 86). In such case, paragraphs 1 (a) and 1 (b) of draft article 1 might become redundant. For those States in which such a broader scope of application might create difficulties, draft article 18 might contemplate a reverse exclusion, namely that a State might declare that it would apply the Convention only if both parties were located in Contracting States.

36. In respect of draft paragraph 3, it was suggested that the provision should be deleted, so as to retain the potential benefit of draft article 1, subparagraph 1 (b). It was said that draft article 1, subparagraph 1 (b) contained a useful provision to allow for an expanded geographic scope of application for the draft convention, since it did not require that the States in which the parties to the contract were located should both be Contracting States of the Convention, so long as the laws of a Contracting State applied to the underlying transaction. In response, it was stated that some States might have difficulties applying draft article 1, subparagraph 1 (b), and that it should be possible for those States to exclude that provision by virtue of a declaration under draft article 18, paragraph 3. A similar

exclusion existed under the United Nations Sales Convention, and the current draft should be retained for the same reasons that applied in connection with that other convention.

37. A further proposal made was to include another possibility of exclusion in respect of draft article 1, subparagraph 1 (c). It was pointed out that draft article 1, subparagraph 1 (c) provided for the possibility of applying the draft convention when the parties had agreed that it should be applied, even if the other conditions in that provision were not met. Such a possibility did not exist in the United Nations Sales Convention, but was provided, for instance, in article 1, paragraph 2 (e), of the United Nations Convention on the Carriage of Goods by Sea (1978) and in article 1, paragraph 2, of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995). In that connection, the proposal was made that a declaration be introduced to exclude the application of draft article 1(1)(c). Such an exclusion would address the concern of a number of States whose domestic legislation allowed parties to choose the application of foreign law, but not of international conventions as such. Alternatively, it was suggested that draft article 1(1)(c) should be combined with draft article 3, which dealt with party autonomy, so as to make it clear that the draft convention could be incorporated into the parties' dealings as a set of mutually agreed upon contractual rules, rather than as a statutory text to which the parties were subject.

38. The Working Group paused to consider the various suggestions that had been made in connection with draft paragraphs 2 and 3. The Working Group became increasingly aware of the difficulty of developing a consensus on the matter within the current structure of articles 1, paragraph 1, and article 18. The Working Group acknowledged that, as currently drafted, article 1 established a number of conditions for the application of the draft convention, which might considerably limit its scope, thus depriving business from the benefit of enhanced legal certainty intended by the draft convention. Furthermore, with the possible exception of draft paragraph 2, the system of exclusions under draft article 18 might lead to even further limitation in the scope of application of the draft convention.

39. The Working Group eventually agreed that the best approach might be to reverse the structure of draft articles 1 and 18 so as to establish the broadest possible scope of application as a departure point, while allowing States for which a broad scope of application might not be desirable to make declarations aimed at reducing the reach of the draft convention.

40. The Working Group therefore agreed that it would be preferable to replace both draft paragraphs 2 and 3 by a provision that reflected the qualifications to the scope of application of the draft convention currently contained in draft article 1, paragraph 1, along the following lines:

“1. Any State may declare in writing at any time that it will apply this Convention only

“(a) When the States referred to in article 1, paragraph 1 are Contracting States to this Convention;

“(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.”

41. It was noted that, under this approach, which had been contemplated in the first version of the draft convention (A/CN.9/WG.IV/WP.95, annex), the draft convention

would be given a broad scope of application (see paras. 23-25 above), but Contracting States would retain the possibility of limiting the scope of application by way of declarations. In doing so, States might choose the elements that they deemed appropriate and would not be bound to use all of the elements mentioned in subparagraphs (a) to (c) of the new draft paragraph 1 of article 18.

42. The Working Group approved the substance of the revised paragraph 1 and referred it to the drafting group.

#### *Paragraph 4*

43. The Working Group generally agreed that the exclusion contemplated in the draft paragraph was necessary in view of the Working Group's tentative agreement to retain variant B of draft article 1, paragraph 4. However, the Working Group agreed that it was important to afford States that excluded the application of draft article 1, paragraph 4, the possibility of extending the application of the provisions of the draft convention, on an individual basis, to electronic communications exchanged in connection with other international conventions that might be specifically identified by declarations submitted by Contracting States. Thus, the Working Group agreed that the draft paragraph should be reformulated along the following lines:

“Any State may declare in writing at any time that it will not be bound by [relevant provisions reflecting variant B of current article 1, paragraph 4] of this Convention, except as otherwise stated in a declaration submitted under article 19.”

44. The Working Group approved the substance of the draft paragraph, as revised, and referred it to the drafting group. The Working Group acknowledged that the cross-references made in this and other provisions it had agreed to amend needed to be carefully reviewed by the drafting group in the light of the Working Group's final decisions on the placement of various provisions, including draft paragraph 4.

#### *Paragraph 5*

45. The Working Group agreed that, for the purpose of ensuring flexibility in the application of the draft convention, the possibility of unilateral exclusions should be retained despite the fact that the draft convention was expected to contain a common list of exclusions under draft article 2 (see paras. 59-69). The Working Group therefore agreed to remove the square brackets around the draft paragraph and to refer it to the drafting group.

#### *Paragraph 6*

46. The Working Group agreed that draft paragraph 6 had become redundant, in view of its deliberations on draft paragraph 1, and agreed to delete it.

### **Article 19 [Y]. Communications exchanged under other international conventions**

47. The text of the draft article was as follows:

“1. Except as otherwise stated in a declaration made in accordance with paragraph 3 of this article, [each Contracting State declares that it shall apply the provisions of this Convention] [the provisions of this Convention shall apply] to the use of electronic communications in connection with the [negotiation] [formation] or performance of a contract [or agreement] to which any of the following international conventions, to which the State is or may become a Contracting State, apply:



“[Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)]

“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, 19 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).

“2. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will also apply this Convention to the exchange by means of data messages of any communications, declarations, demands, notices or requests under any other international agreement or convention [on commercial law matters][pertaining to international trade] to which the State is a Contracting State [and which are identified in that State’s declaration].

“3. Any State may declare in writing at any time that it will not apply this Convention to international contracts falling within the scope of [any of the conventions referred to in paragraph 1 of this article][any international agreements, treaties or conventions, including any of the conventions referred to in paragraph 1 of this article, to which the State is a Contracting Party and which are identified in that State’s declaration].”

#### *General comments*

48. The Working Group noted that the draft article was 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 (see A/CN.9/WG.IV/WP.94). At the fortieth session of the Working Group, there had been 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 draft paragraph 1 (see A/CN.9/527, paras. 33-48).

49. The draft article, it was noted, was intended to remove doubts as to the relationship between the rules contained in the draft convention and rules contained in other international conventions. It was not the purpose of the draft article to amend any other international convention. Through the draft article, the Contracting States could use the provisions of the draft convention to remove possible legal obstacles to electronic commerce that might arise from the interpretation of those conventions and to facilitate their application in cases where the parties conducted their transactions through electronic means.

#### *Paragraph 1*

50. The Working Group agreed that the benefit of legal certainty intended by the draft article should be automatically effective upon ratification, acceptance, approval or

accession and should not require a separate declaration by the Contracting State (see A/CN.9/548, para. 52). Therefore, the Working Group agreed to retain only the words “the provisions of this Convention shall apply”, removing the square brackets around them, and to delete the phrase “[each Contracting State declares that it shall apply the provisions of this Convention]”.

51. The view was expressed that the relationship between the draft convention and other international instruments beyond those listed in the draft paragraph was not entirely clear, as the matter was dealt with in two different parts of the draft convention, namely draft articles 1, paragraph 4, and draft article 19. That uncertainty, it was said, was aggravated by the Working Group’s tentative agreement to retain variant B of draft article 1, paragraph 4. The Working Group agreed that, to address those concerns, it would be useful to insert variant B of draft article 1, paragraph 4 as a new paragraph 2 in draft article 19 and reformulate it along the following lines:

“The provisions of this Convention apply further to electronic communications in connection with the formation or performance of a contract to which another international convention, treaty or agreement not specifically referred to in paragraph 1 of article 19 applies, except as otherwise stated in a declaration submitted by a State under article 18, paragraph 2.”

52. The Working Group further agreed that the opening phrase of the current paragraph 1 of draft article 19 (“Except as otherwise stated in a declaration made in accordance with paragraph 3 of this article”) would not be necessary and could be deleted.

53. The Working Group was informed that Working Group II (Arbitration) had pronounced itself in favour of including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the 1958 New York Convention”) in the list in paragraph 1. Since the 1958 New York Convention used the expression “arbitration agreement”, rather than “contract”, the Working Group agreed that the square brackets around the words “or agreement”, as well as around the title of that convention, should be removed. The Working Group noted, however, that in order to include the New York Convention in draft article 19, it might be necessary to include a provision on electronic equivalents of “original” documents in the draft convention, since article IV, paragraph (1) (b) of the 1958 New York Convention required that the party seeking recognition and enforcement of a foreign arbitral award must submit, *inter alia*, an original or a duly authenticated copy of the arbitration agreement. The Working Group agreed to defer a final decision on the matter until it had considered the new paragraphs 4 and 5 of draft article 9 (see paras. 129-139 below).

#### *Paragraph 2*

54. The Working Group agreed that the current text of the draft paragraph had become redundant in view of the Working Group’s tentative agreement to retain variant B of draft article 1, paragraph 4, and to incorporate the latter in draft article 19. Instead, draft article 19 should now contain a provision that established a link to the declarations contemplated in the revised version of draft article 18, paragraph 2, in a manner that made it possible for States that made such a declaration to limit its consequences by adding specific conventions to the list of international instruments to which they would apply the provisions of the draft convention. Such a new provision, it was agreed, could read as follows:

“A State that made a declaration pursuant to article 18, paragraph 2, may also declare that, notwithstanding such declaration, it will apply the provisions of this Convention to any international agreement, treaty or convention, which is identified in that State’s declaration, and to which the State is a Contracting Party.”

55. The Working Group generally agreed to the principle reflected in the new draft provision. For purposes of clarity and economy of language, it decided that the substance of the new draft paragraph (h) and of the new draft article 18, paragraph 2 (see above, paras. 43-44), should be combined in a single provision in draft article 19. Doing so would ensure that all declarations concerned with the relationship between the draft convention and other international conventions were placed in the same part of the draft convention.

### *Paragraph 3*

56. The Working Group considered at some length the question of whether a declaration submitted under the draft paragraph had necessarily to exclude the application of the draft convention to the use of electronic communications in connection with all contracts to which another international convention applied, or whether a State could exclude only certain types or categories of contracts covered by another international convention. There was strong support for the latter proposition. It was said that a system of limited exclusions would promote the wider use of the draft convention and would not deprive contracts covered by other international conventions of the legal certainty offered by its provisions only because a State concluded that the rules of the draft convention were not suitable for a particular type of contract covered by the same international convention. However, the view that eventually prevailed was contrary to that proposition on the grounds that such a system of modulated exclusions might render the application of the draft convention excessively complex and might jeopardize the objectives of legal certainty and predictability the draft convention aimed to achieve.

57. Subject to the deletion of the words “[any of the conventions referred to in paragraph 1 of this article]”, to the removal of the square brackets around the immediately following phrase and to aligning the language in the draft paragraph with the language used in draft paragraph 1, the Working Group approved the substance of the draft paragraph.

### *Conclusion on draft article 19*

58. Subject to the above amendments and additions, the Working Group approved the substance of the draft article, as revised, and referred it to the drafting group.

## **Article 2. Exclusions**

59. The text of the draft article was as follows:

“1. This Convention does not apply to electronic communications relating to contracts concluded for personal, family or household purposes.

“[2. This Convention does not apply to electronic communications that relate to any of the following:

“[(a) (i) Transactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) the transfer of security rights in, sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary;

“[(b) Contracts that create or transfer rights in immovable property, except for rental rights;

“[(c) Contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;

“[(d) Contracts of suretyship granted by, and on collateral securities furnished by, persons acting for purposes outside their trade, business or profession;

“[(e) Contracts governed by family law or by the law of succession;

“[(f) Bills of exchange, promissory notes and other negotiable instruments;

“[(g) Documents relating to the carriage of goods;

“[Other exclusions that the Working Group may decide to add.]

#### *Paragraph 1*

60. The Working Group approved the substance of the draft paragraph and referred it to the drafting group.

#### *Paragraph 2*

61. Strong support was expressed for the proposed exclusions under draft subparagraph 2 (a). It was stated that the financial service sector was subject to well-defined regulations or industry standards that addressed issues relating to electronic commerce in an effective way for the worldwide functioning of that sector and that no benefit would be derived from their inclusion in the draft convention. It was also stated that, given the inherently cross-border nature of financial transactions, the relegation of such an exclusion to country-based declarations under draft article 18 would be inadequate to reflect that reality. The Working Group approved the substance of the draft subparagraph (a) and referred it to the drafting group.

62. The Working Group proceeded to consider at some length the provisions contained in draft subparagraphs (b), (c), (d) and (e).

63. There was strong support for the deletion of subparagraphs (b), (c), (d) and (e). States that felt that electronic communications should not be authorized in those cases would always have the option of making individual exclusions by declarations under draft article 18. It was argued that such a system would allow States to limit the application of the draft convention as deemed best, while the adoption of a list of exemptions would have the effect to impose those exclusions even for States that saw no reason for preventing the parties to the transactions listed in those subparagraphs from using electronic communications.

64. In response, strong support was expressed for retaining those provisions, which were said to be justified by sound reasons of public policy. Several States had special rules on the extent to which electronic communications could be admitted in connection with transactions such as those referred to in subparagraphs (b) to (d). Moreover, some of those matters were clearly foreign to the trade-law mandate of UNCITRAL and should not be perceived as being covered by the draft convention. Leaving the matters referred to in those subparagraphs for unilateral exclusions by way of declarations under draft article 18 would not be conducive to enhancing legal certainty. A list of explicit exclusions would

not be detrimental to promoting electronic communications in international trade in view of the limited impact that those transactions had on commerce as a whole.

65. The preponderant view within the Working Group, however, was in favour of the deletion of subparagraphs (b), (c), (d) and (e) from the list of exclusions as those matters were regarded as being territory-specific issues that should be better dealt at the State level. It was also said that some States already admitted the use of electronic communications in connection with some, if not all, of the matters contemplated in those subparagraphs. Retaining those provisions, however, might block those developments and would hinder the adaptation of the law to technological evolution. The rationale for specific exclusions was also questioned. In respect of subparagraph (c), for instance, it was stated that, as currently drafted, the provision might have the undesirable effect, *inter alia*, of hindering the international development of electronic public procurement. Another difficulty of the draft provision was the reference to “tribunals” which might be read to encompass arbitral bodies. In response it was suggested that possible ambiguities might be resolved by using a more descriptive expression, such as “national judicial authorities”.

66. Having considered the various views expressed, the Working Group decided to delete subparagraphs (b), (c), (d) and (e) from paragraph 2 of article 2 of the draft convention. The Working Group deferred the discussion of draft subparagraphs (f) and (g) to the discussion of paragraphs (4) and (5) of article 9 of the draft convention (see paras. 129-139 below).

*Proposed additional paragraph and organization of the draft article*

67. It was proposed that a reference be inserted in article 2 of the draft convention to indicate that specific matters and types of transactions besides those listed in draft article 2 might be excluded from the scope of the draft convention by way of declarations made under article 18 paragraph 2 of the draft convention. Such a provision could read as follows:

“States may make declarations for further exclusions of the scope of application of this Convention on specific matters according to article 18, paragraph 2, of this Convention.”

68. The Working Group approved the substance of the proposed new paragraph and referred it to the drafting group. It was noted that explanatory notes or an official commentary to the draft convention should indicate that possible exclusions might cover matters typically excluded from domestic legislation on electronic transactions, such as any of those referred to in the subparagraphs that the Working Group had agreed to delete.

69. A suggestion was also made that paragraph 1 and 2 of draft article 2 be merged into one single paragraph. The Working Group agreed that the drafting group should consider that matter.

**Article 3. Party autonomy**

70. The text of the draft article was as follows:

“The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions [either by an explicit exclusion or impliedly, through contractual terms that vary from its provisions].”

71. The Working Group noted that the draft article was a standard clause in that it restated the principle of party autonomy as it appeared in other uniform law instruments. The sentence in square brackets had been proposed at the Working Group's forty-third session to specify the manner in which parties could derogate from the draft convention (A/CN.9/548, paras. 122-123).

72. While there was some support for retaining the words in square brackets, the Working Group agreed that those words added little to the draft article and might in fact give rise to uncertainty as to the ability of the parties to derogate from the provisions of the draft convention by means other than those expressly mentioned in the draft article.

73. Without prejudice to the general validity of the rule reflected in the draft article, it was suggested that there were areas where party autonomy could be limited or even excluded in favour of mandatory rules. Possible areas included draft article 8, paragraph 2, and draft article 9. It was also suggested that the entire chapter II of the draft convention should be made mandatory for the parties.

74. In that connection, the view was expressed that party autonomy should not be allowed to go so far as to allow the parties to derogate from rules based on public policy considerations, such as relaxing statutory signature requirements in favour of methods of authentication that provided a lesser degree of reliability than electronic signatures, which were 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.

75. It was further said that the draft article should not be read to the effect that parties could deviate from provisions on the scope of application of the draft convention and make the Convention applicable to matters that had been the subject of an exclusion by a Contracting State. In response, it was noted that other UNCITRAL instruments, such as United Nations Sales Convention contained a rule on party autonomy such as the one in the draft article and that it was generally understood that party autonomy applied only to provisions that created rights and obligations for the parties, and not to the provisions of an international convention that were directed to Contracting States.

76. The prevailing view within the Working Group was that the right of a party to derogate from the application of the draft convention should not be restricted. It was noted that the draft convention was only intended to provide functional equivalence in order to meet general form requirements and that it did not affect mandatory rules that required, for instance, the use of specific methods of authentication in a particular context. In any event, States remained free to make declarations excluding certain matters under draft article 18 (see above, paras. 43-44).

77. 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 draft article should be retained, without the sentence within square brackets. The Working Group approved the substance of the draft article and referred it to the drafting group.

#### **Article 4. Definitions**

78. The text of the draft article was as follows:

“For the purposes of this Convention:

“[(a) “Communication” means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the [negotiation] [formation] or performance of a contract;

“[(b) “Electronic communication” means any communication that the parties make by means of data messages;]

“(c) “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;

“(d) “Originator” of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;

“(e) “Addressee” of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;

“(f) “Information system” means a system for generating, sending, receiving, storing or otherwise processing data messages;

“(g) “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 person each time an action is initiated or a response is generated by the system;

“[(h) “Place of business” means [any place of operations where a party carries out a non-transitory activity with human means and goods or services;] [the place where a party maintains a stable establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location;]]

“[(i) “Person” means natural persons only, whereas “party” includes both natural persons and legal entities;]

*[Other definitions that the Working Group may wish to add.]”*

*Subparagraph (a) “communication”*

79. It was noted that the new definition was intended to avoid the repetition elsewhere of the various purposes for which electronic communications were exchanged (“declaration, demand, notice, request, including offer and acceptance of an offer”). The Working Group agreed to delete the reference to the term “negotiation” and retain the term “formation”. With that change, the Working Group approved the draft definition and referred it to the drafting group.

*Subparagraph (b) “electronic communication”*

80. The Working Group noted that the new definition established a link between the purposes for which electronic communications might be used and the notion of “data messages”, which was important to retain since it encompassed a wide range of techniques

beyond purely “electronic” techniques. The Working Group approved the draft definition and referred it to the drafting group.

*Subparagraph (c) “data message”*

81. The suggestion was made to add the word “magnetic” before the word “optical” and provide for other examples of means by which information could be generated, sent, received or stored, such as fax and Internet. However, it was also suggested that the list of examples should be deleted since some of them, such as telegraph or telex, referred to older technologies and were not within the scope of the draft convention. The prevailing view, however, favoured the retention of examples to indicate that the definition of “data message” covered not only electronic mail but also other techniques, even if apparently dated, which could still be used in the chain of electronic communications.

82. The Working Group agreed to retain the list of examples and add the word “magnetic” before the word “optical”. With that change, the Working Group approved the draft definition and referred it to the drafting group. The Working Group agreed that any explanatory notes or official commentary on the draft convention might clarify, as appropriate, that the list was merely illustrative and that other techniques, such as the Internet, might fall under the definition of “data message”.

*Subparagraphs (d) and (e) “originator” and “addressee”*

83. The Working Group approved the draft definitions and referred them to the drafting group.

*Subparagraph (f) “information system”*

84. The Working Group agreed to defer the consideration of that definition until it had considered draft article 10, paragraph 2 (see paras. 145-161 below).

*Subparagraph (g) “automated information system”*

85. The Working Group agreed to substitute the term “automated message system” for the term “automated information system” to avoid confusion with the definition in subparagraph (f). With that change, the Working Group approved the draft definition and referred it to the drafting group.

*Subparagraph (h) “place of business”*

86. The view was expressed that the draft definition should be deleted and that the draft convention should leave it to national laws to define the term “place of business”. However, the prevailing view was that the draft convention should define the term in view of the role played by the notion of “place of business” in the draft convention, where it appeared in several articles. The views were divided, however, as to which of the two alternatives contained in square brackets should be chosen.

87. With the aim of achieving a consensus on the matter, it was suggested that the second alternative could be retained, using the words “any place” instead of “the place”, and “non-transitory establishment” instead of “stable establishment”. There was strong support for that proposal. However, concern was expressed that the suggested changes would render the definition tautological, since a “place of business” would then mean a “non-transitory” establishment other than a “temporary” provision of goods and services.



In response, it was noted that there would be no tautology, since the notion of “non-transitory”, which was already inherent in the word “stable” in the second option in the current text, qualified the word “establishment”, whereas the words “other than temporary provision of goods and services” referred to “economic activity”. The Working Group concurred with that view.

88. With those changes, the Working Group approved the draft definition and referred it to the drafting group.

*Subparagraph (i) “person” and “party”*

89. Views were divided as to desirability of the definitions of “person” and “party”. The suggestion was made to replace the word “individual” for “person”, and “person” for “party” as the term “person” in many jurisdictions traditionally encompassed both natural and legal persons. However, the prevailing view favoured the deletion of both definitions. The Working Group agreed nevertheless that it could consider using the words “natural person”, as appropriate, in those substantive provisions of the draft convention that required a distinction between legal entities and natural persons.

### **Article 5. Interpretation**

90. 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]”.

*“by virtue of the rules of private international law”*

91. The Working Group noted that the closing phrase had been placed in square brackets at the request of the Working Group at an earlier session (see A/CN.9/527, paras. 125-126) because 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. It was suggested, however, that since the draft convention, in its present form, did not contain any conflict-of-laws rules, the risk no longer existed and, therefore, the language in square brackets could be retained. The Working Group agreed to delete the square brackets. With that change, the Working Group approved the substance of the draft article and referred it to the drafting group.

### **Article 6. Location of the parties**

92. The text of the draft article was as follows:

“1. For the purposes of this Convention, a party’s place of business is presumed to be the location indicated by that party [, unless the party does not have a place of business at such location [[and] such indication is made solely to trigger or avoid the application of this Convention]].

“2. If a party [has not indicated a place of business or] has more than one place of business, then, subject to paragraph 1 of this article, the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

“3. If a party 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 party in connection with the formation of a contract or the place from which the information system may be accessed by other parties, in and of themselves, do not constitute a place of business [, unless such party is a legal entity that does not have a place of business [within the meaning of article 4 (h)]]].

“5. The sole fact that a party 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 that country.”

#### *General comments*

93. It was noted that the draft article offered elements that allowed the parties to ascertain the location of the places of business of their counterparts. That facilitated a determination, among other elements, as to the international or domestic character of a transaction and the place of contract formation. The Working Group noted that there had been considerable debate on the draft provision over the years. The current draft convention no longer contemplated a positive duty for the parties to disclose their places of business or provide other information, but merely created a presumption in favour of a party’s indication of its place of business, which was accompanied by conditions under which that indication could be rebutted and default provisions that applied if no indication had been made.

#### *Paragraph (1)*

94. The Working Group did not accept a suggestion to retain both phrases in square brackets, combined by the conjunction “or”. The Working Group heard arguments for the deletion of the words in the second set of square brackets, as had happened at earlier meetings (A/CN.9/509, para. 48 and A/CN.9/528, para. 87), as well as the reiteration of earlier arguments for retaining them (see A/CN.9/509, para. 49 and A/CN.9/528, para. 88), which at the current session also focused on the need to avoid the impression that the draft convention allowed the parties to circumvent the application of a law that they regarded as undesirable.

95. The Working Group considered that the legal consequences of false or inaccurate representations made by the parties was not a matter within the purview of the draft convention and that draft article 7 made it clear that those questions, for which most legal systems would have answers, should be left for the applicable law outside the draft convention. The Working Group therefore agreed to delete the words in the second set of square brackets and proceeded to consider the other words in square brackets.

96. As regards the words in the first set of square brackets, the main arguments for their deletion included the following:

(a) Those words added little to the operation of the presumption, as they merely provided that a location would not be regarded as a place of business if the relevant party did not have a place of business at that location;

(b) Those words gave rise to uncertainty as to who bore the burden of proof concerning the accuracy or truthfulness of a party's indication of its location.

97. In response, the main arguments for retaining only the words in the first set of square brackets were:

(a) Those words were useful to clarify that the presumption created in the draft paragraph was not an absolute one, which was not self-evident from the text;

(b) Without those words, the draft paragraph might be read to give parties entire freedom to choose arbitrarily any location as their place of business. That result would be highly undesirable, since a party should not benefit from recklessly inaccurate or untruthful representations

98. An additional argument for retaining the words in the first set of square brackets was that those words were useful from the point of view of business facilitation, since they provided a sound basis for upholding a party's indication of a place of business. That might be important in connection with companies that had several places of business, with more than one having connections to a specific contract. For example, an Internet vendor maintaining several warehouses at different locations from which different goods might be shipped to fulfil a single purchase order effected by electronic means might see a need to indicate one of such locations as its place of business for any given contract. The current draft recognized that possibility, with the consequence that such an indication could only be challenged if the vendor did not have a place of business at the location it indicated. If that indication was not possible, the parties might need to enquire, in respect of each contract, which of the vendor's multiple places of business had the closest connection to the relevant contract in order to determine what was the vendor's place of business in that particular case.

99. Having considered the different views expressed, the Working Group agreed on the usefulness of retaining the first set of words in square brackets. The Working Group agreed, however, that the formulation of the text could be improved, for instance by clarifying that rebuttal of the presumption required an interested party (other than the one making the indication), to show that there was no place of business at the location indicated. With that change, the Working Group approved the substance of the draft paragraph and referred to the drafting group.

#### *Paragraph (2)*

100. It was generally understood that, given the current structure of the draft convention, the main purpose of the draft paragraph was to provide a default rule when a party that had more than one place of business failed to indicate the place of business for a particular transaction. For cases where a party had only one place of business and did not disclose it, the definition in draft article 4, subparagraph (h) already provided an answer. Thus the Working Group agreed to retain the words in square brackets with substitution of "and" for "or". It was also generally felt that the amended paragraph would also offer a default rule in situations where a party indicated more than one place of business.

101. The Working Group also agreed with the suggestion that the words “and its performance” be deleted as the place of a contract was more commonly used for the purpose of determining the place of business. Reasons for that decision included the following:

(a) Similar wording in other international instruments, in particular the United Nations Sales Convention, had in practice given rise to conflicting interpretations when the place of the contract was different from the place of the contract’s performance, which was often the case (see further A/CN.9/509, para. 51);

(b) Earlier concerns as to the risk of establishing a duality of regimes by departing from the languages used in the United Nations Sales Convention (see A/CN.9/509, para. 52) no longer applied in view of the limited scope of the draft convention in its current form.

102 With those changes, the Working Group approved the substance of the draft paragraph and referred it to the drafting group.

#### *Paragraph (3)*

103. It was noted that, as currently drafted, the provision did not apply to legal entities, since only natural persons were capable of having an “habitual residence”. In response, it was noted that the intent of the draft paragraph was indeed to apply only to natural persons and that it would be unwise to alter the existing wording, which was common in uniform law conventions, in particular if the Working Group were also to attempt to formulate default rules for the location of legal entities that did not have a place of business within the meaning of draft article 4, subparagraph (h). The Working Group acknowledged that there might be legal entities, such as so-called “virtual companies”, whose establishment might not meet all requirements of the definition of “place of business”. The Working Group agreed, however, that it would be difficult to attempt to formulate universally acceptable criteria that might be used in a default rule on location to cover those situations, in view of the variety of options available (e.g. place of incorporation, place of principal management, among others). In any event, if an entity did not have a place of business, the draft convention would not apply to its communications under article 1, which depended on transactions applying between parties having their places of business in different States.

104. Subject to replacing the term “party” with the words “natural person” the Working Group approved the substance of the provision and referred it to the drafting group.

#### *Paragraph (4)*

105. Support was expressed for maintaining the first set of words within square brackets, mainly for the following reasons:

(a) Businesses were increasingly regarding their technology and equipment as significant assets, a fact that spoke against discarding categorically the location of equipment, which may be the largest asset of the business, as a possible element for determining a place of business;

(b) The draft convention should offer a default rule for determining the place of business of a legal entity that did not have a place of business in the meaning of draft article 4, subparagraph (h), similarly to what draft paragraph 3 did in respect of natural persons. The location of equipment and technology supporting an information system

could be used as an optional connecting factor to determine the place of business for those legal entities.

106. That proposal was objected to mainly on the following grounds:

(a) There might be considerable difficulty in identifying the appropriate connecting factors—among the many theoretically available—that would justify establishing a link between a “virtual company” and a given place. Location of equipment technology was only one of these factors and not necessarily the most significant;

(b) It would be contradictory for the Working Group to have agreed on a certain number of factors to define “place of business”, on the one hand, and to proceed to formulate other criteria for location for cases falling short of those factors. The definition of place of business adopted in the draft convention, it was said, was not compatible with the nature of virtual companies.

107. The Working Group concluded that it was not appropriate to include a provision on the presumption on the place of business of a virtual company in the draft convention and that the matter at this early stage was better left to the elaboration of emerging jurisprudence. The Working Group agreed that it would be better to replace the current draft paragraph by a provision clarifying that the location of the equipment and technology supporting an information system was not a relevant criterion for the identification of the place of business. The new formulation, which the Working Group approved and referred to the drafting group, was as follows:

“A location is not a place of business merely because that is where:

(a) equipment and technology supporting an information system used by a person in connection with the formation of a contract is located; or (b) such information system may be accessed by other persons.”

108. In that connection, it was suggested that the words “the equipment and technology supporting an information system” should be replaced with words such as “the equipment and technology supporting the communications of the parties”. It was suggested that the proposed language would focus on the functionality of the system (i.e. to enable the communications between the parties) and not on the system as such.

109. The Working Group agreed, however, that the objective of locating a place of business was better served by the reference to information systems, which had the advantage of focusing on the means used by a business entity to support the negotiation of contracts and the provision of goods and services. Replacing that notion with the broader notion of “communications between the parties” might encompass all systems used in the chain of communications, such as various information service providers (ISPs) and web servers, even if unrelated to the negotiating parties. Moreover, the current wording was based on terms used in the UNCITRAL Model Law on Electronic Commerce, and should be kept for the sake of uniformity between the draft convention and domestic legislation already enacted on the basis of the Model Law.

110. Subject to the above amendments, the Working Group approved the substance of the draft paragraph and referred it to the drafting group.

#### *Paragraph (5)*

111. It was noted that, unlike the basic factual assumption of the draft paragraph, in some countries the assignment of domain names was only made after verification of the

accuracy of the information provided by the applicant, including its location in the country to which the relevant domain name related. For those countries, it was said, it might be appropriate to rely, at least in part, on domain names for the purpose of article 7 (see also A/CN.9/509, para. 58).

112. The Working Group did not accept that proposal for the following main reasons:

(a) Differences in national standards and procedures for the assignment of domain names would make such an element unfit for establishing a presumption;

(b) The procedures for domain-name assignment were not always transparent to the public, which made it difficult to ascertain the level of reliability of each national procedure.

113. Furthermore, the draft paragraph only prevented a court or arbitrator from inferring the location of a party from the sole fact that the party used a given domain name or address. However, nothing in the draft paragraph prevented a court or arbitrator from taking into account the assignment of a domain name as a possible element, among others, to determine a party's location, where appropriate.

114. The Working Group approved the substance of the draft paragraph and referred it to the drafting group.

#### **Article 7. Information requirements**

115. The text of the draft article was as follows:

“Nothing in this Convention affects the application of any rule of law that may require the parties to disclose their identities, places of business or other information, or relieves a party from the legal consequences of making inaccurate or false statements in that regard.”

116. In the light of its earlier deliberations and the fact that the current text reflected a compromise solution to achieve a consensus on the matter (see A/CN.9/546, paras. 88-105), the Working Group did not accept a proposal to add a new paragraph in the draft article whereby the parties would have a duty to disclose their places of business. The Working Group approved the draft article and referred it to the drafting group.

#### **Article 8. Legal recognition of electronic communications**

117. The text of the draft article was as follows:

“1. A contract or other communication shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.

[2. Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.]”

118. The Working Group did not accept a proposal to link the validity of a contract to the use of an electronic signature, as most legal systems did not impose a general signature requirement as a condition for the validity of all types of contract.

119. There was also no support for a suggestion to add a new paragraph providing that the parties might validly use the medium of technology of their choice in communications in

connection with formation or performance of contracts. While appreciating the value of a recognition of the principle of technological and media neutrality, the Working Group considered that:

(a) A positive statement of that principle in the form proposed might interfere with the operation of rules of law that required, for instance, the use of specific authentication methods in connection with certain types of contract;

(b) The structure and formulation of the draft paragraph reflected the general rule of non-discrimination in article 5 of the Model Law on Electronic Commerce and that the same reasons that led to the choice of that formulation in the Model Law also applied here.

120. It was suggested that the wording of draft paragraph 1 could mislead the reader into believing that the contract itself was a communication, which would be inconsistent with the language and definitions of the draft convention, where the contract was treated as the product of the exchange of communications. However, it was also noted that some communications in electronic form might not give rise to a contract, and that, therefore, explicit reference to both the contract and communications was needed as they both needed to be validated with respect to their electronic form.

121. The Working Group considered various suggestions intended to clarify that the rule of non-discrimination in the draft paragraph applied to two situations: (a) the particular case of contracts formed by the exchange of electronic communications; and (b) the general use of electronic means to convey any statement, declaration, demand, notice or request in connection with a contract. The Working Group eventually agreed that the current text, when read in conjunction with the definitions of “communication” and “electronic communication” in article 4, subparagraphs (a) and (b), already covered both situations.

122. Subject to removing the square brackets around paragraph 2, which otherwise did not attract substantive comments, the Working Group approved the substance of the draft article and referred it to the drafting group.

#### **Article 9. Form requirements**

123. The text of the draft article was as follows:

“[1. Nothing in this Convention requires a contract or any other communication to be made or evidenced in any particular form.]

“2. Where the law requires that a contract or any other communication should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

“3. Where the law requires that a contract or any other communication should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

“(a) A method is used to identify the party and to indicate that party’s approval of the information contained in the electronic communication; and

“(b) That method is as reliable as appropriate to the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement.

“[4. Where the law requires that a contract or any other communication should be presented or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

“[(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and

“[(b) Where it is required that the information it contains be presented, that information is capable of being displayed to the person to whom it is to be presented.

“[5. For the purposes of paragraph 4 (a):

“[(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and

“[(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.]”

#### *Paragraph (1)*

124. In the light of its earlier deliberations on the provision (see A/CN.9/546, para. 49), the Working Group agreed to retain the draft paragraph and remove the square brackets around it.

#### *Paragraph (2)*

125. In response to a question, it was noted that the words “the law”, in the draft paragraph and elsewhere, had the same meaning as in corresponding provisions of the UNCITRAL Model Law on Electronic Commerce, and referred to rules based on statute, regulation or judicial precedent. The Working Group agreed, however, that it should not attempt to define “law” in the draft convention, and that the term should be explained in any explanatory notes or official commentary, as was done in paragraph 46 of Guide to Enactment of UNCITRAL Model Law on Electronic Commerce.

126. In response to another question, the Working Group noted that draft article 9 would generally apply to any form requirements under the applicable law. It was explained that public policy rules contained in domestic law barring the use of electronic communications were to be dealt with either as exclusions under draft article 2 or by the means of declarations of exclusion under draft article 18.

#### *Paragraph 3*

127. The suggestion was made that subparagraph 3 (b), which established the conditions for the reliability of an electronic signature should be deleted. The main reasons for the suggestion were the following:

(a) The corresponding provision in article 7 of the UNCITRAL Model Law on Electronic Commerce fulfilled a function in that context, where the questions of reliability of a signature and conditions for attribution of data messages were addressed in an interdependent way;



(b) Essentially, articles 7 and 13 of the Model Law together affirmed the validity of an electronic signature and allowed the attribution of a message to an originator as long as the addressee used a method agreed upon with the originator to verify the authenticity of the message, without the need to demonstrate the authenticity of the signature itself;

(c) However, the draft convention did not deal with attribution of electronic messages, as the Working Group had previously agreed (see A/CN.9/546, para. 127). Subparagraph 3 (b) could mean that even if there was no dispute about the identity of the originator or the fact of signing, a court might invalidate the entire contract because it regarded the technology or methodology as insufficient in principle for the transaction in question.

128. While there was support for the suggestion that the subparagraph should be deleted, the Working Group preferred to retain the provision. It was felt that the same risk might arise from retaining only draft subparagraph (a), since a court might then be inclined to consider only the level of security offered by the signature method for the purpose of establishing someone's identity, without being reminded of the need to take into account factors other than technology, such as the purpose for which the electronic communication was generated or communicated, or a relevant agreement of the parties.

*Paragraphs (4) and (5) "original form"*

129. The Working Group noted that earlier versions of the draft convention did not contain provisions dealing with electronic equivalents of "original" paper-based documents because the draft convention was essentially concerned with matters of contract formation, and not with rules of evidence. It had been suggested that a provision on "originals" was now necessary since draft article 19 extended the provisions of the draft convention to arbitration agreements governed by the 1958 New York Convention. The Working Group was informed that the matter had been considered by Working Group II (Arbitration) at its forty-second session (Vienna, 13-17 September 2004), and had been positively received (see above, para. 53). The Working Group considered articles 9(4) and 9(5) together, as they were interlinked, and noted that the provisions were new to the draft convention.

130. In support for retaining those paragraphs, it was suggested that a provision on electronic equivalents of original paper documents was essential to support effectively the use of electronic means to conclude arbitration agreements, since the enforcement of an arbitral award and the referral of the parties to arbitration under articles II and IV of the 1958 New York Convention required that the party relying on the arbitration agreement should produce its original or a duly certified copy thereof. Without the additional provisions in draft article 9, doubts on the evidentiary value of electronic arbitration agreements would persist, leading the parties to take the safer course of action and revert to the use of paper-based contracts.

131. However, there were also objections to the proposed new paragraphs for the following main reasons:

(a) As currently drafted, those provisions were not limited to arbitration agreements and might have implications that the Working Group might not be in a position to anticipate;

(b) The standard for establishing functional equivalence did not offer an adequate level of legal certainty in view of the flexible reliability test contemplated in subparagraph 5 (b), which implied a determination on a case-by-case basis;

(c) Even if limited to arbitration agreements, those paragraphs were inappropriate, as they went beyond a purely contractual framework and interfered with the operation of domestic rules on civil procedure by imposing on courts a standard for functional equivalence that might not correspond to the standard recognized in their legal systems.

132. The Working Group noted that, although draft paragraphs 4 and 5 had been inserted to address a particular problem raised by arbitration agreements, the usefulness of those provisions extended beyond that limited field in view of possible obstacles to electronic commerce that might result from various other requirements concerning original form. Despite differing views as to the appropriateness of that conclusion, the Working Group did not agree to limit the scope of draft paragraphs 4 and 5 to arbitration agreements.

133. The Working Group proceeded to consider various alternatives to address those concerns. One of them was to delete subparagraph 5 (b) and the word “reliable” in subparagraph 4 (a) with a view to expressing the idea that there needed to be an absolute assurance of integrity of information in order for an electronic communication to replicate the function of an original paper document. That suggestion was not adopted, as the Working Group felt that the resulting formulation of draft paragraphs 4 and 5 would become ambiguous and would not necessarily mean a higher standard of integrity, since it could be argued that any “assurance” of integrity, however “reliable”, might suffice.

134. Another suggestion was to make it clear that the purpose of the new provisions was not to interfere with rules on civil procedure but that the Working Group should consider reinserting in draft article 9, or preferably in draft article 2, an exclusion of contracts or acts requiring by law the involvement of courts, public authorities or professions exercising public authority. The Working Group did not agree with that suggestion and reaffirmed its earlier decision on the matter (see paras. 63-66 above). Exceptions based on public policy, where required, should be made by the State concerned by way of a declaration under draft article 18.

135. The Working Group decided to retain draft paragraphs 4 and 5 and to remove the square brackets around the text.

136. At that time, the Working Group resumed consideration of subparagraphs (f) and (g) of article 2 (see above, para. 66). It was also noted that the potential consequences of authorized duplication of documents of title and negotiable instruments—and generally any transferable instrument that entitled the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money—made it necessary to develop mechanisms to ensure the singularity or originality. Finding a solution for that problem, it was further recalled, required a combination of legal, technological and business solutions, which had not yet been fully developed and tested. The Working Group agreed that the issues raised by negotiable instruments and similar documents, in particular the need for ensuring their uniqueness, went beyond simply ensuring the equivalence between paper and electronic form and that, therefore, draft paragraphs 4 and 5 were not sufficient to render the provisions of the draft convention appropriate for those documents. The Working Group therefore agreed that the essence of article 2, subparagraphs (f) and (g) should be retained in a provision such as the following:

“This Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts and other transferable instruments that entitle the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.”

137. The suggestion was made that the following additional paragraph should be added to the draft article:

“Paragraphs 4 and 5 do not apply where a rule of law or the agreement between the parties requires a party to present certain original documents for the purpose of claiming payment under a letter of credit, a bank guarantee or a similar instrument.”

138. It was explained that the proposed addition was meant to clarify that letters of credit and their underlying transactions were not excluded from the scope of application of the draft convention as a whole, but only from the provisions dealing with originals. That option was preferable to unilateral exclusions by declarations made under draft article 18, in view of the international nature of letters of credit and similar instruments. There were, however, strong objections to that proposal, as it was felt that more appropriate places for exclusions were, instead, draft articles 2 or 18. It was also proposed that the draft convention should give States the possibility to exclude the application of paragraphs 4 and 5 of draft article. The Working Group did not have time fully to consider the proposed amendment and the objections thereto and decided to submit the proposed additional paragraph within square brackets to the Commission for consideration.

139. The Working Group approved the substance of draft paragraphs 4 and 5 and referred it to the drafting group.

#### **Article 10. Time and place of dispatch and receipt of electronic communications**

140. The text of the draft article was as follows:

“1. The time of dispatch of an electronic communication is the time when the electronic communication [enters an information system outside the control of the originator or of the party who sent the data message on behalf of the originator] [leaves an information system under the control of the originator or of the party who sent the data message on behalf of the originator], or, if the electronic communication message has not [entered an information system outside the control of the originator or of the party who sent the data message on behalf of the originator] [left an information system under the control of the originator or of the party who sent the data message on behalf of the originator], at the time when the electronic communication is received.

“2. The time of receipt of an electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee or by any other party named by the addressee. An electronic communication is presumed to be capable of being retrieved by the addressee when the electronic communication enters an information system of the addressee unless it was unreasonable for the originator to have chosen that information system for sending the electronic communication, having regard to the content of the electronic communication and the circumstances of the case [, including any designation by the addressee of a particular information system for the purpose of receiving electronic communications.]

“3. An electronic communication 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.

“4. Paragraph 2 of this article applies notwithstanding that the place where the information system is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.”

#### *Paragraph 1*

141. It was pointed out that a communication’s exit from an information system under the control of the originator and its entry into another information system not under the originator’s control were two sides of the same factual situation, since a communication typically left one information system by entering another one. The formulation in the first set of square brackets, which was also used in article 15, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce, was said to be preferable because it focused on an element in respect of which the parties would have easily accessible evidence, given that transmission protocols of data messages typically indicated the time of delivery of messages to the destination information system or to intermediary transmission systems, rather than the time when messages left their own systems.

142. The prevailing view, however, was in favour of the criterion used in the phrase in the second set of square brackets. It would be more logical, it was said, to provide that a communication was deemed to be dispatched when it left the originator’s sphere of control or, to use the terminology of the draft convention, when it left an information system under the control of the originator. That formulation would more closely mirror the notion of “dispatch” in a non-electronic environment.

143. On the language in the second set of square brackets, it was stated that the electronic communication left the control of the originator at the moment of the dispatch, and that any rule on communications within the “same” system would be irrelevant. However, it was also noted that certain electronic communications might never leave the originator’s system, such as, for instance, information posted on a web site operated by the originator. The rule in the second part of the draft paragraph was important since otherwise those situations would not be covered.

144. The Working Group decided to retain the text in the second and fourth sets of square brackets and to delete the text in the first and third sets of square brackets and referred the text to the drafting group.

#### *Paragraph 2*

145. The Working Group noted that no other provision in the draft convention had generated the same amount of debate within the Working Group as draft paragraph 2 (see A/CN.9/509, paras. 94-98; A/CN.9/528, paras. 141-151 and A/CN.9/546, paras. 61-80). The Working Group was reminded that the current text was an attempt to reach a compromise between those who favoured a rule based on the time when a communication became capable of being retrieved, and those who favoured the more objective criterion of its entry into the addressee’s information system (A/CN.9/548, paras. 73 and 74).

146. The view was expressed that the problems the Working Group still faced stemmed from the varying interpretation given to the words “information system” (see also

A/CN.9/546, paras. 68-69). The absence of a commonly accepted understanding of that expression made it unwise to establish a general rule on receipt of electronic communications, since it was unclear what type of legal relationship between the addressee and the information system the draft paragraph contemplated (i.e. whether a relationship of ownership or another, similar, type of relationship). A requirement for such a relationship to exist could unduly limit the type of information system that could be used to send an electronic communication by valid means to the addressee. To avoid that problem, it was suggested that the second sentence of the draft paragraph should be redrafted to provide that an electronic communication was presumed to be capable of being retrieved by the addressee when it entered an information system that the addressee had agreed to use. That amendment, it was said, would make it clear that the agreement of the addressee was the sole relevant criterion, irrespective of the legal relationship between the addressee and the information system that the addressee had agreed to use. The proposal was also intended to eliminate the impression that the draft paragraph made an information system fully comparable to a physical address. That result would be unreasonable, since the mere ownership, for instance, of an e-mail address could not impose on the owner the same duty to check its mailbox as the owner of a place of business to collect its postal mail.

147. Although there were expressions of support for the proposal, the prevailing view was not in favour of the proposed amendment. It was said that the proposed amendment would not introduce any significant improvement over the current text, in which the word “unreasonable” already made it clear that an originator that selected an address in the absence of a consent by the addressee to use that address could not rely on the presumption of receipt. Moreover, the needs of electronic commerce would not be promoted by a rule that expressly or impliedly required prior consent for each transaction, as it would be too onerous to impose on the originator the need to show the addressee’s acceptance of the use of an address for a communication.

148. In the course of that discussion, three strongly supported positions emerged in the Working Group:

(a) First, the main difficulty created by the current text was that it no longer distinguished between designated and non-designated information systems, a distinction which needed to be restored to reflect business practices (see also A/CN.9/546, para. 70);

(b) Secondly, the current text was acceptable as currently drafted, since it reflected a sound basis for a compromise solution that avoided the distinction between designated and non-designated information systems and the various problems caused by it (see A/CN.9/528, para. 148);

(c) Thirdly, the text should deal with designated systems at the most and that, even in that context, it should refrain from establishing general rules on receipt in view of the fact that measures implemented by companies and individuals to preserve the integrity, security or usability of their information systems (for instance to block “spam” mail or prevent the spread of viruses) had led in practice to repeated loss of communications.

149. The Working Group paused to consider those views, in particular the last position, which introduced a new element in its debate. The Working Group acknowledged the fact that security measures such as filters or firewalls might indeed prevent electronic communications from reaching their addressees. There was no agreement, however, on the suggestion that the risk of loss of the message should be entirely borne by the originator.

At the most, the effect of such a system could be that a blocked message could not be presumed to be “capable of being retrieved”.

150. In that connection, it was suggested that one of the concerns related to the apparently absolute character of the rule established in the draft paragraph. In the light of increasing concerns over security of information and communications in the business world, rules on receipt should necessarily be linked to consent to use a particular information system, and should not compel persons who had not accepted the risk of loss of communications. It was suggested that an approach better than the current one would be to recast the draft paragraph along the following lines: “The time of receipt of an electronic communication is presumed to be the time when the electronic communication becomes capable of being retrieved by the addressee at the electronic address designated by the addressee, unless retrievability could not reasonably be effected, taking into account security measures.” It was argued that the use of a presumption matched with the reference to a designated address would reflect current practice and better serve business needs with its inherent flexibility.

151. While there were various expressions of support for the basic principle reflected in that proposal, there were also strong objections to it. The new formulation would not only depart significantly from article 15 of the UNCITRAL Model Law on Electronic Commerce, but would also reduce legal certainty by converting the existing rule in a rebuttable presumption and by shifting the risk of loss of messages entirely on the originator. Moreover, the proposal built upon highly subjective elements by eliminating the objective test of entry of a communication in an information system. Having no rule at all on the matter, it was said, might be a better outcome than introducing uncertainty in such an important provision.

152. The Working Group held an extensive discussion on the merits of the proposal and possible alternatives to improve its formulation. During that debate, the following areas of general agreement eventually emerged:

(a) It was important for the draft convention to deal with the issue of receipt of electronic communications, preferably by way of a general rule, followed by appropriate presumptions to facilitate factual determinations;

(b) It would be preferable if the draft paragraph would link the receipt of an electronic communication to its delivery to a location that could be more narrowly defined than the broadly understood notion of an “information system”. There was strong support for using instead the term “electronic address”, despite some concerns that those words had not been defined in the draft convention and were not necessarily clearer than “information system”;

(c) If followed by appropriate consequences, a distinction could be made between situations in which a party expressly requested or required the use of a particular electronic address, and situations in which an electronic communication was simply sent to an electronic address owned or used by that party.

153. After extensive consultations, the following revised text was proposed as a substitute for the draft paragraph:

“The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.

“The time of receipt of an electronic communication sent to another address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address.

“An electronic communication is presumed to be capable of being retrieved by the addressee when it arrives at the addressee’s electronic address.

“This paragraph does not apply to an electronic communication whose capability of being retrieved or whose arrival at the electronic address is prevented [or significantly delayed] by the operation of reasonable technological measures implemented to preserve the integrity, security or usability of the addressee electronic communication system.”

154. While there was wide support for using the above proposal as a new working basis, there were also strong objections to the proposed text, in particular to the second and the fourth sentences.

155. As regards the second sentence, it was argued that its text would reintroduce the notion of designated systems and would be inconsistent with article 24 of the United Nations Sales Convention, which did not draw a distinction between designated and non-designated addresses or places of business. Concerns were also expressed regarding the retrievability of the communication in a non-designated electronic address, since the combined effect of the second and third sentences would be to burden unreasonably the addressee with the obligation to check regularly multiple addresses not currently in use. The proposed new sentence would further make it easier for parties in bad faith to attempt to bind another party to the content of a communication that the addressee might otherwise reject by sending the message to an electronic address other than the one chosen by the addressee.

156. In response, it was noted that the proposed rule would be effective only when the addressee became aware of the fact that the communication had been sent to a particular address, a condition that narrowed significantly the impact of the rule, especially in comparison with the provision contained in article 15 of the UNCITRAL Model Law on Electronic Commerce. The rule in the second sentence, by requiring actual awareness of the existence of the electronic communication, was the most favourable rule for the recipient.

157. There were also concerns about the use of the term “electronic address”. It was suggested that a definition should be added in draft article 4 to make it clear that the term was not limited to e-mail addresses, but open to any future technological development. It was stated that, as used in the draft provision, the term “electronic address” referred to “a portion or location in an information system that a person uses for receiving electronic messages.” The Working Group agreed on that understanding, but preferred not to include a definition in draft article 4, leaving the concept to be elucidated in any explanatory notes or official commentary to the draft convention.

158. The Working Group did not agree to a proposal to insert additional words whereby the recipient of a communication in a non-designated electronic address would only be deemed to have received a communication sent to an address different from the one designated if the addressee did not choose not to give effect to the communication. It was noted that the proposed additional text dealt with validity of communications and fell outside the scope of the draft convention.

159. Likewise, the Working Group did not accept a proposal to insert the words “during business hours” in the third sentence of the proposed new text of draft paragraph 2. It was noted that, like article 24 of the United Nations Sales Convention, the draft paragraph should not be concerned with national public holidays and customary working hours, elements that led to problems and to legal uncertainty in an instrument that applied to international transactions. Moreover, the legal effect of retrieval did not fall within the scope of the draft convention, but was left for applicable national law. It was also reminded that the presumption could be rebutted if the communication was not capable of being retrieved.

160. Despite some support for the adoption of the fourth sentence of the proposed new draft paragraph, the widely prevailing view was that the sentence in question was not needed and should be deleted. It was noted that the presumption established in the third sentence of the proposed new text of draft paragraph 2 could be rebutted in cases when security or other devices would prevent the communication from being retrieved. It was further argued that the operation of the presumption would allow greater flexibility in the assessment of facts, should there be arguments as to whether a communication had been received or not. The Working Group agreed, however, that any explanatory notes or official commentary on the draft convention should emphasize the issue referred to in that sentence.

161. Subject to those deliberations, the Working Group decided to approve the revised new text of draft paragraph 2 and referred it to the drafting group.

### *Paragraph 3*

162. Concerns were expressed that the current provision would ultimately attribute legal value to all electronic communications by deeming them to have been received at the addressee’s place of business, even if they were sent to a non-designated electronic address. It was suggested that the draft paragraph should be amended to limit its scope to electronic communications delivered to a designated electronic address.

163. In response, it was pointed out that the scope of the provision was to avoid duality of places of business in case the communication was retrieved in a place other than the place of business for the purpose of determining the application of the draft convention. It was noted that the provision only clarified that the location of an information system supporting an electronic address was irrelevant for determining where a communication was received. Such a clarification was useful in an electronic environment, and had become even more important in view of the amendments adopted in draft paragraph 2, since electronic communications could be retrieved from nearly any location from which a party was able to access its electronic address, unlike the normal situation for postal communications that were usually delivered at a party’s premises.

164. The Working Group approved the draft paragraph and referred it to the drafting group.

### *Paragraph 4*

165. The Working Group agreed to insert the words “supporting an electronic address” after the words “information system” and referred the provision to the drafting group.



*Conclusion*

166. Subject to the above amendments, the Working Group approved the substance of the draft article and referred it to the drafting group.

**Article 11. Invitations to make offers**

167. The text of the draft article was as follows:

“A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.”

168. The Working Group was reminded that the draft provision, as currently drafted, reflected a consensus view on the matter that had developed after extensive debate (see A/CN.9/509, paras. 74-85; A/CN.9/528, para. 109-120; A/CN.9/546, paras. 106-116).

169. The view was expressed that the notion of invitation to make an offer was not known in some legal systems, and it therefore would be preferable to replace that notion with words such as “is not an offer”. In response, it was observed that the notion of invitation to make an offer was common in uniform international trade law texts, being used in the United Nations Sales Convention.

170. It was proposed to replace the term “parties”, which could be read as to imply the existence of a contract, with the more neutral term “persons”. It was also noted that the term “parties” in draft article 11 clearly referred to the parties to a communication, regardless of whether a contract was eventually formed. The term “persons” was not suitable in the present context, since in the draft convention it meant “natural persons”.

171. The Working Group considered that there was no need to formulate specific rules to deal with offers of goods through Internet auctions and similar transactions, which in many legal systems had been regarded as binding offers to sell the goods to the highest bidder. It was felt that such a possibility was already covered by the phrase “unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance”.

172. The Working Group approved draft article 11 and referred it to the drafting group.

**Article 12. Use of automated information systems for contract formation**

173. The text of the draft article was as follows:

“A contract formed by the interaction of an automated information system and a person, or by the interaction of automated information systems, shall not be denied validity or enforceability on the sole ground that no person reviewed each of the individual actions carried out by the systems or the resulting contract.”

174. The Working Group approved draft article 12 and referred it to the drafting group.

**Article 13. Availability of contract terms**

175. The text of the draft article was as follows:

“[Variant A

“Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other contracting party those electronic communications that contain the contractual terms in a particular manner, or relieves a party from the legal consequences of its failure to do so.]

“[Variant B

“A party offering goods or services through an information system that is generally accessible to persons making use of information systems shall make the electronic communication or communications which contain the contract terms available to the other party [for a reasonable period of time] in a way that allows for its or their storage and reproduction.]”

176. The Working Group noted that variant A had been added pursuant to a request by the Working Group in view of the controversy around the draft article (see A/CN.9/546, paras. 130-135). The Working Group also noted that variant B, had been retained in square brackets, as there was no consensus on the need for the provision within the Working Group (see A/CN.9/509, paras. 123-125, and A/CN.9/546, paras. 130-135).

177. Some support was expressed for the deletion of draft article 13. It was stated that draft article 13 in either variant would impose on the Contracting Parties requirements more stringent than those applying in the paper world, without any reason for such differentiated treatment. It was also noted that the provision was not necessary since articles 14 and 19 of the United Nations Sales Convention would provide the necessary regulatory framework for the cases, of insufficient definition of the proposal and of subsequent alteration of the terms of the proposal respectively. It was further noted that the text in variant B echoed provisions aimed at consumer protection, which were clearly out of the scope of the draft convention.

178. However, there was also strong support for the adoption of variant B. It was argued that this text would encourage good business practice. It was also stated that the policy scope of the article of improving transparency of contractual terms and legal certainty would be achieved without imposing an excessive burden on the Contracting Parties. It was further noted that the provision would be equally beneficial for business-to-business and for business-to-consumer commerce. It was suggested that the rule should be expanded to cover also subsequent changes in contractual conditions.

179. The countervailing view was that the determination of the consequences for the breach of the rule was a matter falling under domestic law. It was also noted that the application of variant B of draft article 13 could lead to the non-enforceability of provisions expressly agreed by the parties.

180. The eventually prevailing view favoured the adoption of variant A. It was stated that such “safe harbour” provision would constitute a useful reminder of the applicable domestic and international rules while avoiding the creation of any substantive rule that would exceed the scope of the draft convention.

181. The Working Group approved the removal of square brackets from the text of variant A and the deletion of the text in square brackets of variant B and referred the text of draft article 13 to the drafting group.

#### **Article 14. Error in electronic communications**

182. The text of the draft article was as follows:

“[1. Where a person makes an error in an electronic communication exchanged with the automated information system of another party and the automated information system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the electronic communication in which the error was made if:

“[(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as practicable after having learned of the error and indicates that he or she made an error in the electronic communication;

“[(b) The person, or the party on whose behalf that person was acting, takes reasonable steps, including steps that conform to the other party’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 the goods or services; and

“[(c) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.]

“[2. Nothing in this article affects the application of any rule of law that may govern the consequences of any errors made during the [negotiation] [formation] or performance of the type of contract in question other than an error that occurs in the circumstances referred to in paragraph 1.]”

#### *General remarks*

183. The Working Group was reminded of its earlier discussions on the draft article (A/CN.9/509, paras. 104-111 and A/CN.9/548, paras. 14-26).

184. In the light of its earlier deliberations (see, in particular, A/CN.9/509, para. 108), the Working Group did not accept proposals to reformulate the article as a positive obligation to provide for a method for correcting errors prior to the dispatch of the communication. As at earlier meetings, it was felt that such a prescriptive provision was incompatible with the enabling nature of the draft convention. The Working Group affirmed its earlier decision that, if retained, the draft article should merely provide for consequences in the absence of means to correct input errors (A/CN.9/548, para. 19).

185. There were strong objections to the retention of the draft article, even in its current form, mainly for reasons that had already been expressed at earlier occasions:

(a) The draft convention should not deal with a complex substantive issue such as error and mistake, since that might interfere with well-established notions of contract law (A/CN.9/548, para 15; see also A/CN.9/509, para. 106);

(b) The draft article was more appropriate for consumer protection than for the practical requirements of commercial transactions, which would not be promoted by a provision that allowed the parties to later withdraw from their offers or bids on the basis

that they had been the result of a mistake (A/CN.9/548, para. 16; see also A/CN.9/509, para. 110);

(c) Provisions allowing the withdrawal of communication because of input errors would create serious difficulties for trial courts, since the only evidence of the error would be the assertion of the interested party that he or she made an error in the electronic communication.

186. Despite those objections, the prevailing view was in favour of retaining a provision along the lines of the article for the following main reasons:

(a) The draft article addressed a type of error specific to electronic commerce, in view of the relatively higher risk of human errors being made in communications exchanged with automated message systems (A/CN.9/509, para. 105; A/CN.9/548, para. 17);

(b) The draft article would provide a uniform rule much needed in view of the differing and possibly conflicting solutions that might be provided for under domestic laws;

(c) The draft article did not in any way aggravate the evidentiary difficulties that already existed in a paper-based environment, in which allegations of error had nevertheless to be carefully assessed by the courts in the light of all relevant circumstances, including the overall credibility of a party's assertions.

187. Having eventually decided to retain the draft article, the Working Group proceeded to consider its various elements.

*Paragraph 1: notion of error and time for withdrawal*

188. Concerns were expressed regarding the notion of error in the draft article essentially because:

(a) As presently drafted, the provision appeared to cover an excessively wide range of situations, not all of which were related to the use of electronic communications;

(b) The unqualified reference to "error" in the draft provision might encompass any type of error, including errors such as misunderstanding of the terms of a contract or simply poor business judgement; and

(c) The draft provision might be misused by parties acting in bad faith, who could withdraw a contractual offer or an acceptance if they were no longer interested in a transaction, merely by alleging that they had made a mistake.

189. In response, it was observed that the draft provision was intended to deal with input errors or single keystroke errors occurring in an electronic communication exchanged with an automated message system of another party. The right to withdrawal, it was said, was only given in that situation if the system did not allow for the correction of errors. That by itself was a considerable limitation to the specific scope of the draft article.

190. With a view to addressing the concerns that had been expressed, it was suggested that the word "input" should be used to qualify the notion of "error" in the draft article. It was argued that the qualification would better reflect the policy scope of the provision, which was to provide an instrument to redress errors relating to inputting wrong data in communications exchanged with an automated message system. It was added that such

wording would also make it clear that the draft article did not deal with other types of error, which should be left for the general doctrine of error under domestic law.

191. However, it was argued that, if that was the case, the draft article should also clearly provide that the right to withdraw the communication would apply only at the moment of reviewing the communication before dispatch, and that the party would not be able to withdraw its communications after confirmation of the communication. The countervailing view, which the Working Group eventually adopted, was that such a limitation was not appropriate. In practice, a party might only become aware that it had made an error at a later stage, for instance, when it received goods of a type or in a quantity different from what it had originally intended to order.

192. The Working Group agreed that, for purposes of clarity, the words “natural person” should be used in the draft article where appropriate.

*Paragraph 1: “withdrawal of communication” or “correction of error”*

193. There was support for the suggestion that the term “withdraw” should be replaced by the term “correct” since: (a) the term “correct” would describe better the process of correcting the communication vitiated by an input error; (b) by limiting the remedy to the correction of an input error, the proposed amendment would also limit the possibility for a party to allege an error as an excuse to withdraw from an unfavourable contract. Another proposal was to use the words “correct or withdraw”. That would cover both situations where correction was the appropriate remedy for the error (such as tipping the wrong quantity in an order) and situations where withdrawal would be a better remedy (such as when a person unintentionally hit a wrong key or an “I agree” button and sent a message he or she did not intend to send).

194. While there was support to those proposals, the prevailing view favoured using the word “withdraw” only since:

(a) The typical consequence of an error in most legal systems was to make it possible for the party in error to avoid the effect of the transaction resulting from its error, but not necessarily to restore the original intent and enter into a new transaction (see A/CN.9/548, para. 25);

(b) Withdrawal equated to nullification of a communication, while correction required the possibility to modify the previous communication. A provision mandating the right to correct would introduce additional costs for system providers and give remedies with no parallel in the paper world, a result which the Working Group had previously agreed to avoid; and

(c) The proposed amendment might cause practical difficulties, as operators of automated message systems might more readily provide an opportunity to nullify a communication already recorded than an opportunity to correct errors after a transaction was concluded.

*Paragraph 1: withdrawal “in whole or in part”*

195. The suggestion was made that the draft paragraph should provide for the possibility to withdraw only the part of the declaration where the error had been made, if the information system so allowed. It was stated that the proposal had the dual scope of granting to parties the possibility to redress errors in electronic communications, when no means of correcting errors were made available, and of preserving as much as possible the

effects of the contract, by correcting only the portion vitiated by the error, in line with the general principle of preservation of contracts. Such an addition, it was argued, would limit the right of withdrawal that would otherwise be unqualified also in case of minor errors.

196. The prevailing view, however, was not in favour of the proposed additions, since it was considered that the possibility to withdraw only the vitiated part of the communication was implicit, at least by way of interpretation, in the right to withdraw the entire communication. Moreover, it could be difficult to distinguish the erroneous portion of the communication from the rest.

*Paragraph 1 (a)*

197. It was suggested that the words “or the party on whose behalf that person was acting” should be deleted from paragraphs 1 (a), 1 (b) and 1 (c), since those words: (a) implied a reference to the law of agency or other similar doctrines, matters that were outside the scope of the draft convention; and (b) were in any event irrelevant for the qualification of the error as human error.

198. The countervailing view, which the Working Group adopted, was that the existing wording was useful, since it merely clarified that the person who made the error might not necessarily be the same party to whom the transaction would be attributed. Moreover, the Working Group had earlier agreed that the text should reflect the principle that in such cases the right to correct the mistake belonged to the party on whose behalf the individual inputting the data was acting (see A/CN.9/548, para. 22).

199. It was also noted that the words in question were too vague and could endanger legal certainty if a party were allowed to invoke an error after some time had passed since the dispatch of the communication. The expression should therefore be qualified by words such as “but not later than when the contract is actually concluded” or “prior to the confirmation of an order”. There was not sufficient support for those proposals, since the Working Group considered that instances might occur where the person remained unaware of the error until the delivery of the goods, and that in such a case a time limit for the withdrawal of the declaration would bar the remedy.

200. The Working Group accepted a drafting suggestion to replace the phrase “as soon as practicable” with the words “as soon as possible”.

*Paragraph 1 (b) and (c)*

201. There was strong support for deleting paragraphs 1 (b) and 1 (c), since they departed from the consequences of avoidance of contracts under some legal systems and created obstacles for the party in error to avoid the contract (see A/CN.9/548, para. 23). In substance, domestic law already provided a solution for the concerns that those provisions intended to address by principles such as the theory of unjust enrichment.

202. The prevailing view, however, was in favour of retaining those provisions, since (a) they offered a harmonized solution for the limited problem addressed in the draft article that was potentially more common in the use of electronic communications; and (b) dealing with that particular problem in the draft convention was preferable to leaving the matter to be addressed by notions that might vary under different legal systems.

203. Another argument for retaining those provisions was that they provided a useful remedy for cases in which the automated message system proceeded to deliver physical or virtual goods or services immediately upon conclusion of the contract, with no possibility

to stop the process. Paragraphs 1 (b) and 1 (c) provided a fair basis for the exercise of the right of withdrawal and would also tend to limit abuses by parties acting in bad faith.

#### *Paragraph 2*

204. It was suggested that the draft paragraph should be redrafted so as to clarify that it referred to rules of law relating not only to consequences of errors, but also to the conditions for invoking an error. The Working Group did not concur with that suggestion, as it felt that the draft paragraph, as currently drafted, covered both situations.

205. The Working Group decided to delete the word “negotiation” and retain only the word “formation”, removing the square brackets around it. The Working Group also decided to insert the word “input” between the words “other than an” and “error” in order to emphasize the limited scope of the draft article. Lastly, the Working Group decided to remove the square brackets around draft paragraph 2.

#### *Conclusion*

206. With the above-mentioned amendments, the Working Group approved the draft article and referred it to the drafting group. It was agreed that any explanatory notes or official commentary to the draft convention should explain the notion of “input error” and other basic concepts underlying the draft article.

## Annex

### **Draft Convention on the use of electronic communications in international contracts**

#### **CHAPTER I. SPHERE OF APPLICATION**

##### *Article 1. Scope of application*

1. This Convention applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States.

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 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 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*

1. This Convention does not apply to electronic communications relating to any of the following:

- (a) Contracts concluded for personal, family or household purposes;
- (b) (i) Transactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) the transfer of security rights in sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary.

2. This Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.

##### *Article 3. Party autonomy*

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.



## CHAPTER II. GENERAL PROVISIONS

### *Article 4. Definitions*

For the purposes of this Convention:

- (a) “Communication” means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract;
- (b) “Electronic communication” means any communication that the parties make by means of data messages;
- (c) “Data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;
- (d) “Originator” of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;
- (e) “Addressee” of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;
- (f) “Information system” means a system for generating, sending, receiving, storing or otherwise processing data messages;
- (g) “Automated message 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 person each time an action is initiated or a response is generated by the system;
- (h) “Place of business” means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.

### *Article 5. Interpretation*

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.

### *Article 6. Location of the parties*

1. For the purposes of this Convention, a party’s place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.

2. If a party has not indicated a place of business and has more than one place of business, then, subject to paragraph 1 of this article, the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the 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. A location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties.

5. The sole fact that a party 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 that country.

#### *Article 7. Information requirements*

Nothing in this Convention affects the application of any rule of law that may require the parties to disclose their identities, places of business or other information, or relieves a party from the legal consequences of making inaccurate or false statements in that regard.

### **CHAPTER III. USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS**

#### *Article 8. Legal recognition of electronic communications*

1. A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.

2. Nothing in this Convention requires a party to use or to accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.

#### *Article 9. Form requirements*

1. Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form.

2. Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

(a) A method is used to identify the party and to indicate that party's approval of the information contained in the electronic communication; and

(b) That method is as reliable as appropriate to the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement.

4. Where the law requires that a communication or a contract should be presented or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and

(b) Where it is required that the information it contains be presented, that information is capable of being displayed to the person to whom it is to be presented.

5. For the purposes of paragraph 4 (a):

(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and

(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

[6. Paragraphs 4 and 5 do not apply where a rule of law or the agreement between the parties requires a party to present certain original documents for the purpose of claiming payment under a letter of credit, a bank guarantee or a similar instrument.]

*Article 10. Time and place of dispatch and receipt of electronic communications*

1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.

2. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

3. An electronic communication 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 6.

4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.

*Article 11. Invitations to make offers*

A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

*Article 12. Use of automated message systems for contract formation*

A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed each of the individual actions carried out by the systems or the resulting contract.

*Article 13. Availability of contract terms*

Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other contracting party those electronic communications that contain the contractual terms in a particular manner, or relieves a party from the legal consequences of its failure to do so.

*Article 14. Error in electronic communications*

1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the electronic communication in which the input error was made if:

(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication;

(b) The person, or the party on whose behalf that person was acting, takes reasonable steps, including steps that conform to the other party'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 the goods or services; and

(c) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

2. Nothing in this article affects the application of any rule of law that may govern the consequences of any errors made during the formation or performance of the type of contract in question other than an input error that occurs in the circumstances referred to in paragraph 1.

## CHAPTER IV. FINAL PROVISIONS

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### *Article 18. Declarations on the scope of application*

1. Any State may declare, in accordance with article 20, that it will apply this Convention only:

(a) When the States referred to in article 1, paragraph 1, are Contracting States to this Convention;

(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. Any State may exclude from the scope of application of this Convention the matters it specifies in a declaration made in accordance with article 20.

### *Article 19. Communications exchanged under other international conventions*

1. The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract or agreement to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);

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, 19 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).

2. The provisions of this Convention apply further to electronic communications in connection with the formation or performance of a contract or agreement to which another international convention, treaty or agreement not specifically referred to in paragraph 1 of this article, and to which a Contracting State to this Convention is or may become a Contracting State, applies, unless the State has declared, in accordance with article 20, that it will not be bound by this paragraph.

3. A State that makes a declaration pursuant to paragraph 2 of this article may also declare that it will nevertheless apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of any contract or agreement to which a specified international convention, treaty or agreement applies to which the State is or may become a Contracting State.

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4. Any State may declare that it will not apply provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract or agreement to which any international convention, treaty or agreement specified in that State's declaration, to which the State is or may become a Contracting State, applies, including any of the conventions referred to in paragraph 1 of this article, even if such State has not excluded the application of paragraph 2 of this article by a declaration made in accordance with article 20.

**B. Note by the Secretariat on legal aspects of electronic commerce -  
Electronic contracting: Provisions for a draft convention,  
submitted to the Working Group on  
Electronic Commerce at its forty-fourth session  
(A/CN.9/WG.IV/WP.110) [Original: English]**

The Working Group began its deliberations on electronic contracting at its thirty-ninth session (New York, 11-15 March 2002). The deliberations of the Working Group since that time are summarized in the provisional agenda for its forty-fourth session (A/CN.9/WG.IV/WP.109). The annex to the present note contains the newly revised version of the draft convention, which reflects the deliberations and decisions of the Working Group at its previous sessions.

**ANNEX<sup>1</sup>**

**DRAFT CONVENTION<sup>2</sup> ON THE USE OF  
ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS**

*The States Parties to this Convention,<sup>3</sup>*

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

*Noting* that the increased use of electronic communication improves the efficiency of commercial activities, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

*Considering* that problems created by uncertainty as to the legal value of the use of electronic communications in international contracts constitute an obstacle to international trade,

*Convinced* that the adoption of uniform rules to remove obstacles to the use of electronic communications would enhance legal certainty and commercial predictability for international contracts and may help States gain access to modern trade routes,

*Being of the opinion* that uniform rules should respect the freedom of parties to choose appropriate media and technologies, taking account of their interchangeability, to the

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<sup>1</sup> The numbers in square brackets after the article numbers indicate the corresponding numbers in the previous version of the draft convention (A/CN.9/WG.IV/WP.108, annex).

<sup>2</sup> The form of a convention has been chosen as a working assumption (see A/CN.9/484, para. 124), pending a final decision by the Working Group as to the nature of the instrument.

<sup>3</sup> The provisions of the preamble are new. The first and third paragraphs are based on the first and second paragraphs of the preamble to the United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001). The fourth paragraph is partly based on the fourth paragraph of the UNCITRAL Model Law on Electronic Commerce. The fifth paragraph reflects a proposal that was made at the Working Group's forty-third session (A/CN.9/548, para. 82).

extent that the means chosen by the parties comply with the purpose of the relevant rules of law,

*Desiring* to provide a common solution for legal obstacles to the use of electronic communications, including obstacles that might result from the operation of existing international trade law instruments, in a manner acceptable to States with different legal, social and economic systems,

*Have agreed as follows:*

## CHAPTER I. SPHERE OF APPLICATION

### *Article 1. Scope of application*

1. This Convention applies to the use of electronic communications<sup>4</sup> in connection with the [negotiation] [formation]<sup>5</sup> or performance of a contract between parties whose places of business are in different States:

(a) When the States are Contracting States;<sup>6</sup>

(b) When the rules of private international law lead to the application of the law of a Contracting State;<sup>7</sup> or

<sup>4</sup> The expression “electronic communications” has been introduced throughout the text to align the terminology used in various provisions (A/CN.548, para. 85) and to avoid the repetition of lengthy phrases such as “communications, declarations, demands, notices or requests, by means of data messages”. Definitions of “communications” and “electronic communications” have been added in draft article 4, subparagraphs (a) and (b).

<sup>5</sup> At its forty-third session, the Working Group requested the Secretariat to offer alternative language to the expression “existing or contemplated contract”, which was contained in the previous version of the draft article (see A/CN.9/WG.IV/WP.108, annex), to avoid the impression that the draft article referred to contracts already in existence at the time the Convention entered into force (A/CN.9/548, para. 84).

<sup>6</sup> Draft article 18 [X], paragraph 2, allows Contracting States to exclude the application of this paragraph. For transactions subject to the laws of a State that has made such a declaration, the provisions of the draft convention would apply to electronic communications exchanged between parties whose places of business are in different States, even if those States are not both parties to the convention. The Working Group may wish to consider whether or not such a possibility should instead become the general rule for determining the application of the Convention under draft article 1, as was suggested at the Working Group’s forty-third session (see A/CN.9/548, para. 86). In such a case, paragraphs 1 (a) and 1 (b) might become redundant. For those States in which such a broader scope of application might create difficulties, draft article 18 [X] might contemplate a reverse exclusion, namely, that a State might declare that it would apply the Convention only if both parties were located in Contracting States.

<sup>7</sup> This paragraph reproduces a rule that is contained in other UNCITRAL instruments. The Working Group has found the provision useful to allow for an expanded geographic scope of application for the draft convention, since it does not require that the States where the parties to the contract were located should both be Contracting States of the Convention. While there had been objections to that rule already at earlier sessions (see A/CN.9/509, para. 38), the Working Group has thus far agreed to retain paragraph 1 (b) (see A/CN.9/528, para. 42 and A/CN.9/548, paras. 91-92). For those States that might have difficulties applying paragraph 1 (b), it would be possible to exclude its application by virtue of a declaration under draft article 18 [X], paragraph 3. Such a declaration would result in the Convention being not applicable if the rules of private international law of a Contracting State would lead to the application of the law of the State having made such a declaration of exclusion.



(c) When the parties have agreed that it applies.<sup>8</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 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 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.

[Variant A<sup>9</sup>

4. Without prejudice to article 19 [Y], the provisions of this Convention do not apply to electronic communications relating to the [negotiation] [formation] or performance of a contract which is governed by an international convention, treaty or agreement which is not referred to in paragraph 1 of article 19 [Y], or has not been the subject of a declaration made by a Contracting State under paragraph 2 of article 19 [Y].<sup>10</sup>

[Variant B

4. The provisions of this Convention apply further to electronic communications in connection with the [negotiation] [formation] or performance of a contract that is governed by an international convention, treaty or agreement, even if such international convention, treaty or agreement is not specifically referred to in paragraph 1 of article 19 [Y], unless the Contracting State has excluded this provision by way of a declaration made in accordance with paragraph 3 of article 18 [X].<sup>11</sup>

<sup>8</sup> This possibility is provided, for instance, in article 1, paragraph 2 (e), of the United Nations Convention on the Carriage of Goods by Sea and in article 1, paragraph 2, of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. The Working Group may wish to consider whether it should be possible for Contracting States to exclude this provision by a declaration made pursuant to draft article 18 [X].

<sup>9</sup> Both variants A and B are intended to clarify the relationship between draft articles 1 and 19 [Y].

<sup>10</sup> Variant A reflects the understanding that draft articles 1 and 19 [Y] distinguish between three groups of international contracts. The first group comprises international contracts that are not covered by any existing uniform law convention. The second group comprises contracts falling under existing international conventions other than those listed in draft article 19 [Y], paragraph 1, or expressly mentioned by a Contracting State in a declaration made under paragraph 2 of that article. The last group comprises contracts governed by any of the conventions listed in paragraph 1, or mentioned in a declaration made under paragraph 2, of draft article 19 [Y]. The first group of contracts would fall under the scope of application of the draft convention if they meet the conditions of draft article 1. The third group of contracts would also benefit from the provisions of the draft convention in accordance with draft article 19 [Y], paragraphs 1 and 2. However, electronic communications exchanged in connection with contracts belonging to the second group would not be covered by the draft convention (A/CN.9/548, para. 43).

<sup>11</sup> This variant is intended to widen the scope of application of the draft convention by making it clear that its provisions might also apply to the exchange of electronic communications covered by other treaties beyond those specifically listed in draft article 19 [Y], paragraph 1. The variant reflects the view that the list of instruments in draft article 19 [Y], paragraph 1, or any declaration made under paragraph 2 of that article, should be regarded as non-exhaustive

*Article 2. Exclusions*

1. This Convention does not apply to electronic communications relating to contracts concluded for personal, family or household purposes.<sup>12</sup>

[2. This Convention does not apply to electronic communications that relate to any of the following:<sup>13</sup>

[(a) (i) Transactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) the transfer of security rights in, sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary;

[(b) Contracts that create or transfer rights in immovable property, except for rental rights;

[(c) Contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;

[(d) Contracts of suretyship granted by, and on collateral securities furnished by, persons acting for purposes outside their trade, business or profession;

[(e) Contracts governed by family law or by the law of succession;

[(f) Bills of exchange, promissory notes and other negotiable instruments;

[(g) Documents relating to the carriage of goods;

*[Other exclusions that the Working Group may decide to add.]*

*Article 3 [4]. Party autonomy*

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions [either by an explicit exclusion or impliedly, through contractual terms that vary from its provisions].<sup>14</sup>

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clarifications intended to remove doubts as to the application of the draft convention, but not as effective limitations to its reach (see A/CN.9/548, para. 75). If this variant is retained, the Working Group may wish to retain paragraph 4 of draft article 18 [X], which offers the Contracting States the possibility of excluding the application of this provision.

<sup>12</sup> The last version of this paragraph contained, within square brackets, the words “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”. The Working Group, at its forty-third session, agreed, after extensive debate, to delete those words, since it preferred that the exclusion of consumer transactions should not be conditional upon the actual or presumed knowledge of one of the parties (see A/CN.9/548, paras. 99-105 and 111-114).

<sup>13</sup> Paragraphs 2 (a) to (g) reflect proposals that were made at previous sessions of the Working Group (see A/CN.9/548, paras. 108-109). The wording in paragraph 1 (a) is based on the formulation used for the corresponding exclusions in article 4, paragraph 2, of the United Nations Convention on the Assignment of Receivables in International Trade.

<sup>14</sup> The words in square brackets reflect a proposal that was made at the Working Group’s forty-third session (see A/CN.9/548, para. 122).

## CHAPTER II. GENERAL PROVISIONS

*Article 4 [5]. Definitions<sup>15</sup>*

For the purposes of this Convention:

[(a) “Communication” means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the [negotiation] [formation] or performance of a contract;<sup>16</sup>

[(b) “Electronic communication” means any communication that the parties make by means of data messages;]<sup>17</sup>

(c) “Data message” means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI),<sup>18</sup> electronic mail, telegram, telex or telecopy;

(d) “Originator” of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;<sup>19</sup>

(e) “Addressee” of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;

<sup>15</sup> The definitions contained in subparagraphs (c) to (f) are derived from article 2 of the UNCITRAL Model Law on Electronic Commerce. The definition of “electronic signature”, which appeared in the previous version of the draft convention, has been deleted since the term “electronic signature” is no longer used in draft article 9.

<sup>16</sup> This definition is new. It is intended to simplify the text and avoid the repetition elsewhere in the draft convention of the various purposes for which electronic communications are exchanged (“declaration, demand, notice, request, including offer and acceptance of an offer”).

<sup>17</sup> This definition, too, is new. Several domestic enactments of the UNCITRAL Model Law on Electronic Commerce have preferred to use plain words such as “electronic communications” or “electronic records” in lieu of the more technical expression “data messages”. The revised draft uses the term “electronic communication” (which is used, for example, in Australia and Ireland), rather than “electronic record” (which is used, for example, in the United States of America), because of the difficulty of finding an adequate equivalent to the latter term in some languages. The definition establishes a link between the purposes for which data messages may be used and the notion of “data messages”, which it is important to retain since it encompasses a wide range of techniques beyond purely “electronic” techniques.

<sup>18</sup> The previous versions of the draft convention contained a definition of “electronic data interchange (EDI)”, which was based on the corresponding definition in article 2, subparagraph (b) of the UNCITRAL Model Law on Electronic Commerce. The Working Group may wish to consider whether such a definition, which has been deleted from the current text, would be necessary, in view of the fact that the only reference to EDI in the draft convention is in the definition of “data messages”.

<sup>19</sup> The wording of this definition is taken from article 2, subparagraph (c), of the UNCITRAL Model Law on Electronic Commerce. The words “purports to have been sent”, which appeared in earlier versions of the draft convention, have been replaced with the words “has been sent”.

(f) “Information system” means a system for generating, sending, receiving, storing or otherwise processing data messages;<sup>20</sup>

(g) “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 person each time an action is initiated or a response is generated by the system;<sup>21</sup>

[(h) “Place of business”<sup>22</sup> means [any place of operations where a party carries out a non-transitory activity with human means and goods or services;]<sup>23</sup> [the place where a party maintains a stable establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location;]<sup>24</sup>]

[(i) “Person” means natural persons only, whereas “party” includes both natural persons and legal entities;]<sup>25</sup>

*[Other definitions that the Working Group may wish to add.]*

#### *Article 5 [6]. Interpretation*

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.

<sup>20</sup> The Working Group may wish to consider whether this definition needs further clarification, in view of the questions that have been raised in connection with paragraph 2 of the former article 11 (currently article 10) (see A/CN.9/528, paras. 148 and 149, and A/CN.9/546, paras. 59-80).

<sup>21</sup> This definition is based on the definition of “electronic agent” contained in section 2, paragraph 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 contents of draft article 14.

<sup>22</sup> The proposed definition appears within square brackets since the Commission has not thus far defined “place of business” (see A/CN.9/527, paras. 120-122). At the thirty-ninth session of the Working Group, it was suggested that the rules on the location of the parties should be expanded to include elements such as the place of an entity’s organization or incorporation (see 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 location of the parties by expanding the definition of place of business (see 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 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 actual 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>23</sup> This alternative 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>24</sup> This alternative follows the understanding of the concept of “place of business” in the European Union (see para. 19 of the preamble to Directive 2000/31/EC of the European Union).

<sup>25</sup> This definition has been amended so as to clarify the meaning of these terms, which are not synonymous, for instance, in the context of draft article 14.

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>26</sup>

*Article 6 [7]. Location of the parties*

1. For the purposes of this Convention, a party's place of business is presumed to be the location indicated by that party [, unless the party does not have a place of business at such location [[and] such indication is made solely to trigger or avoid the application of this Convention]].<sup>27</sup>

2. If a party [has not indicated a place of business or]<sup>28</sup> has more than one place of business, then, subject to paragraph 1 of this article, the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

3. If a party 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 party in connection with the formation of a contract or the place from which the information system may be accessed by other parties, in and of themselves, do not constitute a place of business [, unless such party is a legal entity that does not have a place of business [within the meaning of article 4 (h)]].<sup>29</sup>

<sup>26</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 (see A/CN.9/527, paras. 125 and 126).

<sup>27</sup> The draft paragraph is not intended to create a new concept of "place of business" for the online world. The phrase in square brackets aims to prevent a party from benefiting from recklessly inaccurate or untruthful representations (see A/CN.9/509, para. 49), but not to limit the parties' ability to choose the Convention or otherwise agree on the applicable law. The two variants previously contained in the draft paragraph have been combined (see A/CN.9/528, paras. 87-91). The words "manifest and clear" which the Working Group found to be conducive to legal uncertainty (see A/CN.9/528, para. 86), have been deleted.

<sup>28</sup> It has been suggested to the Secretariat that the presumption contemplated in the draft article could also apply in the event that a party does not indicate its place of business. This suggestion has been inserted in square brackets, since the presumption contemplated in the draft article has been used in other UNCITRAL instruments only in connection with multiple places of business.

<sup>29</sup> The draft paragraph reflects the principle that rules on location should not 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 (see 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 (see also the overview of issues related to the location of information systems in A/CN.9/WG.IV/WP.104, paras. 9-17). The phrase within square brackets is only intended to deal with so-called "virtual companies" and not with natural persons, who are covered by the rule contained in draft paragraph 3. Should the Working Group discard the possibility contemplated in the phrase in square brackets and prefer instead to make it clear that the location of the equipment and technology supporting an information system is never a relevant criterion, the Working Group may wish to rephrase the

5. The sole fact that a party 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 that country.<sup>30</sup>

*Article 7 [7 bis]. Information requirements*

Nothing in this Convention affects the application of any rule of law that may require the parties to disclose their identities, places of business or other information, or relieves a party from the legal consequences of making inaccurate or false statements in that regard.

**CHAPTER III. USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS**

*Article 8. Legal recognition of electronic communications*

1. A contract or other communication shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.

[2. Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.]<sup>31</sup>

*Article 9. Form requirements*

[1. Nothing in this Convention requires a contract or any other communication to be made or evidenced in any particular form.]<sup>32</sup>

2. Where the law requires that a contract or any other communication should be in writing, or provides consequences for the absence of a writing, that requirement is met

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draft paragraph to read along the following lines: "A location is not a place of business merely because that is where: (a) equipment and technology supporting an information system used by a person in connection with the formation of a contract is located; or (b) such information system may be accessed by other persons."

<sup>30</sup> Since the current system for assignment of domain names was not originally conceived in geographical terms, the Working Group held that the apparent connection between a domain name and a country was insufficient to support a presumption that there was a genuine and permanent link between the domain name user and the country (see A/CN.9/509, paras. 44-46; see also A/CN.9/WG.IV/WP.104, paras. 18-20). However, in some countries the assignment of domain names is only made after verification of the accuracy of the information provided by the applicant, including its location in the country to which the relevant domain name relates. 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 is suggested in the draft paragraph (see 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>31</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 do not want to do so (see A/CN.9/527, para. 108). However, since the provision is not intended to require that the parties should always agree beforehand on the use of data messages, the second phrase provides that a party's agreement to transact electronically may be inferred from its conduct. The reference to "consent" has been replaced with the phrase "a person's agreement to use or accept information in the form of data messages" so as to avoid the erroneous impression that the draft paragraph refers to consent to the underlying transaction (see A/CN.9/546, para. 43).

<sup>32</sup> This provision incorporates the general principle of freedom of form contained in article 11 of the United Nations Sales Convention, in the manner suggested at the forty-second session of the Working Group (see A/CN.9/546, para. 49).

by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.<sup>33</sup>

3. Where the law requires that a contract or any other communication should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

(a) A method is used to identify the party and to indicate that party's approval of the information contained in the electronic communication; and

(b) That method is as reliable as appropriate to the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement.<sup>34</sup>

[4. Where the law requires that a contract or any other communication should be presented or retained in its original form,<sup>35</sup> or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

[(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and

[(b) Where it is required that the information it contains be presented, that information is capable of being displayed to the person to whom it is to be presented.

[5. For the purposes of paragraph 4 (a):

[(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and

[(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.]

<sup>33</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>34</sup> The draft paragraph 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>35</sup> Earlier versions of the draft convention did not contain provisions dealing with electronic equivalents of "original" paper-based documents. The reason for the absence of such a provision was that the draft convention was essentially concerned with matters of contract formation, and not with rules of evidence. A provision on "originals" might however become necessary if draft article 19 [Y] were to make the provisions of the draft convention applicable to arbitration agreements governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the 1958 New York Convention"). This matter will be submitted to the consideration of Working Group II (Arbitration) at its forty-second session (Vienna, 13-17 September 2004). The Secretariat will inform Working Group IV (Electronic Commerce) of the recommendations made by Working Group II (Arbitration) on this matter (see also footnote 55).

*Article 10. Time and place of dispatch and receipt of electronic communications*<sup>36</sup>

1. The time of dispatch of an electronic communication is the time when the electronic communication [enters an information system outside the control of the originator or of the party who sent the data message on behalf of the originator] [leaves an information system under the control of the originator or of the party who sent the data message on behalf of the originator],<sup>37</sup> or, if the electronic communication message has not [entered an information system outside the control of the originator or of the party who sent the data message on behalf of the originator] [left an information system under the control of the originator or of the party who sent the data message on behalf of the originator], at the time when the electronic communication is received.

2. The time of receipt of an electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee or by any other party named by the addressee. An electronic communication is presumed to be capable of being retrieved by the addressee when the electronic communication enters an information system of the addressee unless it was unreasonable for the originator to have chosen that information system for sending the electronic communication, having regard to the content of the electronic communication and the circumstances of the case [, including any designation by the addressee of a particular information system for the purpose of receiving electronic communications.]

3. An electronic communication 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.

4. Paragraph 2 of this article applies notwithstanding that the place where the information system is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.

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<sup>36</sup> Earlier versions of the draft article followed more closely the formulation of 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. The current formulation reflects the deliberations of the Working Group at its forty-second session (see A/CN.9/546, paras. 59-86). The Working Group may wish to review the new formulation, in particular draft paragraph 2, with a view to ensuring that it is consistent in result with article 15 of the Model Law.

<sup>37</sup> The Working Group may wish to consider whether the rule in the first set of square brackets is indeed appropriate in view of the fact that the originator is more likely to have a record of when a data message leaves an information system than to have a record of when the message enters some intermediate information system. The phrase in the second set of square brackets takes that factual situation into account.



*Article 11. Invitations to make offers*<sup>38</sup>

A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications<sup>39</sup> for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

*Article 12. Use of automated information systems for contract formation*<sup>40</sup>

A contract formed by the interaction of an automated information system and a person, or by the interaction of automated information systems, shall not be denied validity or enforceability on the sole ground that no person reviewed each of the individual actions carried out by the systems or the resulting contract.

*[Article 13. Availability of contract terms]*

[Variant A<sup>41</sup>

Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other contracting party those electronic communications that contain the contractual terms in a

<sup>38</sup> This provision deals with an issue that has given rise to extensive debate. At the forty-first session of the Working Group, it was noted that “there was currently no standard business practice in that area” (see A/CN.9/528, para. 117). The current text is inspired by article 14, paragraph 1, of the United Nations Sales Convention and affirms the principle that proposals to conclude a contract that are addressed to an unlimited number of persons are not binding offers, even if they involve the use of interactive applications. The Working Group may wish to consider, however, whether specific rules should be formulated to deal with offers of goods through Internet auctions and similar transactions, which in many legal systems have been regarded as binding offers to sell the goods to the highest bidder.

<sup>39</sup> At its forty-second session, the Working Group noted that the expression “automated information system”, which had been used in earlier versions of the draft article, did not offer meaningful guidance since the party that placed an order might have no means of knowing how the order would be processed and to what extent the information system was automated. The notion of “interactive applications”, in turn, was considered to be an objective term that better described a situation apparent to any person accessing the system, namely, that it was prompted to exchange information through that system by means of immediate actions and responses having an appearance of automaticity. It was noted that the term was not a legal term but rather a term of art highlighting that the provision focused on what was apparent to the party activating the system rather than on how the system functioned internally. On that basis, the Working Group agreed that the term “interactive applications” could be retained (see A/CN.9/546, para. 114).

<sup>40</sup> This article has been redrafted as a non-discrimination rule, as requested by the Working Group at its forty-second session (see A/CN.9/546, paras. 128 and 129). At that time, it was suggested that the Working Group might wish to consider adding a general provision on attribution of data messages, including attribution of data messages exchanged by automated information systems (see A/CN.9/546, paras. 85, 86 and 125-127).

<sup>41</sup> This variant has been added pursuant to a request by the Working Group in view of the controversy around the draft article (see A/CN.9/546, paras. 130-135). If this variant alone is retained, the Working Group may wish to consider placing the draft article in chapter I or II of the draft convention.

particular manner, or relieves a party from the legal consequences of its failure to do so.]

[Variant B<sup>42</sup>

A party offering goods or services through an information system that is generally accessible to persons making use of information systems<sup>43</sup> shall make the electronic communication or communications which contain the contract terms<sup>44</sup> available to the other party [for a reasonable period of time] in a way that allows for its or their storage and reproduction.]

*[Article 14. Error in electronic communications<sup>45</sup>*

[1. Where a person makes an error in an electronic communication exchanged with the automated information system of another party and the automated information system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the electronic communication in which the error was made if:

[(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as practicable after having learned of the error and indicates that he or she made an error in the electronic communication;

[(b) The person, or the party on whose behalf that person was acting, takes reasonable steps, including steps that conform to the other party'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 the goods or services; and

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<sup>42</sup> This variant, 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 (see A/CN.9/509, paras. 123-125, and A/CN.9/546, paras. 130-135). If the provision is retained, the Working Group may wish to consider whether the draft article should provide consequences for the failure by a party to make available the contract terms and what consequences would be appropriate. In some legal systems the consequences might be that a contractual term that has not been made available to the other party cannot be enforced against it.

<sup>43</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>44</sup> The words "and general conditions" have been deleted as they appeared to be redundant. The Working Group may, however, wish to consider whether the provision should be made more explicit as to the version of the contract terms that needs to be retained.

<sup>45</sup> This draft paragraph deals with the issue of errors in automated transactions (see A/CN.9/WG.IV/WP.95, paras. 74-79). Earlier versions of the draft article contained, in paragraph 1 of variant A, a rule based on article 11, paragraph 2, of Directive 2000/31/EC of the European Union, which creates an obligation for persons offering goods or services through automated information systems to offer means for correcting input errors, and required such means to be "appropriate, effective and accessible". The draft article was the subject of essentially two types of objections: one objection was that the draft convention should not deal with a complex substantive issue such as error and mistake, a matter on which the Working Group has not yet reached a final decision; another objection was that the obligations contemplated in article 14, paragraph 2, of the first version of the draft convention (as contained in A/CN.9/WG.IV/WP.95) were regarded as being of a regulatory or public law nature (see A/CN.9/509, para. 108). The Working Group may wish to consider whether the latter objection could be addressed by deleting the reference to an obligation to provide means for correcting errors and by contemplating only private law consequences for the absence of such means.

[(c) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.]<sup>46</sup>

[2. Nothing in this article affects the application of any rule of law that may govern the consequences of any errors made during the [negotiation] [formation] or performance of the type of contract in question other than an error that occurs in the circumstances referred to in paragraph 1.]

[Other substantive provisions that the Working Group may wish to include.]<sup>47</sup>

#### CHAPTER IV. FINAL PROVISIONS<sup>48</sup>

##### *Article 15. Depositary*

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

##### *Article 16. Signature, ratification, acceptance or approval*

1. This Convention is open for signature by all States [at [...] from [...] to [...] and thereafter] at the United Nations Headquarters in New York from [...] to [...].

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

##### *Article 17. Effect in domestic territorial units*

1. If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or

<sup>46</sup> Paragraphs 1 (b) and 1 (c) appear within square brackets since it was suggested, at the thirty-ninth session of the Working Group, 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. However, the prevailing view was that a provision offering a harmonized solution for dealing with the consequences of errors in electronic commerce transactions had great practical importance and was needed in the draft convention (see A/CN.9/509, para. 110).

<sup>47</sup> Such additional provisions might include the consequences for a person's failure to comply with draft articles 11, 15 and 16, an issue that the Working Group has not yet considered (see A/CN.9/527, para. 103), and other issues that the Working Group may wish to include.

<sup>48</sup> Except for draft articles 18 [X] and 19 [Y], all provisions in this chapter are new. They are based on corresponding provisions in other international conventions prepared by UNCITRAL and follow the advice and practice set out in the Handbook *Final Clauses of Multilateral Treaties* (United Nations publication, Sales No. E.04.V.3), prepared in 2003 by the Treaty Section of the United Nations Office of Legal Affairs (also available to subscribers of the United Nations Treaty Collection databases at <http://untreaty.un.org/English/FinalClauses/Handbook.pdf>).

accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

*Article 18 [X]. Reservations and declarations<sup>49</sup>*

1. No reservations are permitted except those expressly authorized in this article.

2. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by paragraph 1 (a) of article 1 of this Convention.<sup>50</sup>

3. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by paragraph 1 (b) of article 1 of this Convention.<sup>51</sup>

4. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by paragraph 4 of article 1 of this Convention.<sup>52</sup>

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<sup>49</sup> The Working Group has not yet concluded its deliberations on possible exclusions to the preliminary draft convention under draft article 2 (see A/CN.9/527, paras. 83-98). The draft article has been added as a possible alternative, in the event that consensus is not achieved on possible exclusions to the preliminary draft convention.

<sup>50</sup> The intended effect of such a declaration would be that for transactions subject to the laws of the relevant State, the provisions of the draft convention would apply to exchanges of data messages in connection with the formation or performance of contracts between parties whose places of business are in different States, even if only one of those States is a party to the Convention.

<sup>51</sup> At its forty-first session, the Working Group agreed to consider, at a later stage, a provision allowing Contracting States to exclude the application of paragraph 1 (b) of article 1, along the lines of article 95 of the United Nations Sales Convention (see A/CN.9/528, para. 42).

<sup>52</sup> This provision has been included to reflect a proposal made at the forty-third session of the Working Group (see A/CN.9/548, para. 78). It is logically related to variant B of draft article 1, paragraph 4, and would become superfluous if the Working Group were to retain variant A of draft article 1, paragraph 4.

[5. Any State may declare in writing at any time<sup>53</sup> that it will not apply this Convention to the matters specified in its declaration.]<sup>54</sup>

6. A State making a reservation in writing under paragraphs 2, 3 and 4 of this article shall not be bound by the matters specified in such reservation.

*Article 19 [Y]. Communications exchanged under other international conventions<sup>55</sup>*

1. Except as otherwise stated in a declaration made in accordance with paragraph 3 of this article, [each Contracting State declares<sup>56</sup> that it shall apply the provisions of this Convention] [the provisions of this Convention<sup>57</sup> shall apply] to the use of electronic communications in connection with the [negotiation] [formation] or performance of a contract [or agreement]<sup>58</sup> to which any of the following international conventions, to which the State is or may become a Contracting State, apply:

[Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)]<sup>59</sup>

<sup>53</sup> At its forty-third session, the Working Group agreed to use the words “at any time” in this paragraph (see A/CN.9/548, paras. 32-33). The Working Group may wish to consider whether it would be appropriate to use the same formulation in paragraphs 2, 3 and 4 of this draft article.

<sup>54</sup> This provision appears in square brackets, pending a decision by the Working Group as to whether the possibility of unilateral exclusions should be retained even if the Working Group were to agree on a common list of exclusions under draft article 2.

<sup>55</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 (see A/CN.9/WG.IV/WP.94). At the fortieth session of the Working Group, 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 paragraph 1 (see A/CN.9/527, paras. 33-48). This article is intended to remove doubts as to the relationship between the rules contained in the draft convention and rules contained in other international conventions. It is not the purpose of the draft article to amend any other international convention. In practice, the draft article would have the effect of an undertaking by each of the Contracting States to use the provisions of the draft convention to remove possible legal obstacles to electronic commerce that might arise from the interpretation of those conventions and to facilitate their application in cases where the parties conduct their transactions through electronic means.

<sup>56</sup> The obligation assumed by each Contracting State under this article is intended to be automatically effective upon ratification, acceptance, approval or accession and does not require a separate declaration by the Contracting State (see A/CN.9/548, para. 52).

<sup>57</sup> The last version of the draft article specifically referred to draft article 6 [7] and to the substantive provisions of the draft convention contained in chapter III. That cross reference was intended to avoid the impression that the provisions on the scope of application of the draft convention would affect the definition of the scope of application of other international conventions. The cross references have been deleted since the Working Group, at its forty-third session, felt that the cross reference was not necessary (A/CN.9/548, paras. 53-54).

<sup>58</sup> The words “or agreement” have been included in square brackets in the event that the Working Group decides to include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the 1958 New York Convention”) in the list in paragraph 1, since the 1958 New York Convention uses the expression “arbitration agreement”.

<sup>59</sup> It has been suggested to the Secretariat that the use of electronic communications to conclude international arbitration agreements might benefit from a provision that expressly recognizes their validity for the purposes of the 1958 New York Convention. Reference to this Convention appears within square brackets, however, because neither Working Group II (Arbitration) nor Working Group IV (Electronic Commerce) have yet had an opportunity to consider this matter.

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, 19 April 1991)<sup>60</sup>

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).

2. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will also apply this Convention to the exchange by means of data messages of any communications, declarations, demands, notices or requests under any other international agreement or convention [on commercial law matters][pertaining to international trade] to which the State is a Contracting State [and which are identified in that State's declaration].<sup>61</sup>

3. Any State may declare in writing at any time that it will not apply this Convention<sup>62</sup> to international contracts falling within the scope of [any of the conventions referred to in paragraph 1 of this article][any international agreements, treaties or conventions, including any of the conventions referred to in paragraph 1 of this article, to which the State is a Contracting Party and which are identified in that State's declaration].<sup>63</sup>

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If the reference is maintained, it may be necessary to include a provision on electronic equivalents of "original" documents, since article IV, paragraph (1) (b) of the 1958 New York Convention requires that the party seeking recognition and enforcement of a foreign arbitral award must submit, *inter alia*, an original or a duly authenticated copy of the arbitration agreement (see also new paras. 4 and 5 of draft article 9 and footnote 35 above).

<sup>60</sup> Neither this Convention nor the Convention on the Assignment of Receivables in International Trade has yet entered into force. Reference in a subsequent international convention to an earlier instrument not yet in force, or subsequent provisions to adjust or interpret the text of an earlier instrument not yet in force, are not contrary to international treaty practice and have been used in the past. For example, at the time of the adoption of the United Nations Convention on Contracts for the International Sale of Goods ("the United Nations Sales Convention"), in 1980, the 1974 Convention on the Limitation Period in the International Sale of Goods ("the Limitations Convention") had not yet entered into force. Nevertheless, the diplomatic conference that adopted the United Nations Sales Convention also adopted a Protocol amending the Limitations Convention. Both the Limitations Convention (in its original form) and the 1980 Protocol (for those Contracting States that had ratified the United Nations Sales Convention) entered into force on 1 August 1988.

<sup>61</sup> Paragraph 1 is intended to make it clear that the provisions of the draft convention apply also to messages exchanged under any of the international conventions referred to therein. Paragraph 2 contemplates the possibility 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.

<sup>62</sup> The words "or any specific provision thereof", which were contained in the last version of the draft paragraph have been deleted, since the Working Group was of the view that a State choosing to adopt the draft convention should not be permitted to apply only some but not all of its provisions (A/CN.9/548, para. 63).

<sup>63</sup> The second set of words in square brackets has been included pursuant to suggestions made at

*Article 20. Procedure and effects of reservations and declarations*

1. Reservations and declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.
2. Reservations and declarations and their confirmations are to be in writing and be formally notified to the depositary.
3. A reservation or declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a reservation or declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.
4. Any State which makes a reservation or declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

*Article 21. Amendments*

1. Any Contracting State may propose amendments to this Convention. Proposed amendments shall be submitted in writing to the Secretary-General of the United Nations, who shall circulate the proposal to all States Parties, with the request that they indicate whether they favour a conference of States Parties. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Proposals for amendment shall be circulated to the Contracting States at least ninety days in advance of the conference.
2. Amendments to this Convention shall be adopted by [two thirds] [a majority of] the Contracting States present and voting at the conference of Contracting States and shall enter into force for all Contracting States on the first day of the month following the expiration of six months after the date on which [two thirds] of the Contracting States as of the time of the adoption of the amendment at the conference of the Contracting States have deposited their instruments of acceptance of the amendment.

*Article 22. Entry into force*

1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the [...] instrument of ratification, acceptance, approval or accession.
2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the [...] instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following

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the Working Group's forty-third session (A/CN.9/548, para. 67). They give the Contracting States the possibility to limit the scope of application of the draft convention. This possibility presupposes that the provisions of the draft convention might apply to electronic communications relating to contracts governed by other international conventions not listed in paragraph 1 of the draft article, a possibility which is contemplated in paragraph 4, variant B, of draft article 1. This option might become superfluous if the Working Group were to retain variant A of draft article 1, paragraph 4.

the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

*Article 23 Transitional rules*

This Convention applies only to electronic communications that are exchanged after the date when the Convention enters into force in respect of the Contracting States referred to in paragraph 1 (a) or the Contracting State referred to in paragraph 1 (b) of article 1.

*Article 24. Denunciations*

1. A Contracting State may denounce this Convention by a formal notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

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

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



**C. Note by the Secretariat on legal aspects of electronic commerce -  
Electronic contracting: Provisions for a draft convention,  
submitted to the Working Group on  
Electronic Commerce at its forty-fourth session  
(A/CN.9/WG.IV/WP.111) [Original: English]**

The Secretariat has received comments on the Working Group's consideration of a possible new international instrument on electronic contracting from the Treaty Section of the United Nations Office of Legal Affairs. The text of those comments is reproduced in the annex to this note in the form in which it was received by the Secretariat.

**ANNEX**

**COMMENTS FROM THE TREATY SECTION,  
OFFICE OF LEGAL AFFAIRS**

1. The comments that follow take into account recent developments in the depositary practice of the Secretary-General and also some of the difficulties that have been experienced by the depositary in giving effect to the final clauses of other international agreements. We would like to ensure that this Convention will not contain the same shortcomings that have been problematic elsewhere. We also note that some of the problems that the depositary has faced recently in treaties negotiated in other forums could have been avoided with better drafting. Our comments are intended to make administration easier for the depositary and facilitate more effective implementation by the parties. You will also find the Handbook of Final Clauses, available in hard copy and on the web, useful (<http://untreaty-un.org/English/FinalClauses/Handbook.pdf>). In light of the above, we make the following specific observations:

**Article 15 (Depositary)**

2. We note that the Secretary-General is specified in Article 15 in the standard format as depositary. If any administrative duties are added to his functions during the negotiations they should be performed by the Secretary-General in a different capacity. This distinction should be clearly reflected in the Convention.

**Article 16 (Procedure for signature and for becoming a party)**

3. Is it conceivable that certain international organisations may wish to be party to the Convention? For example, the EC at a future date? It is our understanding that the Convention as it stands will only allow States to become party to it. However, should the negotiators wish to include the participation of international organisations, the entry into force provision, among other provisions, must contain a reference to that effect. It is essential that an international organisation, in addition to treaty-making capacity, possess substantive competence with regard to the matters covered by the Convention. Therefore, consistent with other conventions, e.g., the *Law of the Sea Convention, 1982*, it would be necessary to include a provision that requires an international organisation seeking to become party, to specify the matters governed by the Convention in respect of which competence has been transferred to that international organisation by its member States,

and the nature of such competence. Such a declaration should be made at the time of signature or on the consent to be bound being expressed. The provision should also require the international organisation to notify the depositary of any changes of its competence.

4. Furthermore, in the above case, it is important to specify that the participation of such an international organisation shall not confer any rights under the Convention on a member State of that organisation which is not a State party to the Convention. Additionally, the provision should also clarify that participation of an international organisation should not entail an increase in the representation to which its member States which are States Parties would otherwise be entitled, including rights in decision-making. A system for counting the votes may be specified in order to avoid any disagreement over the issue. For a useful precedent, consider the *Convention on Biological Diversity, 1992*, article 31 (Right to Vote), article 33 (Signature) and article 34 (Ratification, Acceptance or Approval). For example, article 31 (Right to Vote) reads:

“1. Except as provided for in paragraph 2 below, each Contracting Party to this Convention or to any protocol shall have one vote.

“2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Contracting Parties to this Convention or the relevant protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.”

5. Regarding the specific date to be inserted in Article 16, for signature, we strongly suggest this date be fixed at least 6 weeks after the text has been finalized and adopted in order to allow the depositary the necessary time to prepare the original text and the certified true copies thereof. We stress that this is a critical requirement of this office. Our experience suggests unnecessary difficulties and waste of resources where a different approach was adopted, especially involving avoidable corrections procedures.

6. It is noted that no location for opening the Convention for signature is specified. In our experience having an initial signature ceremony away from the United Nations Headquarters generally helps to attract high level interest from States. We suggest that should this be envisaged, the ceremonial signature period be limited to two or three days. Thereafter, the treaty should remain open for signature at the United Nations Headquarters for at least twelve months in order to allow States the necessary time to review the text of the Convention and make up their minds on signature. The Legal Counsel has strongly advised against keeping a text open for signature away from United Nations Headquarters for any period of more than a few days (see Section 6(3) of ST/SGB/2001/7).

7. Keeping these points in mind we recommend drafting 16.1 as follows:

“16.1 This Convention shall be open for signature by [ ] at [location of signature] from [date] to [date], and thereafter at the United Nations Headquarters in New York from [date] to [date].”

#### **Article 17 (Effect in domestic territorial units)**

8. It is noted that the overwhelming majority of treaties deposited with the Secretary-General contain no such provision. The *Vienna Convention on the Law of Treaties, 1969*, which codifies customary international law, provides that a treaty is binding upon each party in respect of its entire territory unless a different intention appears from the treaty or

is otherwise established. We note that such a provision exists in other UNCITRAL treaties (such as the *United Nations Convention on the Assignment of Receivables in International Trade, 2001*) and those of the Institute for the Unification of Private Law. Should the Working Group insist on retaining this article, we caution that serious complications could arise where a State consists of numerous territorial units (e.g., USA, Canada, China and Australia). This provision could conceivably result in an overload of work for the depositary.

#### **Article 18 (Declarations on exclusions) and article 21 (Reservations)**

9. It is noted that the declarations referred to in article 18 (1)-(4) are in fact reservations and should be characterised as such. They should be called reservations due to the problems that unclear terminology usually causes and should be made in writing. We recommend consolidating article 18 (Declarations on exclusions) with article 21 (Reservations) as a new article 18 (Reservations and Declarations). The article should specify that the declaration or reservation in question should be communicated to the depositary. It is a responsibility of the depositary to communicate such actions to other concerned parties. We offer the following draft language for your consideration:

##### **“Article 18. Reservations and declarations**

“1. No reservations are permitted except those expressly authorized in this Article.

“2. Any State may declare in writing at the time of deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph 1 (a) of article 1 of this Convention.

“3. Any State may declare in writing at the time of deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph 1 (b) of article 1 of this Convention.

“4. Any State may declare in writing at the time of deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph 2 of article 1 of this Convention.

“5. Any State making a reservation in writing under Article 18 (2) (3) or (4) as described above shall not be bound by the matters specified in such reservation.”

#### **Article 19 (Communications exchanged under other international conventions)**

10. The reference to Contracting States in the second line of paragraph 1 of article 19 is understood to mean those States that have expressed their consent to be bound by the treaty (where the treaty has not yet entered into force or where it has not entered into force for that State). As such it is redundant to include the following language: “... by ratifying, accepting, approving or acceding to this Convention”. We suggest that such language be deleted.

11. A declaration (a reservation in fact) made under Article 19(3) must also be made in writing.

### Article 20 (Procedure and effects of declarations)

12. This provision is confusing. Unless we are to be the arbiters of endless arguments on whether a statement is a declaration or a reservation, we suggest that this provision be modified. It is suggested that the title of article 20 be modified to read: “*Article 20. Procedure and effects of reservations and declarations*” to take into account both the reservations and declarations contained in articles 17, 18 and 19. Articles 1, 2, 3, and 4 should read “Reservations and Declarations ...”.

### Amendment procedure

13. It is noted that the Convention does not provide for an amendment procedure. It is our experience that it is useful to provide for an amendment procedure in order to avoid problems of implementation among the States parties in the event of a need to modify the Convention. For additional information on this topic and examples of amendment provisions, please see the *Handbook of Final Clauses of Multilateral Treaties*, prepared by the Treaty Section, pages 97-101, “Amendment”.

14. In most multilateral treaties the amendment provision specifies that an amendment proposal be adopted at a conference of States parties provided that the proposal has been circulated to the States parties in advance. In certain instances amendments have been adopted by correspondence. A conference of States parties is usually convened by the Secretariat of a Convention or a relevant administrative body. Such a body could be used to circulate the amendment proposal to the States parties prior to the amendment conference. Once an amendment is adopted, the practice of the Secretary-General as depositary is to circulate the amendments to the States parties.

15. It is usual for multilateral treaties to specify that an amendment proposal be adopted at a conference by a specified proportion of the States parties, e.g., *two-thirds of the States parties*. In such cases it is helpful to specify whether this proportion relates to all the States parties to the Convention or to all States parties present at the time the vote is taken. We make this comment in light of difficulties faced with other treaties containing similar provisions.

16. Multilateral treaties may provide for the entry into force of an amendment only for those States parties that have accepted it. This is the most common approach. However, it is our experience that this approach creates significant problems of interpretation and implementation since it establishes a situation whereby States can be parties to two different regimes under a single convention. For example, see the *Convention on the Rights of the Child, 1989*. This situation has also occurred in relation to the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989*, where a newly adopted Annex would be applicable only to the States parties which have accepted it. In order to avoid the creation of different regimes under this Convention, we strongly suggest avoiding provisions which enable only States parties which have accepted an amendment to be bound by it while other States parties remain under a different regime. For additional guidance on this topic, please see the *Handbook of Final Clauses of Multilateral Treaties*, pages 67-75 “Entry into force of annexes, amendments and regulations”.

17. We offer the following model as a guideline:

“Any State Party may propose amendments to the Convention. Proposed amendments shall be submitted in writing to [the Secretariat of the Convention or other administrative entity], which shall circulate the proposal to all States parties. A conference of States parties, convened to consider the amendment proposal, shall discuss the proposed amendments, provided that the proposals have been circulated to the States parties at least [90] days in advance.

“Amendments shall be adopted by [consensus, two-thirds, etc.] of the States parties present at the conference of States parties, and shall enter into force for all States parties on the date on which [22, etc.] States parties have deposited their instruments of acceptance thereof.”

18. Many multilateral treaties provide for an amendment to enter into force once a specified proportion of the States parties, e.g. “two-thirds of the States parties”, have deposited their instruments of acceptance. We have recently dealt with problems in this area where the question has arisen as to whether the number of acceptances is calculated on the basis of the number of States parties at the time of adoption of the amendment or at the time of its acceptance. We suggest clarifying this issue at the outset in order to avoid future confusion. However, please note that when a treaty is silent on this matter, the practice of the Secretary-General as depositary is to calculate the number of acceptances on the basis of the number of States parties to the Convention at the time of acceptance. A solution, which we strongly recommend, is to refer to a specified number of States parties depositing their instruments of acceptance, e.g., “22 States parties” as the entry into force requirement (see the model above).

#### **Institutional structure**

19. We note that there is no institutional structure to provide secretariat functions under the Convention. This is especially relevant for administrative functions, such as the circulation of proposed amendments prior to a meeting of the States parties at which the amendment may be adopted. The depositary does not perform such administrative functions. It would be appropriate to specify the entity which will discharge such administrative functions.

20. The Treaty Section remains ready to assist in matters relating to final clauses and other treaty law matters. We would invite your office to be in touch with the Treaty Section as negotiations progress. In this connection, it is noted that you will need to provide the Treaty Section with camera-ready copies of the Convention, as adopted (hard copy and electronic format—Microsoft Word 2000).

**D. Legal aspects of electronic commerce -  
Electronic contracting: Provisions for a draft convention,  
proposal by Belgium, submitted to the Working Group on  
Electronic Commerce at its forty-fourth session  
(A/CN.9/WG.IV/WP.112) [Original: French]**

The annex to the present note contains a proposed amendment to article 10, paragraph 2, of the draft convention on the use of electronic communications in international contracts (A/CN.9/WG.IV/WP.110), as communicated to the Secretariat by Belgium.

**ANNEX**

**PROPOSED AMENDMENT TO ARTICLE 10, PARAGRAPH 2,  
SUBMITTED BY BELGIUM**

1. Article 10, paragraph 2, should be amended to read as follows:

“The time of receipt of a data message is the time from which the message becomes capable of being retrieved by the addressee or by any other person named by the addressee. A data message is presumed to be capable of being retrieved by the addressee when the data message enters an information system *which the addressee has agreed to use*”.

**Justification**

2. The object of article 10, paragraphs 2 and 3, is to establish a functional equivalent of the conventional notion of receipt of a message at the place of business or habitual residence of the addressee, as contained, for example, in article 24 of the United Nations Convention on Contracts for the International Sale of Goods, which stipulates that a declaration “reaches” the addressee when it is delivered to his place of business or mailing address or to his habitual residence, and also in article 3, paragraph 1, of the UNCITRAL Model Law on International Commercial Arbitration, which provides that a written communication is deemed to have been received if it is delivered at the addressee’s place of business, habitual residence or mailing address.

3. The basic principle of article 10, paragraphs 2 and 3, which is that a data message is deemed to have been received at the place of business or at the habitual residence of the addressee as soon as it enters an information system of the addressee, appears to be inadequate to establish satisfactory functional equivalence and, therefore, cannot but lead to serious legal uncertainty, for example in the application of the two articles cited above.

4. The functional equivalent of the place of business or habitual residence of the addressee is not simply any information system of the addressee, but rather the information system which the addressee has agreed to use for the purpose of receiving data messages and from whose electronic mailbox the addressee may therefore legitimately be expected to retrieve data messages, in the same way as the addressee receives communications at the place of business or habitual residence that it has freely chosen.

5. It should also be noted that the reference to “an information system of the addressee”, as contained in the text proposed in document A/CN.9/WG.IV/WP.110, raises the question of what type of legal relationship between the addressee and the information system the text is referring to: is it a relationship of ownership or another, similar, type of relationship? A requirement for such a relationship to exist could limit unduly the type of information system that can be used to send a data message validly to the addressee. The proposed amendment avoids this problem by focusing on the agreement of the addressee as the sole criterion, irrespective of the legal relationship between the addressee and the information system which the addressee has agreed to use.

6. Of course, the amendment proposed above is based on the assumption that a satisfactory solution has been reached by the Working Group with regard to the definition of the concept “information system”.

**E. Legal aspects of electronic commerce -  
ICC eTerms 2004 and ICC guide to electronic contracting,  
submitted to the Working Group on Electronic Commerce  
at its forty-fourth session**

**(A/CN.9/WG.IV/WP.113) [Original: English]**

Under cover of a letter dated 30 July 2004, the International Chamber of Commerce (ICC) transmitted to the Secretariat a copy of ICC eTerms 2004 including the ICC Guide to electronic contracting, as approved by the ICC Commission on Commercial Law and Practice and the ICC Commission on E-Business IT and Telecoms. The letter by the two co-chairmen of ICC Task Force on Electronic Contracting indicates, inter alia, that ICC appreciates any input from UNCITRAL on the draft text, which is expected to be reviewed in the fall, following the 44th session of the Working Group. The annex to this note reproduces the text of the ICC eTerms 2004, including the ICC Guide to electronic contracting, as they were received by the Secretariat.

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## Task Force on Electronic Contracting

### ICC eTerms 2004

#### ICC Guide to electronic contracting

#### What ICC eTerms 2004 can do for you<sup>1</sup>

- ICC eTerms 2004 are designed to enhance the legal certainty of contracts made by electronic means.
- ICC eTerms 2004 provide you with two short articles, easy to incorporate into your contracts, which make it clear that you and your counterparty intend to agree to a binding electronic contract.
- ICC eTerms 2004 do not affect the subject matter of your contract, and do not interfere in any way with any terms you may have otherwise agreed upon: they simply facilitate the procedures and the use of electronic means in concluding a contract.
- You can use ICC eTerms 2004 for any contract for the sale or other disposition of goods, rights or services.
- You can use ICC eTerms 2004 wherever you contract through electronic means whether through a website, by e-mail, or by EDI.

#### ICC eTerms 2004 – an introduction

How you contract – the physical means whereby you *agree* to be bound to another commercial party to a specific commercial engagement – is important because *how* can indicate *when* you are committed to the other party (and therefore locked into the transaction) and it also indicates the terms of your engagement to the other party, and the terms of your contract.

Commercial parties have long found ways of expressing their intention to be bound to each other. The market has reacted speedily and imaginatively to successive changes in technology through the ages, from the parties simply talking to each other, shaking hands, signing documents, posting them, telephoning, telexing and faxing. The market has not only survived but thrived on each of these changes in technology – and there is little reason to doubt that the same will be the case with the use of electronic messages. The question has, after all, been the same through the ages: is there sufficient evidence in the exchanges between the parties to show that they agreed on a particular commercial commitment – a contract – such that they are bound to each other?

ICC offers this document to business in response to the challenges of – and the opportunities presented by – the new technologies. The document is presented in two parts.

First, by agreeing to abide by **ICC eTerms 2004**, the parties make it clear to arbitrators and judges resolving any disputes they might have on the workings of the substantive contract between them that they do not have a dispute about the technical means by which

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<sup>1</sup> Note: Text to be added when published on ICC website: Click to access [ICC eTerms 2004](#). On this website, ICC is also providing a product accompanying ICC eTerms 2004, entitled an ICC Guide to eContracting. This guide explains how you can apply ICC eTerms to your contract and also sets out a list of practical steps which you can take in house to facilitate eContracting.

they had contracted. With **ICC eTerms 2004** in place, the parties have intentionally agreed to contract *electronically*: one dispute less, then, to resolve and to spend money on.

Secondly, ICC recognises that the speed and ease of electronic contracting bring with them not only opportunities but also concerns. These anxieties can frequently more easily be allayed in-house, through sensible, practical and flexible precautions, rather than through international legislation or through contract terms. With this in mind, the second part of this document provides an **ICC Guide to electronic contracting**, flagging steps which might be taken by businesses to reassure them when contracting electronically

These terms are designed for use between businesses that are contracting electronically. They provide the necessary means of expressing the desire to contract electronically and the ability to specify some of the criteria needed to determine when such contracts become effective. These terms are not designed to be applied to Business to Consumer contracts and do not necessarily confer the ability to contract electronically if the law applicable to the subject matter of the contract does not permit electronic contracting. Please make sure to familiarize yourself with the general contracting requirements of the applicable law before using these terms.

## A. ICC eTerms 2004

### *Article 1 – E-commerce agreement*

The parties agree:

- 1.1 that the use of electronic messages shall create valid and enforceable rights and obligations between them; and
- 1.2 that to the extent permitted under the applicable law, electronic messages shall be admissible as evidence, provided that such electronic messages are sent to addresses and in formats, if any, designated either expressly or implicitly by the addressee; and
- 1.3 not to challenge the validity of any communication or agreement between them solely on the ground of the use of electronic means, whether or not such use was reviewed by any natural person.

### *Article 2 – Dispatch and Receipt*

- 2.1 An electronic message is deemed<sup>2</sup> to be:
  - (a) Dispatched or sent when it enters an information system outside the control of the sender; and
  - (b) Received at the time when it enters an information system designated by the addressee.
- 2.2 When an electronic message is sent to an information system other than that designated by the addressee, the electronic message is deemed to be received at the time when the addressee becomes aware of the message.

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<sup>2</sup> See Guide to Electronic Contracting – Paragraph B3

2.3 For the purpose of this contract, an electronic message is deemed to be dispatched or sent at the place where the sender has its place of business and is deemed to be received at the place where the addressee has its place of business.

## **B. ICC Guide to electronic contracting**

### ***B.1 How to apply ICC eTerms 2004***

As we shall see presently at paragraph B.2 below when discussing the validity of **ICC eTerms 2004**, there may well be some instances where mandatory legal rules within a particular jurisdiction create barriers to contracting electronically. In most instances, however, a clear expression of intention by contracting parties that they intend to be bound through an exchange of electronic messages will effectively indicate to arbitrators or judges deciding disputes between the parties that they willingly and freely entered into a contract through that medium. In most cases, therefore, there is no reason why the applicable law should set aside a contract simply because it was concluded electronically.

This is why **ICC eTerms 2004** starts from the proposition that the parties agree that the use of electronic messages shall create a binding contract: see article 1.1. Arbitrators and judges need to be put on clear notice that the parties have agreed to that fundamental principle in **ICC eTerms 2004** and it is very much up to the parties to make that intention clear.

There are three ways in which contracting parties can signify their intention to agree to **ICC eTerms 2004**:

- [a] parties can, within the limits allowed by any mandatory rules of the applicable law (as to which see paragraph B.2 below), simply incorporate **ICC eTerms 2004** by reference into any contract they agree through electronic means, e.g. by e-mail, or communication through a web application;
- [b] parties can sign and exchange a paper version of **ICC eTerms 2004**, indicating the types of contract during which and the periods to which it will apply (e.g. all sale of goods contracts between the parties concluded between them over the next two years);
- [c] parties can simply exchange electronic messages indicating that they agree to **ICC eTerms 2004** and then proceed to contract through electronic means, raising a presumption through course of dealing that that is the way they wish to conduct their business.

Where parties feel comfortable that they are contracting with a counterparty used to contracting electronically and under an applicable law which easily accommodates e-contracting, then option [a] is recommended.

Where parties are particularly anxious about the validity of contracting electronically with certain counterparties under certain applicable laws, then option [b] is recommended.

Option [c] will have the same effect as option [a] in most jurisdictions, but presents more opportunity for argument than does option [a]. The applicable option should be selected by the parties in view of all of the circumstances of the transaction.

It should be emphasised that, even without the incorporation of **ICC eTerms 2004**, if the parties start performing a contract which they concluded through electronic means, most arbitrators and judges in most jurisdictions would usually find that a contract exists.

### ***B.2 The legal validity of ICC eTerms 2004***

Despite the general legal validity of electronic contracts, there are situations in which the applicable law requires contracts to be recorded on paper and signed in a certain format. Will **ICC eTerms 2004** be effective when the law of such a jurisdiction is the law applicable to the contract between the parties?

It is easy to overestimate this concern. For one thing, the ever-increasing use of electronic contracting, with the cost savings it brings in its wake, shows that most jurisdictions either actively endorse or at least passively permit contracting through electronic means. Even where there are local laws which seem to assume the exchange of paper documents between contracting parties, they may not be mandatory and the effect of **ICC eTerms 2004**, when agreed to by the parties, is safeguarded by the basic principle of freedom of contract.

Nevertheless, in some legal systems mandatory rules, i.e. rules which cannot be avoided through simple contractual agreement, positively exclude electronic contracting by making the validity of a contract depend on the exchange of signed paper documents.

Where you are contracting in these circumstances, do not simply assume that you cannot contract electronically: persuade your counterparty of the economic advantages of electronic contracting and seek local legal advice not only as to whether the law permits e-contracting, but whether it actively prohibits it. If it does prohibit e-contracting, then that may be a good reason for agreeing with your counterparty on having your contract governed by a more accommodating legal system.

### ***B.3 The limits of ICC E-Terms 2004***

While it is important to emphasize the significance of **ICC eTerms 2004**, it is equally important to realise their limits. First and most obviously, they are not themselves the contract between the parties, setting out the substantive rights and obligations between them under an arrangement, for example, for the sale of goods or for the provision of a service. Thus, for example, the risk of malfunction in the transmission of messages will depend on the agreement of the parties and of the applicable law. Those terms will be contained in the contract itself, which **ICC eTerms 2004** facilitate but does not replace.

Secondly, **ICC eTerms 2004** do not resolve all the possible issues which may arise regarding the conclusion of the contract. Thus, for example, if the parties each have their own standard terms and conditions (STCs), with each party intending to contract under its own STCs rather than under those of its counterparty, the issue as to which of the two STCs applies will be answered not by **ICC eTerms 2004** but by the law applicable to the contract.

The central point here is that the purpose of **ICC eTerms 2004** is to provide uniform terms that allow the parties to contract electronically without running the risk of one or other of them later raising the electronic nature of their contract as a ground for its invalidity.

#### **B.4 Who contracts on your behalf?**

Although the nature of e-contracting presents fewer legal problems than might at first be imagined, there are some risks which necessarily go with the benefits of the new technologies, namely speed and ease of use. If electronic contracting is easy and quick, may it perhaps be too easy for a company to find itself bound by a contract before it is really ready to commit itself? This may be especially relevant for SMEs and companies not accustomed to electronic contracting.

This issue raises three related matters, namely (1) who within your company can contract electronically; (2) can an electronic system bind your company to a contract; and (3) what happens when the wrong button is keyed (i.e. when one party commits an error during the contracting process).

##### *Authority to contract electronically*

A company cannot bind itself to a contract without the assistance of a physical person who speaks for it and every company will have its own internal rules as to who among its officers or employees has, *as between them*, the power to bind the company towards third parties.

It is important, however, to realize

- [i] that in many legal systems, a company can be bound towards a counterparty if an officer or employee acting on its behalf *appears* to that counterparty to have the authority to so act, even if he does not *actually* have that authority under the company's internal rules; and that
- [ii] whether or not that is the position, i.e. whether or not *apparent* authority is enough to bind the company, depends on the applicable law of agency.

As a result, the ease with which physical persons can contract electronically may increase the risk of a company finding itself bound to a contract through the actions of an officer or employee acting outside the confines of his authority. In a sense some of these risks are no different in the paper world: an employee can also make unauthorised use of company letterhead and exceed his authority in contracting on behalf of his company. However, a keyboard may be more vulnerable to unauthorised use, and a company would be well-advised therefore to take the following precautionary steps:

- [a] employees need to be reminded regularly of their signing privileges and internal policies and procedures should clearly explain who can contract electronically and for what amount;
- [b] employees need to be reminded regularly that their electronic communications can create rights and obligations for the company, and that they should therefore exercise caution and take internal advice before sending e-mails which might be interpreted as indicating the commitment of the company to a particular contract.

##### *Automated e-contracting*

The technology exists to allow companies to communicate with each other electronically with minimal or no human intervention in each transaction, a means of interaction sometimes referred to as "automated contracting". We have long been used to contracting using machines (for example, transactions using vending machines). "Automated

contracting” goes one step further in that it involves *both* counterparties acting through machines, for instance in “just-in-time” arrangements.

Again, the perception that electronic contracting is riskier than contracting in the physical world may be worse than the reality, since computers can be secured against unprogrammed (or “unauthorised”) transactions through careful and professional software design, which can be approved and modified only by officers and employees of sufficiently high responsibility, authority and expertise.

#### *Inadvertent e-contracting*

The steps described above should guard as much against unauthorised e-contracting as against inadvertent e-contracting, i.e. against a human being (or even a machine) keying a confirm button in error. A dose of caution is always a useful antidote to the risk of being too trigger-happy on the keyboard or click-happy with the mouse.

The importance of careful web site design cannot be over-estimated in this regard. Web sites that are ambiguous or unclear are traps for the unwary, and companies wishing to make use of the benefits of e-contracting need to design their web sites such that the terms they contain are clear to the user when he or she is about to enter into a contract. Using unambiguous language with a “legal” ring to it (such as “offer” and “acceptance”) helps to alert users that they are entering a “commitment” zone and that they should therefore consider carefully whether they truly intend to bind themselves by contract. Consider, for example, building into your website a final step alerting your counterparty that he is about to commit himself, such as requiring that he click a button marked “I agree” before concluding the contract.

### **B.5 With whom are you contracting?**

If it is important to alert officers and employees in-house about issues of authority to contract electronically, it is even more important to alert them to the importance of identifying the counterparty with whom they appear to be communicating. In electronic contracting, which frequently operates in different jurisdictions and across different time-zones, employees may be less familiar with the means of identifying the counterparty: moreover, websites can be spoofed and e-mail addresses can be impersonated.

Again, it is important not to exaggerate the risks, since common sense is also required in the paper world in identifying the party from whom a sheet of letterhead appears to originate. It is true, however, that the ease and speed of e-contracting may lull your employees into an unwarranted sense of security. Thus, it is often useful to take precautionary steps such as the following:

- [a] Brief employees authorised to contract electronically in the basic skills of checking on the authenticity of e-mails, e.g. contacting the party through alternative means, checking contact details on other media, verifying a electronic signature, etc.
- [b] Putting in place recognised authentication procedures, such as specified formats, identifying phrases, specific-use e-mail addresses, encryption and electronic signatures.

Clearly, the type and extent of the procedures to be put in place in this regard will differ based on the resources and technical expertise available, the parties’ exposure to risk, and the volume and types of transactions concluded.

### **B.6 Constructing an electronic contract**

When looking at the limits of **ICC eTerms 2004** at para B.3 above, we saw that eTerms do not themselves provide the parties with the contractual terms for the transaction which they wish to conclude: they simply facilitate the conclusion of that transaction through electronic means. Having agreed to contract electronically, the parties must then consider what business they actually wish to transact and under what terms. In a real sense, this is no different to what parties do in the paper world: having decided to do business, say, through a series of face-to-face meetings and eventually through the exchange of signed paper documents, the parties will draft a contract recording the terms, the rights and the obligations, to which they want to commit themselves. Those terms will on occasion be contained in a one-off, tailor-made contract and on other occasions in a standard form contract intended for frequent use.

Likewise in the electronic world, business will need to give thought as to how to anticipate terms which they are likely to use in a routine fashion, how to draft terms which will differ from contract to contract, and how to “construct” an electronic vehicle or web site which allows for both. How precisely this is done will differ from business to business, depending obviously on the resources available but also on whether the company’s transactions are more frequently routine or one-off. The speed and savings which the new technologies promise are more likely to be realised if care and attention are invested at the early stages of designing websites, software, and business processes which impact on the conclusion of electronic contracts.

The following are a number of terms which one would normally expect to find in most well-drafted electronic contracts, whether on a web site or through a series of electronic messages:

- the identity (legal name) and applicable geographic location of the business,
- relevant registration or identification numbers, etc.
- contact details for a designated representative of the business (including mail, e-mail, telephone and fax details),
- similar contact details for any agents used,
- language or languages of the agreement and of associated information, and language or languages in which communications regarding the contract are to be exchanged,
- the allocation of costs of communication and whether they are calculated at other than the basic rate,
- the period for which the offer or the price remains valid,
- where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently,
- description of the main characteristics of the goods or services to be provided,
- the price of the goods or services including all taxes,
- delivery terms and costs, where appropriate, for example a selected Incoterm,
- the terms of payment,
- terms relating to conditions, warranties, guarantees, after-sales service, remedies and redress, e.g. return and/or refund policy, options for withdrawal or termination, return, exchange, damages etc.
- terms relating to restrictions, limitations or conditions of purchase, geographic or time restrictions, product or service use instructions including safety and health-care warnings,
- terms relating to the confidentiality of information transmitted between the parties and liability for its breach,

- technical/security parameters of communications/exchanges,
- ways to verify representations concerning membership in any associations or self-regulatory schemes,
- applicable law and jurisdiction,
- alternative dispute resolution.

One of the practical differences between contracting through paper and e-contracting is that in a very real way the electronic medium *is* the message: for example, a web site is as much a marketing tool as it is a means of contracting. The design and lay-out of the above information therefore need to be professional, clear and easy to use. In designing your web site or other mechanisms for electronic contracting it is useful to bear the following in mind:

- [a] *make sure that information is easy to find*: users of a web site or an e-service should be able easily to find and navigate through significant legal terms without having to travel through the whole contract on every search;
- [b] *make sure that related terms are gathered together in one electronic place and logically structured*: it will be noted, for example, that the terms described above have been clustered into separate and cognate families, making it easier for the user to gain an overall picture of his rights and responsibilities in different areas of the contract;
- [c] *make sure that the web site contains early on an easy-to-use flow for the contract and the contract process*: the entry page of the website, or a page as close as possible to the entry page, should contain the overall structure of the contract with easy hyper-links to particular areas for ready reference to specific terms.

### **B.7 Technical Specifications**

In designing a web site or other mechanisms for electronic contracting, it is useful to bear in mind a number of technical issues relating to document format, e.g. file size, stability, integrity and replicability.

- [a] File size is important in both transmission and archive. If the file format adds significant memory overhead then consideration needs to be given to the impact which this may have on both transmission (broadband) and archiving. This may be true where picture files are used to capture images of documents.
- [b] Document images provide stability in terms of document format and appearance. Other document types (word-processing files) may change or alter formats as a result of different versions of the programme being used to create and retrieve or view the document. Issues of backwards compatibility are most important here as well as whether the program and media format continue to be supported.
- [c] It is possible that for legal, fiscal or commercial reasons, you may need to preserve e-contracts for a certain period. With this in mind, consideration must be given to the stability of the format, how to prove the integrity of the document and its formatting and how to assure the ability to replicate both. New XML style/format sheets and other technological advances may help address these issues, but again parties must consider their applicability to any particular situation and the ability of the parties to utilize and support the technology. Because of the greater technology complexity, a number of third parties are developing hosting and storage/archiving solutions to



assist businesses with these requirements. Imaging of documents and digital signing of documents or document images are also being used.

### **B.8 Protecting Confidentiality**

The old adage that information is power acquires particular significance in the world of e-contracting. Information is frequently commercially sensitive or legally restricted, for example personally identifiable information (PII), requiring confidential treatment, yet its electronic habitat is freely available and possibly more than usually vulnerable. In designing an application for e-contracting, such as a web site, it is consequently important to consider carefully issues of confidentiality.

First, the following decisions need to be made at a senior level at design stage:

- [a] what information is to be posted on the web site,
- [b] what information is to be required of counterparties,
- [c] whether that information is to be freely accessible on the web site or whether it will appear only on restricted access and, if so, how access will be restricted and monitored.

These decisions need to be applied not only to information transmitted and received at the moment the contract is first made, but also to information transmitted and received during the life of the contract.

Secondly, it is important to alert officers and employees within the company of the potential liability which the company, its partners and customers might face if information is disseminated in an unauthorised way. Moreover, that liability may in certain circumstances be governed (and quantified) not by the law of the contract but by the law of another country. It is prudent, therefore, for companies to have in place clear internal procedures restricting the sharing of information posted and acquired through an e-contracting application.

Thirdly, the contract itself needs to deal with matters of confidentiality and liability for its breach. There is no one-size-fits-all clause that appropriately protects information: confidentiality clauses must be tailored to the nature and significance of the information as well as to the legal framework in which the parties are operating. However, in drafting an appropriate confidentiality clause, it may be helpful to consider the following matters:

- [a] What type of information is covered by the contract: sensitive, confidential, personally identifiable, mission critical?
- [b] What security requirements would you require for this information and does the contract create equivalent obligations to protect the information?
- [c] Did the information originate from a third party and, if so, are there obligations owed towards that third party?
- [d] To the extent that intellectual property or trade secret rights are involved, are there appropriate protections in place?
- [e] Are there specific legal requirements relating to this information or any restrictions on its transfer in either party's jurisdiction; if so, have you met those requirements?

### ***B.9 Technical Breakdown and Risk Management***

Business has long managed risk, through a judicious blend of assessing it, mitigating it where possible, hedging against it through indemnity or insurance, and making determinations of acceptable risk – a sophisticated process of risk management which far pre-dates electronic technology. While it is important therefore to recognise the risks particular to the new technologies, it is important not to exaggerate the dangers or to think that they cannot be handled through the same process of risk management which has long allowed commerce to thrive on earlier challenges and opportunities.

In general, decisions relating to risk and its mitigation should involve senior management and ICT-related risks should be integrated into the overall corporate risk assessment in order to ensure that appropriate priority is given to them. In assessing such risks, it would be helpful to give detailed attention to the following questions:

- What are the risks to the company arising out of the use of a particular type of technology? Thus, for example, what would happen if certain information was lost, damaged, or revealed, both in terms of liability to counterparties and in terms of adverse publicity?
- Which of such risks may be acceptable?
- Which of such risks may be unavoidable?
- What steps can be taken to minimize risk through technical, procedural or contractual means, or through insurance cover? Thought should be given to relatively simple steps which might be taken: for example, can transmission failure be guarded against simply through requiring confirmation of receipt?
- What are the costs involved in such steps?
- Is the potential for certain risks sufficiently small, or is the harm that could result so attenuated, that the risks do not justify the costs of countermeasures?

The answers to these questions should be sought and given by senior management, with such assistance as they require from staff well-equipped and trained not only in electronic technology but also in the assessment of risk. Moreover, such decisions and the reasons for them need to be recorded and periodically reviewed.

**F. Note by the Secretariat on the draft convention on the use  
of electronic communications in international contracts**

**(A/CN.9/577 and Add.1) [Original: English]**

**A/CN.9/577**

1. Working Group IV (Electronic Commerce) began its deliberations on electronic contracting at its thirty-ninth session (New York, 11-15 March 2002). Having completed its work at its forty-fourth session (Vienna, 11- 22 October 2004), the Working Group requested the Secretariat to circulate the revised version of the draft convention to Governments for their comments, with a view to consideration and adoption of the draft convention by the Commission at its thirty-eighth session, in 2005.
2. Pursuant to consultations with the Chairman of the thirty-seventh session of the Commission and the Chairman of the forty-fourth session of Working Group IV (Electronic Commerce), the forty-fifth session of Working Group IV (Electronic Commerce), which had been scheduled to be held in New York from 11 to 15 April 2005, has been cancelled. The thirty-eighth session of the Commission, which was originally scheduled to be held in Vienna from 4 to 22 July 2005 has been re-scheduled to be held in Vienna from 4 to 15 July 2005. It is proposed that the draft convention be considered and finalized by the Commission between 4 and 11 July 2005.
3. The Secretariat would appreciate it if Governments would submit concise comments on individual provisions of the draft convention. The Secretariat reserves the right to summarize the comments received from Governments, as may be required to comply with the guidelines on the length of documentation established by the General Assembly.
4. Annex I to this note contains the newly revised version of the draft convention, which includes the articles adopted by the Working Group at its forty-fourth session, as well as the draft preamble and final provisions on which the Working Group only held a general exchange of views at that time (see para. 32). Annex II contains a table of references to the deliberations by the Working Group.
5. Addendum 1 to this note, which will be issued separately, contains a summary of the deliberations of the Working Group as well as short notes intended to facilitate the consideration of the draft convention by Governments and the Commission.

## ANNEX I

**DRAFT CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS  
IN INTERNATIONAL CONTRACTS**

*The States Parties to this Convention,<sup>1</sup>*

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

*Noting* that the increased use of electronic communications improves the efficiency of commercial activities, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

*Considering* that problems created by uncertainty as to the legal value of the use of electronic communications in international contracts constitute an obstacle to international trade,

*Convinced* that the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and may help States gain access to modern trade routes,

*Being of the opinion* that uniform rules should respect the freedom of parties to choose appropriate media and technologies, [taking account of their interchangeability,] to the extent that the means chosen by the parties comply with the purpose of the relevant rules of law,

*Desiring* to provide a common solution to remove legal obstacles to the use of electronic communications in a manner acceptable to States with different legal, social and economic systems,

*Have agreed as follows:*

**CHAPTER I. SPHERE OF APPLICATION***Article 1. Scope of application*

1. This Convention applies to the use of electronic communications in connection with the formation or performance of a contract [or agreement]<sup>2</sup> between parties whose places of business are in different States.

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<sup>1</sup> The draft preamble was already contained in the last version of the draft convention that was considered by the Working Group (A/CN.9/WG.IV/WP.110). At its 44<sup>th</sup> session, the Working Group held an initial exchange of view on the draft preamble, but, for lack of time, did not formally approve it.

<sup>2</sup> The Secretariat suggests that the words “or agreement” should be added to align the language of the draft article with the language used in draft article 19. The Commission may wish to consider whether these words should be added in draft article 1 or whether any explanatory notes or commentary on the draft convention should explain the Commission’s understanding of the word “contract” in the draft convention.

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 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 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*

1. This Convention does not apply to electronic communications relating to any of the following:

- (a) Contracts concluded for personal, family or household purposes;
- (b) (i) Transactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) the transfer of security rights in, sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary.

2. This Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.

#### *Article 3. Party autonomy*

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.

### **Chapter II. General provisions**

#### *Article 4. Definitions*

For the purposes of this Convention:

- (a) “Communication” means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract;
- (b) “Electronic communication” means any communication that the parties make by means of data messages;
- (c) “Data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;
- (d) “Originator” of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;

(e) “Addressee” of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;

(f) “Information system” means a system for generating, sending, receiving, storing or otherwise processing data messages;

(g) “Automated message 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 person each time an action is initiated or a response is generated by the system;

(h) “Place of business” means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.

#### *Article 5. Interpretation*

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.

#### *Article 6. Location of the parties*

1. For the purposes of this Convention, a party’s place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.

2. If a party has not indicated a place of business and has more than one place of business, then [, subject to paragraph 1 of this article,]<sup>3</sup> the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the 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. A location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties.

5. The sole fact that a party 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 that country.

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<sup>3</sup> The Commission may wish to consider whether the reference to paragraph 1, which the Secretariat has placed within square brackets, is still needed in the current formulation of draft paragraph 2, which, unlike earlier versions, only applies when a party has not indicated a place of business under draft paragraph 1.

*Article 7. Information requirements*

Nothing in this Convention affects the application of any rule of law that may require the parties to disclose their identities, places of business or other information, or relieves a party from the legal consequences of making inaccurate or false statements in that regard.

**CHAPTER III. USE OF ELECTRONIC COMMUNICATIONS  
IN INTERNATIONAL CONTRACTS**

*Article 8. Legal recognition of electronic communications*

1. A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.<sup>4</sup>

2. Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.

*Article 9. Form requirements*

1. Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form.

2. Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

(a) A method is used to identify the party and to indicate that party's approval of the information contained in the electronic communication; and

(b) That method is as reliable as appropriate to the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement.

4. Where the law requires that a communication or a contract should be presented or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and

(b) Where it is required that the information it contains be presented, that information is capable of being displayed to the person to whom it is to be presented.

5. For the purposes of paragraph 4 (a):

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<sup>4</sup> The Commission may wish to consider whether, for purposes of clarity, the words "or result from the exchange of electronic communications" should be added at the end of this paragraph.

(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and

(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

[6. Paragraphs 4 and 5 do not apply where a rule of law or the agreement between the parties requires a party to present certain original documents for the purpose of claiming payment under a letter of credit, a bank guarantee or a similar instrument.]<sup>5</sup>

*Article 10. Time and place of dispatch and receipt  
of electronic communications*

1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.

2. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

3. An electronic communication 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 6.

4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.

*Article 11. Invitations to make offers*

A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

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<sup>5</sup> This paragraph appears within square brackets because the Working Group was not able, for lack of time, to complete its review at its forty-fourth session. As an alternative to the draft paragraph, it was proposed that the draft convention could give States the possibility to exclude the application of paragraphs 4 and 5 of draft article 9 by declarations made under draft article 18 (A/CN.9/571, para. 138).



*Article 12. Use of automated message systems  
for contract formation*

A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed each of the individual actions carried out by the systems or the resulting contract.

*Article 13. Availability of contract terms*

Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other party those electronic communications that contain the contractual terms in a particular manner, or relieves a party from the legal consequences of its failure to do so.

*Article 14. Error in electronic communications*

1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the electronic communication in which the input error was made if:

(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication;

(b) The person, or the party on whose behalf that person was acting, takes reasonable steps, including steps that conform to the other party'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 the goods or services; and

(c) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

2. Nothing in this article affects the application of any rule of law that may govern the consequences of any errors made during the formation or performance of the type of contract in question other than an input error that occurs in the circumstances referred to in paragraph 1.

**CHAPTER IV. FINAL PROVISIONS<sup>6</sup>***Article 15. Depositary*

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

*Article 16. Signature, ratification, acceptance or approval*

1. This Convention is open for signature by all States [at [...] from [...] to [...] and thereafter] at the United Nations Headquarters in New York from [...] to [...].
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

*[Article 16 bis. Participation by Regional Economic Integration Organisations<sup>7</sup>*

1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.
2. The Regional Economic Integration Organisation shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depositary of any changes to

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<sup>6</sup> Draft articles 15, 16, 17, 18, 19, 20, 21, 22, variant A, 23 and 25 were already contained in the last version of the draft convention considered by the Working Group (A/CN.9/WG.IV/WP.110). Draft articles 16 *bis*, 19 *bis*, 22 variant B, and 24 reflect proposals for additional provisions made at the forty-fourth session of the Working Group. At that time, the Working Group considered and adopted draft articles 18 and 19 and held an initial exchange of views on the other final clauses, which, for lack of time, the Working Group did not formally approve. In the light of its deliberations on chapters I, II and III and articles 18 and 19, the Working Group requested the Secretariat to make consequential changes in the draft final provisions in chapter IV, as contained in the version of the draft convention considered by the Working Group. The Working Group also requested the Secretariat to insert within square brackets in the final draft to be submitted to the Commission the draft additional provisions that had been proposed during its forty-fourth session (A/CN.9/571, para. 10).

<sup>7</sup> This draft article was not contained in the last version of the draft convention that was considered by the Working Group (A/CN.9/WG.IV/WP.110). It reflects a proposal made by Austria, Belgium, Croatia, Czech Republic, Denmark, Finland, France, Germany, Italy, Spain, Sweden, and the European Commission at the 44<sup>th</sup> session of the Working Group (A/CN.9/WG.IV/XLIV/CRP.3).

the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a “Contracting State” or “Contracting States” or “State Party” or “States Parties” in this Convention applies equally to a Regional Economic Integration Organisation where the context so requires.]

*Article 17. Effect in domestic territorial units*

1. If a Contracting State has two or more territorial units in which<sup>8</sup> different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

*Article 18. Declarations on the scope of application*

1. Any State may declare, in accordance with article 20, that it will apply this Convention only:

(a) When the States referred to in article 1, paragraph 1 are Contracting States to this Convention;

(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. Any State may exclude from the scope of application of this Convention the matters it specifies in a declaration made in accordance with article 20.

*Article 19. Communications exchanged under other international conventions*

1. The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract or agreement to which any of

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<sup>8</sup> The wording of the draft article reflects the wording of similar provisions in other instruments prepared by UNCITRAL. However, the words “according to its constitution”, which appeared after the words “two or more territorial units in which” in the previous version of the draft convention (A/CN.9/WG.IV/WP.110) have been deleted, as it was suggested that, in practice, those words, particularly when narrowly read, had given rise to uncertainty, since the legal basis for the existence of different legal systems in territorial units belonging to the same State may not always derive from provisions of a written constitution.

the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);

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, 19 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).

2. The provisions of this Convention apply further to electronic communications in connection with the formation or performance of a contract or agreement to which another international convention, treaty or agreement not specifically referred to in paragraph 1 of this article, and to which a Contracting State to this Convention is or may become a Contracting State, applies, unless the State has declared, in accordance with article 20, that it will not be bound by this paragraph.

3. A State that makes a declaration pursuant to paragraph 2 of this article may also declare that it will nevertheless apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of any contract or agreement to which a specified international convention, treaty or agreement applies to which the State is or may become a Contracting State.

4. Any State may declare that it will not apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract or agreement to which any international convention, treaty or agreement specified in that State's declaration, to which the State is or may become a Contracting State, applies, including any of the conventions referred to in paragraph 1 of this article, even if such State has not excluded the application of paragraph 2 of this article by a declaration made in accordance with article 20.

*[Article 19 bis. Procedure for amendments to article 19, paragraph 1<sup>9</sup>*

1. The list of instruments in article 19, paragraph 1 may be amended by the addition of [other conventions prepared by UNCITRAL] [relevant conventions, treaties or agreements] that are open to the participation of all States.

2. After the entry into force of this Convention, any State Party may propose such an amendment. Any proposal for an amendment shall be communicated to the depositary in written form. The depositary shall notify proposals that meet the requirements of

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<sup>9</sup> This draft article was not contained in the last version of the draft convention that was considered by the Working Group (A/CN.9/WG.IV/WP.110). It reflects a proposal made by Belgium at the 44<sup>th</sup> session of the Working Group (A/CN.9/WG.IV/XLIV/CRP.5).

paragraph 1 to all States Parties and seek their views on whether the proposed amendment should be adopted.

3. The proposed amendment shall be deemed adopted unless one third of the States Parties object to it by a written notification not later than 180 days after its circulation.]

*Article 20. Procedure and effects of declarations*

1. Declarations under articles 17, paragraphs 1, 18, paragraphs 1 and 2 and 19, paragraphs 2, 3 and 4 may be made at any time. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Declarations and their confirmations are to be in writing and be formally notified to the depositary.

3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

4. Any State which makes a declaration under this Convention may modify or withdraw it at any time by a formal notification in writing addressed to the depositary. The modification or withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

*Article 21. Reservations*

No reservations may be made under this Convention.

*Article 22. Amendments*

[Variant A<sup>10</sup>

1. Any Contracting State may propose amendments to this Convention. Proposed amendments shall be submitted in writing to the Secretary-General of the United Nations, who shall circulate the proposal to all States Parties, with the request that they indicate whether they favour a conference of States Parties. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Proposals for amendment shall be circulated to the Contracting States at least ninety days in advance of the conference.

2. Amendments to this Convention shall be adopted by [two thirds] [a majority of] the Contracting States present and voting at the conference of Contracting States and shall enter into force in respect of States which have ratified, accepted or approved such amendment on the first day of the month following the expiration of six months after the date on which [two thirds] of the Contracting States as of the time of the adoption of the amendment at the conference of the

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<sup>10</sup> Variant A of this draft article was already contained in the last version of the draft convention that was considered by the Working Group (A/CN.9/WG.IV/WP.110).

Contracting States have deposited their instruments of acceptance of the amendment.]

[Variant B<sup>11</sup>

1. The [Office of Legal Affairs of the United Nations] [secretariat of the United Nations Commission on International Trade Law]<sup>12</sup> shall prepare reports [yearly or] at such [other] time as the circumstances may require for the States Parties as to the manner in which the international regimen established in this Convention has operated in practice.

2. At the request of [not less than twenty-five per cent of] the States Parties, review conferences of Contracting States shall be convened from time to time by the [Office of Legal Affairs of the United Nations] [secretariat of the United Nations Commission on International Trade Law] to consider:

(a) The practical operation of this Convention and its effectiveness in facilitating electronic commerce covered by its terms;

(b) The judicial interpretation given to, and the application made of, the terms of this Convention; and

(c) Whether any modifications to this Convention are desirable.

3. Any amendment to this Convention shall be approved by at least a two-thirds majority of States participating in the conference referred to in the preceding paragraph and shall then enter into force in respect of States which have ratified, accepted or approved such amendment when ratified, accepted, or approved by three States in accordance with the provisions of article 23 relating to its entry into force.]

#### *Article 23. Entry into force*

1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the [...] instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the [...] instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

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<sup>11</sup> Variant B of the draft article was not contained in the last version of the draft convention that was considered by the Working Group (A/CN.9/WG.IV/WP.110). It reflects a proposal made by the United States of America at the forty-fourth session of the Working Group (A/CN.9/WG.IV/XLIV/CRP.4).

<sup>12</sup> These references may need to be replaced with references to “the Secretary-General of the United Nations” or “the Depositary” to ensure consistency with the existing practice of the United Nations in respect of administrative services provided to Member States. The Secretariat is studying the implications of the proposed formulation and will advise the Commission on the matter at its thirty-eight session (Vienna, 4-15 July 2005).

[Article 24. *Transitional rules*<sup>13</sup>

[1. This Convention applies only to electronic communications that are made after the date when the Convention enters into force.

[2. In Contracting States that makes a declaration under article 18, paragraph 1, this Convention applies only to electronic communications that are made after the date when the Convention enters into force in respect of the Contracting States referred to in paragraph 1 (a) or the Contracting State referred to in paragraph 1 (b) of article 18.

[3. This Convention applies only to the electronic communications referred to in article 19, paragraph 1, after the date when the relevant Convention among those listed in article 19, paragraph 1 has entered into force in the Contracting State.

[4. When a Contracting State has made a declaration under article 19, paragraph 3, this Convention applies only to electronic communications in connection with the formation or performance of a contract falling within the scope of the declaration after the date when the declaration takes effect in accordance with article 20, paragraph 3 or 4.

[5. A declaration under article 18, paragraphs 1 or 2, or article 19, paragraphs 2, 3 or 4, or its withdrawal or modification, does not affect any rights created by electronic communications made before the date when the declaration takes effect in accordance with article 20, paragraph 3 or 4.]

*Article 25. Denunciations*

1. A Contracting State may denounce this Convention by a formal notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

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

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

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<sup>13</sup> The last version of the draft convention that was considered by the Working Group (A/CN.9/WG.IV/WP.110) contained only paragraph 1 of the draft article. In its current form, the draft article reflects a proposal made by the United States of America at the forty-fourth session of the Working Group (A/CN.9/WG.IV/XLIV/CRP.6).

## ANNEX II

**REFERENCES TO PREPARATORY WORK BY WORKING GROUP IV  
(ELECTRONIC COMMERCE)**

*Preamble*

44 <sup>th</sup> session (Vienna, 11-22 October 2004)	A/CN.9/571, para. 10
43 <sup>rd</sup> session (New York, 15-19 March 2004)	A/CN.9/548, para. 82

*Article 1. Scope of application*

44 <sup>th</sup> session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 14-27
43 <sup>rd</sup> session (New York, 15-19 March 2004)	A/CN.9/548, paras. 71-97
41 <sup>st</sup> session (New York, 5-9 May 2003)	A/CN.9/528, paras. 32-48
40 <sup>th</sup> session (Vienna, 14-18 October 2002)	A/CN.9/527, paras. 73-81
39 <sup>th</sup> session (New York, 11-15 March 2002)	A/CN.9/509, paras. 28-40

*Article 2. Exclusions*

44 <sup>th</sup> session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 59-69
43 <sup>rd</sup> session (New York, 15-19 March 2004)	A/CN.9/548, paras. 98-111; see also paras. 112-118
41 <sup>st</sup> session (New York, 5-9 May 2003)	A/CN.9/528, paras. 49-64, see also paras. 65-69 (on a related draft article since deleted)
40 <sup>th</sup> session (Vienna, 14-18 October 2002)	A/CN.9/527, paras. 82-98, see also paras. 99-104 (on a related draft article since deleted)

*Article 3. Party autonomy*

44 <sup>th</sup> session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 70-77
43 <sup>rd</sup> session (New York, 15-19 March 2004)	A/CN.9/548, paras. 119-124
41 <sup>st</sup> session (New York, 5-9 May 2003)	A/CN.9/528, paras. 70-75
40 <sup>th</sup> session (Vienna, 14-18 October 2002)	A/CN.9/527, paras. 105-110

*Article 4. Definitions*

44 <sup>th</sup> session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 78-89
41 <sup>st</sup> session (New York, 5-9 May 2003)	A/CN.9/528, paras. 76-77
40 <sup>th</sup> session (Vienna, 14-18 October 2002)	A/CN.9/527, paras. 111-122

*Article 5. Interpretation*

44 <sup>th</sup> session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 90-91
41 <sup>st</sup> session (New York, 5-9 May 2003)	A/CN.9/528, paras. 78-80
40 <sup>th</sup> session (Vienna, 14-18 October 2002)	A/CN.9/527, paras. 123-126

*Article 6. Location of the parties*

44 <sup>th</sup> session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 92-114
41 <sup>st</sup> session (New York, 5-9 May 2003)	A/CN.9/528, paras. 81-93
39 <sup>th</sup> session (New York, 11-15 March 2002)	A/CN.9/509, paras. 41-59



*Article 7. Information requirements*

44 <sup>th</sup> session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 115-116
42 <sup>nd</sup> session (Vienna, 17-21 November 2003)	A/CN.9/546, paras. 87-105 (at that time article 11)
39 <sup>th</sup> session (New York, 11-15 March 2002)	A/CN.9/509, paras. 60-65

*Article 8. Legal recognition of electronic communications*

44 <sup>th</sup> session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 117-122
42 <sup>nd</sup> session (Vienna, 17-21 November 2003)	A/CN.9/546, paras. 39-45
41 <sup>st</sup> session (New York, 5-9 May 2003)	A/CN.9/528, paras. 94-108, see also paras. 121-131 (on a related draft since deleted) paras. 117-120 (on a related draft article since deleted)
39 <sup>th</sup> session (New York, 11-15 March 2002)	A/CN.9/509, paras. 86-92; see also paras. 66-73 (on a related draft article since deleted)

*Article 9. Form requirements*

44 <sup>th</sup> session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 123-139
43 <sup>rd</sup> session (New York, 15-19 March 2004)	A/CN.9/548, paras. 47-58
42 <sup>nd</sup> session (Vienna, 17-21 November 2003)	A/CN.9/546, paras. 46-58
39 <sup>th</sup> session (New York, 11-15 March 2002)	A/CN.9/509, paras. 112-121

*Article 10. Time and place of dispatch and receipt of electronic communications*

44 <sup>th</sup> session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 140-166
42 <sup>nd</sup> session (Vienna, 17-21 November 2003)	A/CN.9/546, paras. 59-86
41 <sup>st</sup> session (New York, 5-9 May 2003)	A/CN.9/528, paras. 132-151
39 <sup>th</sup> session (New York, 11-15 March 2002)	A/CN.9/509, paras. 93-98

*Article 11. Invitations to make offers*

44 <sup>th</sup> session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 167-172
42 <sup>nd</sup> session (Vienna, 17-21 November 2003)	A/CN.9/546, paras. 106-116
41 <sup>st</sup> session (New York, 5-9 May 2003)	A/CN.9/528, paras. 109-120
39 <sup>th</sup> session (New York, 11-15 March 2002)	A/CN.9/509, paras. 74-85

*Article 12. Use of automated information systems for contract formation*

44 <sup>th</sup> session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 173-174
39 <sup>th</sup> session (New York, 11-15 March 2002)	A/CN.9/509, paras. 99-103

*Article 13. Availability of contract terms*

44 <sup>th</sup> session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 175-181
42 <sup>nd</sup> session (Vienna, 17-21 November 2003)	A/CN.9/546, paras. 130-135
39 <sup>th</sup> session (New York, 11-15 March 2002)	A/CN.9/509, paras. 122-125

*Article 14. Error in electronic communications*

44 <sup>th</sup> session (Vienna, 11-22 October 2004)	A/CN.9/571, paras. 182-206
43 <sup>rd</sup> session (New York, 15-19 March 2004)	A/CN.9/548, paras. 14-26
39 <sup>th</sup> session (New York, 11-15 March 2002)	A/CN.9/509, para. 99 and paras. 104-111

*Article 15. Depositary*

44<sup>th</sup> session (Vienna, 11-22 October 2004) A/CN.9/571, para. 10

*Article 16. Signature, ratification, acceptance or approval*

44<sup>th</sup> session (Vienna, 11-22 October 2004) A/CN.9/571, para. 10

*Article 16 bis. Participation by Regional Economic Integration Organizations*

44<sup>th</sup> session (Vienna, 11-22 October 2004) A/CN.9/571, para. 10

*Article 17. Effect in domestic territorial units*

44<sup>th</sup> session (Vienna, 11-22 October 2004) A/CN.9/571, para. 10

*Article 18. Declarations on the scope of application*

44<sup>th</sup> session (Vienna, 11-22 October 2004) A/CN.9/571, paras. 28-46

43<sup>rd</sup> session (New York, 15-19 March 2004) A/CN.9/548, paras. 27-37

*Article 19. Communications exchanged under other international conventions*

44<sup>th</sup> session (Vienna, 11-22 October 2004) A/CN.9/571, paras. 23-27, 47-58

43<sup>rd</sup> session (New York, 15-19 March 2004) A/CN.9/548, paras. 38-70

*Article 19 bis. Procedure for amendments to article 19, paragraph 1*

44<sup>th</sup> session (Vienna, 11-22 October 2004) A/CN.9/571, para. 10

*Article 20. Procedure and effects of declarations*

44<sup>th</sup> session (Vienna, 11-22 October 2004) A/CN.9/571, para. 10

*Article 21. Reservations*

44<sup>th</sup> session (Vienna, 11-22 October 2004) A/CN.9/571, para. 10

*Article 22. Amendments*

44<sup>th</sup> session (Vienna, 11-22 October 2004) A/CN.9/571, para. 10

*Article 23. Entry into force*

44<sup>th</sup> session (Vienna, 11-22 October 2004) A/CN.9/571, para. 10

*Article 24. Transitional rules*

44<sup>th</sup> session (Vienna, 11-22 October 2004) A/CN.9/571, para. 10

*Article 25. Denunciations*

44<sup>th</sup> session (Vienna, 11-22 October 2004) A/CN.9/571, para. 10

## A/CN.9/577/Add.1

**Note by the Secretariat on the draft convention on the use of  
electronic communications in international  
contracts: Background information**

## ADDENDUM

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## I. Introduction

1. The Working Group began its deliberations on electronic contracting at its thirty-ninth session (New York, 11-15 March 2002). The deliberations of the Working Group since that time are summarized in paragraphs 3 to 32 below. Having completed its work at its forty-fourth session (Vienna, 11-22 October 2004), the Working Group requested the Secretariat to circulate the revised version of the draft convention to Governments for their comments, with a view to consideration and adoption of the draft convention by the Commission at its thirty-eighth session, in 2005.

2. The annex to document A/CN.9/577 contains the newly revised version of the draft convention, which includes the articles adopted by the Working Group at its forty-fourth session, as well as the draft preamble and final provisions on which the Working Group only held a general exchange of views at that time (see para. 27). This addendum contains a summary of the relevant deliberations of the Working Group and the Commission (paras. 3-27) as well as short notes intended to facilitate the consideration of the draft convention by Governments, in particular those that have not actively participated in the deliberations of the Working Group, and by the Commission (paras. 28-65).

## II. Summary of deliberations by the Working Group

3. At its thirty-third session (New York, 17 June-7 July 2000), the United Nations Commission on International Trade Law (UNCITRAL, hereafter referred to as “the Commission”) held a preliminary exchange of views on proposals for future work in the field of electronic commerce. The three suggested topics were: 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

<sup>1</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567.

settlement, and dematerialization of documents of title, in particular in the transport industry.

4. The Commission welcomed those suggestions. 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>

5. The Working Group considered those proposals at its thirty-eighth session (New York, 12-23 March 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). 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 by recommending to the Commission that it should start work towards the preparation of an international instrument dealing with certain issues in electronic contracting on a priority basis. At the same time, the Working Group recommended 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).

6. At the thirty-fourth session of the Commission (Vienna, 25 June-13 July 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. 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.<sup>3</sup> In order to give States sufficient time to hold internal consultations, the

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<sup>2</sup> *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, paras. 384-388.

<sup>3</sup> *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, para. 293.

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>

7. At its thirty-ninth session (New York, 11-15 March 2002), 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).

8. The Working Group considered first 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). 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 to 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.

9. Furthermore, at the closing of that session, the Working Group was 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 noted 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). 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 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

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<sup>4</sup> Ibid., para. 295.

wish to be included in the survey being conducted by the Secretariat (A/CN.9/509, para. 16).

10. The Commission considered the Working Group's report at its thirty-fifth session (New York, 17-28 June 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>

11. 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 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>6</sup>

12. At its fortieth session (Vienna, 14-18 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. The Working Group used the remaining time at that session to resume its deliberations on the preliminary draft convention (see A/CN.9/527, paras. 72-126).

13. The Working Group resumed its deliberations on the preliminary draft convention at its forty-first session (New York, 5-9 May 2003). The Working Group noted that a task force that had been established by the International Chamber of Commerce had submitted comments on the scope and purpose of the draft convention (A/CN.9/WG.IV/WP.101,

<sup>5</sup> Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 206.

<sup>6</sup> Ibid., para. 207.

annex). The Working Group generally welcomed the work being undertaken by 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 decisions and deliberations of the Working Group with respect to the draft convention are reflected in chapter IV of the report on its forty-first session (see A/CN.9/528, paras. 26-151).

14. In accordance with a decision taken at its fortieth session (see A/CN.9/527, para. 93), the Working Group also held a preliminary discussion on the question of excluding intellectual property rights from the draft convention (see A/CN.9/528, paras. 55-60). The Working Group agreed that the Secretariat should be requested to seek the specific advice of relevant international organizations, such as the World Intellectual Property Organization (WIPO) 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 rules on the protection of intellectual property rights. It was agreed that whether or not such an exclusion was necessary would ultimately depend on the substantive scope of the draft convention.

15. At its thirty-sixth session (Vienna, 30 June-11 July 2003), the Commission noted the progress made by the Secretariat in connection with a survey of possible legal barriers to the development of electronic commerce in international trade-related instruments. The Commission reiterated its belief in the importance of that project and its support for the efforts of the Working Group and the Secretariat in that respect. The Commission noted that the Working Group had recommended that the Secretariat expand the scope of the survey to review possible obstacles to electronic commerce in additional instruments that had been proposed to be included in the survey by other organizations and to 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 Commission called on member States to assist the Secretariat in that task by inviting appropriate experts or sources of information in respect of the various specific fields of expertise covered by the relevant international instruments.<sup>7</sup>

16. The Commission further noted with appreciation that the Working Group had continued its consideration of a preliminary draft convention dealing with selected issues related to electronic contracting. The Commission reaffirmed its belief that the instrument under consideration would be a useful contribution to facilitate the use of modern means of communication in cross-border commercial transactions. The Commission observed that the form of an international convention had been used by the Working Group thus far as a working assumption, but that did not preclude the choice of another form for the instrument at a later stage of the Working Group's deliberations.<sup>8</sup>

17. The Commission was informed that the Working Group had exchanged views on the relationship between the preliminary draft convention and the Working Group's efforts to remove possible legal obstacles to electronic commerce in existing international instruments relating to international trade (see A/CN.9/528, para. 25). The Commission

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<sup>7</sup> Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 211.

<sup>8</sup> Ibid., para. 212.

expressed support for the Working Group's efforts to tackle both lines of work simultaneously.<sup>9</sup>

18. The Commission was informed that the Working Group had held a preliminary discussion on the question of whether intellectual property rights should be excluded from the draft convention (see A/CN.9/528, paras. 55-60). The Commission noted the Working Group's understanding that its work should not be aimed at providing a substantive law framework for transactions involving "virtual goods", nor was it concerned with the question of whether and to what extent "virtual goods" were or should be covered by the United Nations Sales Convention. The question before the Working Group was whether and to what extent the solutions for electronic contracting being considered in the context of the preliminary draft convention could also apply to transactions involving licensing of intellectual property rights and similar arrangements. The Secretariat was requested to seek the views of other international organizations on the question, in particular WIPO.<sup>10</sup>

19. At its forty-second session (Vienna, 17-21 November 2003), the Working Group began its deliberations by holding a general discussion on the scope of the preliminary draft convention. The Working Group, *inter alia*, noted that a task force had been established by the International Chamber of Commerce to develop contractual rules and guidance on legal issues related to electronic commerce, tentatively called "e-Terms 2004". The Working Group welcomed the work being undertaken by 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 since the draft convention dealt with requirements that were typically found in legislation, and legal obstacles, being statutory in nature, could not be overcome by contractual provisions or non-binding standards. The Working Group expressed its appreciation to the International Chamber of Commerce for the interest in carrying out its work in cooperation with UNCITRAL and confirmed its readiness to provide comments on drafts that the International Chamber of Commerce would be preparing (see A/CN.9/546, paras. 33-38).

20. The Working Group proceeded to review articles 8 to 15 of the revised preliminary draft convention contained in the annex to the note by the Secretariat (A/CN.9/WG.IV/WP.103). The Working Group agreed to make several amendments to those provisions and requested the Secretariat to prepare a revised draft for future consideration (see A/CN.9/546, paras. 39-135).

21. The Working Group continued its work on the preliminary draft convention at its forty-third session (New York, 15-19 March 2004) on the basis of a note by the Secretariat that contained a revised version of the preliminary draft convention (A/CN.9/WG.IV/WP.108). The deliberations of the Working Group focused on draft articles X, Y and 1 to 4 (A/CN.9/548, paras. 13-123). The Working Group agreed that it should endeavour to complete its work on the draft convention with a view to enabling its review and approval by the Commission in 2005.

22. At its thirty-seventh session (New York, 14-25 June 2004), the Commission took note of the reports of the Working Group on the work of its forty-second and forty-third sessions (A/CN.9/546 and A/CN.9/548, respectively). The Commission was informed that the Working Group had undertaken a review of articles 8 to 15 of the revised text of the

<sup>9</sup> Ibid., para. 213.

<sup>10</sup> Ibid., para. 214.



preliminary draft convention at its forty-second session. The Commission noted that the Working Group, at its forty-third session, had reviewed articles X and Y as well as articles 1 to 4 of the draft convention and that the Working Group had held a general discussion on draft articles 5 to 7 bis. The Commission expressed its support for the efforts by the Working Group to incorporate in the draft convention provisions aimed at removing possible legal obstacles to electronic commerce that might arise under existing international trade-related instruments. The Commission was informed that the Working Group had agreed that it should endeavour to complete its work on the draft convention with a view to enabling its review and approval by the Commission in 2005. The Commission expressed its appreciation for the Working Group's endeavours and agreed that a timely completion of the Working Group's deliberations on the draft convention should be treated as a matter of importance, which would justify approving a two-week forty-fourth session of the Working Group to be held in October 2004.<sup>11</sup>

23. The Working Group resumed its deliberations at its forty-fourth session (Vienna, 11-22 October 2004), on the basis of a newly revised preliminary draft convention contained in annex I of the note by the Secretariat A/CN.9/WG.IV/WP.110. The Working Group reviewed and adopted draft articles 1 to 14, 18 and 19 of the draft convention. The relevant decisions and deliberations of the Working Group are reflected in its report on the work of its forty-fourth session (A/CN.9/571, paras. 13-206). At that time, the Working Group also held an initial exchange of views on the preamble and the final clauses of the draft convention, including proposals for additional provisions in chapter IV. In the light of its deliberations on chapters I, II and III and articles 18 and 19 of the draft convention, the Working Group requested the Secretariat to make consequential changes in the draft final provisions in chapter IV. The Working Group also requested the Secretariat to insert within square brackets in the final draft to be submitted to the Commission the draft provisions that had been proposed for addition to the text considered by the Working Group (A/CN.9/WG.IV/WP.110). The Working Group requested the Secretariat to circulate the revised version of the draft convention to Governments for their comments, with a view to consideration and adoption of the draft convention by the Commission at its thirty-eighth session, in 2005.

### III. Notes on the main provisions of the draft convention

24. The purpose of the draft convention is to offer practical solutions for issues related to the use of electronic means of communication in connection with international contracts.

25. The draft convention is not intended to establish uniform rules for substantive contractual issues that are not specifically related to the use of electronic communications. However, given that a strict separation between technology-related and substantive issues in the context of electronic commerce is not always feasible or desirable, the draft convention contains a few substantive rules that extend beyond merely reaffirming the principle of functional equivalence where substantive rules are needed in order to ensure the effectiveness of electronic communications (A/CN.9/527, para. 81).

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<sup>11</sup> Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 71.

## **A. Sphere of application (draft articles 1 and 2)**

26. The draft convention applies to the “use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States”.

### **1. Territorial sphere of application**

27. It was the intention of the Working Group that the draft convention should not be confined to the context of contract formation, as electronic communications are used for the exercise of a variety of rights arising out of the contract (such as notices of receipt of goods, notices of claims for failure to perform or notices of termination) or even for performance, as in the case of electronic fund transfers (A/CN.9/509, para. 35).

28. Unlike other international instruments, such as the United Nations Sales Convention, the draft convention does not require that both parties be located in Contracting States.

29. In the context of the United Nations Sales Convention, the need for both countries involved to be Contracting States was introduced to allow the parties to determine easily whether or not the convention applies to their contract, without having to resort to rules of private international law to identify the applicable law. The possibly narrower geographic field of application offered by that option was compensated for by the advantage of the enhanced legal certainty it provided. (A/CN.9/548, para. 88).

30. The Working Group had initially contemplated a rule similar to paragraph 1 (a) of article 1 of the United Nations Sales Convention to ensure consistency between the two texts (A/CN.9/509). However, as the Working Group’s deliberations progressed and the impact of the draft convention became clearer, the need for parallelism between the draft convention and the United Nations Sales Convention was questioned since it was felt that their respective scopes of application were in any event independent of each other (A/CN.9/548, para. 89).

31. It was further argued that a rule similar to paragraph 1 (a) of article 1 of the United Nations Sales Convention would automatically prevent the application of the draft convention whenever one of the States involved was not a Contracting State. It was further felt that, to the extent that several provisions of the draft convention were intended to support or facilitate the operation of other laws in an electronic environment (such as, for example, draft articles 8 and 9), a requirement similar to paragraph 1 (a) of article 1 of the United Nations Sales Convention would lead to the undesirable result that a domestic court might be mandated to interpret the provisions of its own laws (for instance, in respect of form requirements) in different ways, depending on whether or not both parties to an international contract were located in Contracting States of the draft convention. The Working Group felt that the application of the draft convention would be simplified and its practical reach greatly enhanced if it were simply to apply to international contracts, that is, contracts between parties in two different States, without the cumulative requirement that both those States should also be Contracting States of the draft convention. (A/CN.9/548, paras. 87, see also A/CN.9/571, para.17).

32. The Working Group eventually agreed that the best approach was to establish the broadest possible scope of application as a departure point, while allowing States for which a broad scope of application might not be desirable to make declarations aimed at reducing the reach of the draft convention. (A/CN.9/571, para.39). It is recognized that in

its present form, the draft convention applies when the law of a Contracting State is the law applicable to the dealings between the parties, which is to be determined by the rules on private international law of the forum State, if the parties have not chosen the applicable law.

## 2. Excluded matters: consumer transactions

33. The draft convention does not apply to electronic communications exchanged in connection with consumer contracts. However, unlike the corresponding exclusion under article 2(a) of the United Nations Sales Convention, the exclusion of consumer transactions under the draft convention is an absolute one, so that consumer contracts would always be excluded even if the personal, family or household purpose of the contracts was not apparent to the other party.

34. According to its article 2, subparagraph (a), the United Nations Sales Convention does 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 qualification was intended to promote legal certainty, since 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. As a result, the consumer purpose of a sales contract could not be held against the seller, for the purpose of excluding the applicability of that 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. The drafters of the United Nations Sales Convention assumed that there might be situations where a sales contract would fall under that 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),<sup>12</sup> 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” (A/CN.9/527, para. 86).

35. In the case of the draft convention, however, the Working Group felt that 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 United Nations Sales Convention, such as the Internet, greatly increased the likelihood of consumers purchasing goods from sellers established in another country (A/CN.9/527, para. 87). Since the Working Group recognized that certain rules of the draft convention might not be appropriate in the context of consumer transactions, the Working Group agreed that consumers should be completely excluded from the reach of the draft convention (A/CN.9/548, paras. 101-102).

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<sup>12</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.

### 3. Other excluded matters

36. The draft convention does not apply to transactions in certain financial markets subject to specific regulation or industry standards. The Working Group considered that the financial service sector was subject to well-defined regulatory controls and industry standards that addressed issues relating to electronic commerce in an effective way for the worldwide functioning of that sector and that no benefit would be derived from their inclusion in the draft convention. It was also stated that, given the unique nature of that sector, the relegation of such an exclusion to country-based declarations under draft article 18 would be inadequate to reflect that reality (A/CN.9/558, para. 109).

37. Furthermore, the draft convention does not apply to negotiable instruments or documents of title, in view of the particular difficulty of creating an electronic equivalent of paper-based negotiability, for which special rules would need to be devised (see A/CN.9/527, paras. 45, 55, 62 and 65). The Working Group noted in particular that the potential consequences of unauthorized duplication of documents of title and negotiable instruments—and generally any transferable instrument that entitled the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money—made it necessary to develop mechanisms to ensure the singularity or originality of the relevant document. Finding a solution for that problem required a combination of legal, technological and business solutions, which had not yet been fully developed and tested (A/CN.9/571, para. 136).

### B. Location of the parties and information requirements (draft articles 6 and 7)

38. The draft convention contains a set of rules dealing with the location of the parties. The draft convention does not contemplate a duty for the parties to disclose their places of business (see para. 50), but establishes a certain number of presumptions and default rules aimed at facilitating a determination of a party's location. It attributes primary—albeit not absolute—importance to a party's indication of its relevant place of business.

39. The rebuttable presumption of location established by draft article 6 serves eminently practical purposes and is not meant to depart from the notion of “place of business”, as used in non-electronic transactions. For example, an Internet vendor maintaining several warehouses at different locations from which different goods might be shipped to fulfil a single purchase order effected by electronic means might see a need to indicate one of such locations as its place of business for a given contract. The current draft recognizes that possibility, with the consequence that such an indication could only be challenged if the vendor does not have a place of business at the location it indicated. Without that possibility, the parties might need to enquire, in respect of each contract, which of the vendor's multiple places of business has the closest connection to the relevant contract in order to determine what is the vendor's place of business in that particular case (A/CN.9/571, para. 98). If a party has only one place of business and has not made any indication, it would be deemed to be located at the place that meets the definition of “place of business” under draft article 5, subparagraph (h).

40. The draft convention takes a cautious approach to peripheral information related to electronic messages, such as IP addresses, domain names or the geographic location of information systems, which despite their apparent objectivity have little, if any, conclusive

value for determining the physical location of the parties. However, nothing in the draft convention prevents a court or arbitrator from taking into account the assignment of a domain name as a possible element, among others, to determine a party's location, where appropriate (A/CN.9/571, para. 113).

41. Draft article 7 reminds the parties of the need to comply with possible disclosure obligations that might exist under domestic law. The Working Group considered at length various proposals that contemplated a duty for the parties to disclose their places of business, among other information (A/CN.9/484, para. 103; A/CN.9/509, paras. 61-65). The consensus that eventually emerged was that any duty of that kind would be ill-fitted to a commercial law instrument and potentially harmful to certain existing business practices. It was felt that disclosure obligations were typically found in legislation primarily concerned with consumer protection. In any event, to be effective, the operation of regulatory provisions of that type needed to be supported by a number of administrative and other measures that could not be provided in the draft convention (A/CN.9/546, paras. 92-93).

### **C. Treatment of contracts (articles 8, 11,12 and 13)**

42. The draft convention affirms in article 8 the principle contained in article 11 of the UNCITRAL Model Law on Electronic Commerce that contracts should not be denied validity or enforceability solely because they result from the exchange of electronic communications. The draft convention does not venture into determining when offers and acceptances of offers become effective for purposes of contract formation. The Working Group recognized that contracts other than sales contracts governed by the rules on contract formation in the United Nations Sales Convention were in most cases not subject to a uniform international regime. Different legal systems provided various criteria to establish when a contract was formed and the Working Group eventually accepted the view that 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 (A/CN.9/528, para. 103; see also A/CN.9/546, paras. 118-121).

43. Article 12 of the draft convention recognizes that contracts may be formed as a result of actions by automated message systems ("electronic agents"), even if no natural person reviewed each of the individual actions carried out by the systems or the resulting contract. However, article 11 clarifies that the mere fact that a party offers interactive applications for the placement of orders—whether or not its system is fully automated—does not create a presumption that the party intended to be bound by the orders placed through the system. This rule is inspired by article 14, paragraph 1, of the United Nations Sales Convention and 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). The underlying principle to this general rule is the concern that attaching a presumption of binding intention to the use of interactive contracting applications would be detrimental for sellers holding a limited stock of certain goods, if the seller were to be liable to fulfil all purchase orders received from a potentially unlimited number of buyers (A/CN.9/546, para. 107).

44. According to the Working Group's decision to avoid establishing a duality of regimes for electronic and paper-based transactions, and consistent with the facilitative—rather than regulatory—approach of the draft convention, article 13 defers to domestic law

on matters such as any obligations that the parties might have to make contractual terms available in a particular manner.

45. However the draft convention deals with the substantive issue of input errors in electronic communications in view of the potentially higher risk of mistakes being made in real-time or nearly instantaneous transactions (A/CN.9/509, para. 105; A/CN.9/548, para. 17). Draft article 14 provides that a party who makes an input error may withdraw the communication in question under certain circumstances.

46. It should be noted that draft article 14 deals only with errors that occur in interactions between individuals and automated information systems that do not offer the individual an opportunity to review or correct the errors. Rather than requiring generally that an opportunity to correct errors should be provided, the draft article limits itself to providing consequences for the absence of such a possibility (A/CN.9/548, para. 19). The word “input”, which is used to qualify the notion of “error” in the draft article, is intended to make it clear that the provision only aims at providing means to redress errors relating to inputting wrong data in communications exchanged with an automated message system. The draft article does not deal with other types of error, which should be left for the general doctrine of error under domestic law (A/CN.9/571, para. 190).

#### **D. Form requirements (draft article 9)**

47. Article 9 of the draft convention reiterates the basic rules contained in articles 6, 7 and 8 of the UNCITRAL Model Law on Electronic Commerce concerning the criteria for establishing functional equivalence between electronic communications and paper documents—including “original” paper documents—as well as between electronic authentication methods and hand-written signatures. However, unlike the Model Law, the draft convention does not deal with record retention, as it was felt that such a matter was more closely related to rules of evidence and administrative requirements than with contract formation and performance.

48. It should be noted that draft article 9 establishes minimum standards to meet form requirements that may exist under the applicable law. The principle of party autonomy in draft article 3, which is also contained in other UNCITRAL instruments, such as in article 6 of the United Nations Sales Convention, should not be understood as allowing the parties to go as far as relaxing statutory requirements on signature in favour of methods of authentication that provide a lesser degree of reliability than electronic signatures. Generally, it was said, party autonomy did not mean that the draft convention empowers the parties to set aside statutory requirements on form or authentication of contracts and transactions (A/CN.9/527, para. 108).

#### **E. Time and place of dispatch and receipt of electronic communications (draft article 10)**

49. As is the case under article 15 of the UNCITRAL Model Law on Electronic Commerce, the draft convention contains a set of default rules on time and place of dispatch and receipt of data messages, which are intended to supplement national rules on dispatch and receipt by transposing them to an electronic environment. The differences in wording between article 10 of the draft convention and article 15 of the Model Law are not intended to produce a different practical result, but aim at facilitating the operation of the

draft convention in various legal systems, by aligning the formulation of the relevant rules with general elements commonly used to define dispatch and receipt under domestic law.

## 1. “Dispatch” of electronic communications

50. The definition of “dispatch” as the time when an electronic communication left an information system under the control of the originator—as distinct from the time when it entered another information system—was chosen so as to more closely mirror the notion of “dispatch” in a non-electronic environment (A/CN.9/571, para. 142), which is understood in most legal systems as the time when a communication leaves the originator’s sphere of control. In practice, the result should be the same as under article 15, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce, since the most easily accessible evidence to prove that a communication has left an information system under the control of the originator is the indication, in the relevant transmission protocol, of the time when the communication was delivered to the destination information system or to intermediary transmission systems.

## 2. “Receipt” of electronic communications

51. Article 10 of the draft convention is conceived as a set of presumptions, rather than a firm rule on receipt of electronic communications. Using a notion common to many legal systems, and reflected in domestic enactments of the UNCITRAL Model Law on Electronic Commerce, the draft article requires that an electronic communication be capable of being retrieved, in order to be deemed to have been received by the addressee. This requirement is not contained in the Model Law, which focuses on timing and defers to national law on whether data messages need to meet other requirements (such as “processability”) in order to be deemed to have been received (see, on this particular point, a comparative study conducted by the Secretariat in A/CN.9/WG.IV/WP.104/Add2, paras. 10-31, available at [http://www.uncitral.org/english/workinggroups/wg\\_ec/wp-104-add2-e.pdf](http://www.uncitral.org/english/workinggroups/wg_ec/wp-104-add2-e.pdf)).

52. Despite the different wording used, the effect of the rules on receipt of electronic communications in the draft convention is consistent with the article 15 of the UNCITRAL Model Law on Electronic Commerce. As is the case under article 15 of the Model Law, the draft convention retains the objective test of entry of a communication in an information system to determine when an electronic communication is presumed to be “capable of being retrieved” and therefore “received”. The requirement that a message should be capable of being retrieved, which is presumed to occur when the message reaches the addressee’s electronic address, should not be seen as adding an extraneous subjective element to the rule contained in article 15 of the Model Law. In fact “entry” in an information system is understood under article 15 of the Model Law as the time when a data message “becomes available for processing within that information system”,<sup>13</sup> which is arguably also the time when the message becomes “capable of being retrieved” by the addressee.

53. Similar to a number of domestic laws, the draft convention uses the term “electronic address”, instead of “information system”, which was the expression used in the Model Law. In practice, the new terminology, which appears in other international instruments such as the Uniform Customs and Practices for Documentary Credits (“UCP 500”)—

<sup>13</sup> See *Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce CC* (United Nations publication, Sales No. E.99.V.4) para 103.

Supplement for Electronic Presentation (“eUCP”),<sup>14</sup> should not lead to any substantive difference. Indeed, the term “electronic address” may, depending on the technology used, refer to a communications network, and in other instances could include an electronic mailbox, a telecopy device or another specific “portion or location in an information system that a person uses for receiving electronic messages” (A/CN.9/571, para. 157).

54. The draft convention retains the distinction made in article 15 of the Model Law between delivery of messages to specifically designated electronic addresses and delivery of messages to an address not specifically designated. In the first case, the rule of receipt is essentially the same as under article 15, paragraph (2)(a)(i) of the Model Law, that is, a message is received when it reaches the addressee’s electronic address (or “enters” the addressee’s “information system” in the terminology of the Model Law). One noticeable difference, however, concerns the rules for receipt of electronic communications sent to a non-designated address. The Model Law distinguishes between communications sent to an information system other than the designated one and communications sent to any information system of the addressee in the absence of any particular designation. In the first case, the Model Law does not regard the message as being received until the addressee actually retrieves it. The rationale behind this rule is that if the originator chose to ignore the addressee’s instructions and sent the message to an information system other than the designated system, it would not be reasonable to consider the message delivered to the addressee until the addressee has actually retrieved it. In the second situation, however, the underlying assumption of the Model Law was that for the addressee it was irrelevant to which information system the messages would be sent, in which case it would be reasonable to presume that it would accept messages through any of its information systems.

55. The draft convention follows the approach taken in a number of domestic enactments of the Model Law and treats both situations in the same manner. Thus for all cases where the message is not delivered to a designated electronic address, receipt under the draft convention only occurs when (a) the electronic communication becomes capable of being retrieved by the addressee (by reaching an electronic address of the addressee) and (b) the addressee actually becomes aware that the communication was sent to that particular address. In cases where the addressee has designated an electronic address, but the communication was sent elsewhere, the rule in the draft convention is not different in result from article 15, paragraph (2)(a)(ii) of the Model Law, which itself requires, in those cases, that the addressee retrieves the message (which in most cases would be the immediate evidence that the addressee became aware that the electronic communication has been sent to that address).

56. The only substantive difference, therefore, concerns the receipt of communications in the absence of any designation. In this particular case, the Working Group agreed that practical developments since the adoption of the Model Law justified a departure from the original rule. It was noted in particular that concerns over security of information and communications in the business world had led to the increased use of security measures such as filters or firewalls which might prevent electronic communications from reaching their addressees. Under those circumstances, it was felt that any rules on receipt of electronic communications should necessarily be linked to consent to use a particular

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<sup>14</sup> See James E. Byrne and Dan Taylor, *ICC Guide to the eUCP*, ICC, Paris, 2002, p. 54.



electronic address, and should not compel persons who had not agreed to bear the risk of loss of communications that were sent to another address (A/CN.9/571, para. 150).

### **3. Place of dispatch and receipt**

57. The rules on place of dispatch and receipt are essentially the same as in article 15, paragraphs 3 and 4 of the UNCITRAL Model Law on Electronic Commerce.

## **F. Relationship to other international instruments (draft article 19)**

58. The Working Group hopes that States may find the draft convention useful to facilitate the operation of other international instruments—essentially trade-related ones. Besides the UNCITRAL instruments listed in article 19, paragraph 1, other treaties or conventions might be interpreted and applied in the light of the draft convention, insofar as such possibility has not been excluded or limited by declarations made by the State concerned. Draft article 19 intends 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 study done by the Secretariat (see A/CN.9/WG.IV/WP.94; see also A/CN.9/527, paras. 33-48), in a manner that obviates the need for amending individual international conventions.

59. Paragraph 1 of draft article 19 is intended to facilitate electronic transactions in the areas covered by the conventions listed therein, but is not meant to formally amend any of those conventions. By ratifying the draft convention, a State would automatically accept—at the very least—to apply the provisions of the draft convention to electronic communications exchanged in connection with any of the conventions listed in that paragraph. This would provide a domestic solution for a problem originating in international instruments, based on the recognition that domestic courts already have the power to interpret international commercial law instruments. The draft paragraph ensures that a Contracting State would incorporate in its legal system a provision that directs its judicial bodies to use the provisions of the draft convention to address legal issues relating to the use of data messages in the context of those other international conventions (A/CN.9/548, para. 49).

60. In addition to those instruments which, for the avoidance of doubt, are listed in paragraph 1, the provisions of the draft convention may also apply, pursuant to paragraph 2, to electronic communications exchanged in connection with contracts covered by other international conventions, treaties or agreements, unless such application has been excluded by a Contracting State. The possibility of excluding this expanded application of the draft convention has been added to take into account possible concerns of States that may wish to ascertain first whether the draft convention would be compatible with their existing international obligations.

61. Paragraphs 3 and 4 of the draft article add further flexibility by allowing States to add specific conventions to the list of international instruments to which they would apply the provisions of the draft convention—even if the State has submitted a general declaration under paragraph 2—or to exclude certain specific conventions identified in their declarations. It should be noted that declarations under paragraph 4 of the draft article would exclude the application of the draft convention to the use of electronic communications in respect of all contracts to which another international convention applies. The draft article does not contemplate the possibility for a Contracting State to

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exclude only certain types or categories of contracts covered by another international convention (A/CN.9/571, para. 56).

**G. Draft convention on the use of electronic communications  
in international contracts: Comments received from  
Member States and international organizations**

**(A/CN.9/578 and Add.1-17) [Original: Arabic/English]**

**A/CN.9/578**

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**I. Introduction**

1. At its thirty-seventh session (New York, 14-25 June 2004) the United Nations Commission on International Trade Law encouraged Working Group IV (Electronic Commerce) to complete the preparation of a draft convention dealing with selected issues of electronic contracting with a view to enabling its review and approval by the Commission in 2005.<sup>1</sup>

2. The Working Group approved the draft convention on the use of electronic communications in international contracts at its forty-fourth session (Vienna, 11-22 October 2004). By a note verbale dated 29 December 2004 and a letter dated 26 January 2005, the Secretary-General transmitted the text of the draft convention (A/CN.9/577) and the report of the Working Group on that session (A/CN.9/571) to States and to intergovernmental and international non-governmental organizations that are invited to attend the meetings of the Commission and its working groups as observers. A short summary of the deliberations of Working Group IV, as well as explanatory notes on the draft convention, were issued separately (A/CN.9/577/Add.1).

3. The present document reproduces the first comments received by the Secretariat on the draft convention on the use of electronic communications in international contracts. 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.

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<sup>1</sup> *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 71.

## **II. Comments received from Member States and international organizations**

### **A. Member States**

#### **Egypt**

[Original: Arabic]

[17 March 2005]

#### **1. Background**

1. Electronic commerce occupies a prominent place in the concerns of the United Nations Commission on International Trade Law (UNCITRAL). A working group has therefore been formed to deal with legal matters concerning electronic commerce.

2. This group has, at its forty-four meetings, worked hard to produce a number of documents relating to electronic commerce, including the draft convention on the use of electronic communications in international contracts. The group started work on that convention in March 2002, continuing until October 2004. As UNCITRAL wished to produce an exemplary form of this draft, it sent it to all the authorities and countries concerned, the aim being to receive their remarks so that these could be used at the thirty-eighth session of the Commission, to be held in Vienna in July 2005.

#### **2. Preliminary remarks**

3. We can only begin by praising the efforts made by the working group so that this project could reach its current form. In fact, anyone keeping abreast of the work of UNCITRAL will inevitably notice how those in charge of the group have striven to tackle not only every new aspect in the field of international trade, but also the scientific work, which was carried out rapidly and in a well-organized way with the aim of providing the appropriate legal procedures and forms for that trade.

4. It is also worth noting that major efforts are always being directed towards the channels of international cooperation and the facilitation of international trade, especially as UNCITRAL, ever since it was set up, deserves credit for embracing an established doctrine whose underlying idea is that one of the main ways of encouraging international trade consists of establishing standard international material rules in such a manner that they are always the best aid to ensuring the flow and development of international trade on the basis of equality and mutual benefit.

5. We would also like to point out here that our praise of the work of UNCITRAL can be attributed to the fact that we appreciate the difficulty of establishing standard international rules on the subject of private law, which is applied by the local courts of justice, because of the way in which this can be incompatible, firstly, with local rules that give commands, secondly, with matters of public order and, thirdly, with general policy.

6. We are therefore able to observe that UNCITRAL has adopted an intelligent and judicious approach in that the convention does not cover international non-contractual obligations, which give rise to a large number of differences of opinion and widely varying views. UNCITRAL has contented itself with international contractual obligations, so that the part concerning contractual obligations can be completed as a first step. This, we

believe, is then followed by the difficult part, which relates to non-contractual obligations. If these two parts of the work are completed, we shall have complete legal coverage of electronic commercial relations.

7. Concern with electronic commerce lies at the heart of concern with international trade. This is because electronic commerce opens up those wide horizons for international trade that we could not have achieved without modern means of communication. This reaches the stage where new parties and markets are given opportunities for embarking upon international trade. In addition, electronic commerce plays a part in reducing the expense of international trading activities.

8. This is the reason why UNCITRAL became involved in the matter in its desire, firstly, to overcome the legal obstacles that hinder the launching of electronic commerce and, secondly, to fill the gaps in local legal systems, as well as the uncertainty that those gaps may cause to partners to the transactions when it comes to the rules to be followed.

9. We also note that the draft attempts to give the contracting parties the freedom to use an appropriate form of a technological medium whose nature is constantly changing, as long as the parties do not violate the applicable legal rules.

10. We conclude these preliminary remarks by referring to the logical attempt that those who drew up the draft convention undertook to ensure that the standard rules set forth in it will provide appropriate legal solutions to problems arising from the use of electronic communications in international contracts, with due consideration being given to the different legal and economic systems to be found in different countries.

## **Chapter I. Sphere of application**

### *Article 1. Scope of application*

11. In determining the scope of application, the draft, operating in a favourable way, requires that electronic communications be used in concluding or implementing a contract or agreement between parties from different States, on condition that those different States should be apparent from the contract or from any dealings between the parties, irrespective of the nationality of the parties or of whether the contract is of a civil or a commercial character.

12. The Working Group, in connection with that article, inquired about the necessity of providing an explanation, in an additional comment, on the subject of what was meant by the two terms “contract” and “agreement”. We therefore consider it appropriate—taking into account the precision of the two terms and the difference in their meanings in some international systems—that this explanation should be added.

### *Article 2. Exclusions*

13. The draft excludes from its application—in a manner with which we disagree—the use of electronic communications in:

- (a) Contracts concluded for personal, family or household purposes;
- (b) Transactions on a regulated exchange;
- (c) Foreign exchange transactions, inter-bank payment systems, transfer of security rights and transfer of economic assets;

(d) The transfer of security rights in sale, loan, holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary;

(e) Some international commercial tools, such as bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts, or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.

14. In this matter, it is important to us to refer to our understanding of how financial and economic activities are excluded by reason of their particular circumstances. This matter needs to have a specific convention devoted to it. However, for the reasons below it is difficult for us to accept that personal contracts and some of the international commercial mechanisms should be excluded. As regards personal contracts, they represent a part of the volume of electronic commerce, or rather it can be said that natural persons are those most in need of being included in the international organization because they are the party that is the least capable of international movement, has the least material strength and is the most ignorant of the rules of international trade. Their knowledge of the international material rules that regulate the dealings of the international organization will therefore encourage them to conduct electronic commercial dealings. This will reflect positively upon international trade.

15. However, if the reason that induced those who drew up the convention to adopt this approach is that personal contracts may involve the application of rules that give commands in local legislation with regard to some issues such as the rights of the consumer, then it may be appropriate to start adopting unconventional ideas and tools with respect to contracts of this type.

16. On this subject, we propose that a draft international convention be drawn up to cover these contracts, while showing appropriate sensitivity to local rules that give commands, with a non-judicial, electronically managed mechanism—known as “electronic arbitration”—being devised for the settlement of disputes at all stages: allegation, investigation, negotiation and settlement. For this mechanism to be successful, it must be materially managed and supported under an international umbrella that ensures that the mechanism is impartial and that the provisions of the convention include objective and procedural rules that the mechanism will follow in achieving transparency and natural expectation, so as to avoid the defects that have become apparent from the experience of bodies currently dealing with electronic arbitration.

17. As regards international commercial mechanisms, we do not believe that it was justifiable to exclude some mechanisms that play a pivotal role in international commerce. In our view it is logical that these mechanisms need to be fast and cost-effective and that this is made possible by electronic communication, especially as most of these mechanisms are especially well accepted by traders in various communications media and international trade law has always made pioneering efforts to accept unconventional or unofficial forms of dealings.

### *Article 3. Party autonomy*

18. The draft convention naturally, logically and successfully gives the parties to the contract the freedom to choose to apply all, some or none of the provisions of the convention. We shall not dwell long upon this article, because it is not disputed that it is vital and important to the functioning of international trade.

## Chapter II. General provisions

### *Article 4. Definitions*

19 As is usual in modern conventions, especially those dealing with technological advances, the draft has devoted this article to definitions explaining the meaning of each of the following: “communication”, “electronic communication”, “data message”, “originator”, “addressee”, “information system”, “automated message system” and “place of business”.

20. We would like to point out here that all the earlier and later advanced means of communication are to be brought together under the banner of the convention, with the door also being left open for similar means of communication that may appear in future.

21. There is another important point, namely, the matter of excluding intermediaries in electronic communications when it comes to determining the originator and the addressee, and this is in order to prevent any confusion or interference as regards responsibility.

22. Finally, “place of business” has been defined as the “place where a party maintains a non-transitory establishment to pursue economic activity other than the temporary provision of goods and services out of a specific location”.

### *Article 5. Interpretation*

23. This article calls for the provisions of the convention to be interpreted having regard to its international character and the need to promote uniformity in its application and the observance of good faith in international trade.

24. If the convention does not include a particular provision, then the article refers to 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.

### *Article 6. Location of the parties*

25. The draft has deemed that a party’s place of business is presumed to be the location indicated by that party and has placed upon the other party the burden of proving the contrary.

26. The Working Group, in connection with this article, inquired about the extent to which it is advantageous to state anything to the effect that what is meant by “place of business” should be in compliance with the provision of the first paragraph above. We do not see any need for this.

27. If there is more than one place of business, the draft takes as the norm the place of business that has the closest relationship to the relevant contract, having regard to the circumstances known to the parties at any time before or at the conclusion of the contract.

28. If a natural person does not have a place of business, the draft states that reference is to be made to the person’s habitual residence.

29. In a manner that reflects the way in which the draft takes into account the nature of modern communications, it has, in defining the place of business, excluded the location in which the information systems are situated and also the location in which they can be installed.

30. In forming a connection that takes into account the special nature of those media, the draft has paid no attention to whether one of the parties owns a domain name or an electronic mail (e-mail) system that is linked to a particular country and is the only connection to that party's place of business.

*Article 7. Information requirements*

31. This article refers to the fact that nothing in the convention affects the application of any rule of law that may require the parties to disclose their identities or their places of business, or relieves a party from the legal consequences of making inaccurate or false statements in that regard.

**Chapter III. Use of electronic communications in international contracts**

*Article 8. Legal recognition of electronic communications*

32. This article grants recognition of electronic contract, so that its validity cannot be denied on the sole ground that it is in the form of an electronic communication, while attention is drawn to the fact that its use or acceptance is linked to the volition of the parties.

33. In connection with this article, the Working Group asked whether it might be advantageous to add a phrase concerning contracts that result from the exchange of modern communications (in addition to making mention of contracts that are electronic in form). We consider that the addition of such a phrase will be beneficial to the formulation.

*Article 9. Form requirements*

34. In continuing the approach adopted by the draft in not being restricted to a specific technological method, the draft did not impose a condition requiring that the communication or contract should have any particular form, but required that an electronic communication was to be granted the same credibility as a written communication and that the information contained therein was to be accessible so as to be usable for subsequent reference. Where a written signature is required or the original of the document must be kept, the draft deemed that the electronic version of the document had the same status if that version fulfilled a number of requirements and guarantees set forth in the article.

*Article 10. Time and place of dispatch and receipt of electronic communication*

35. It can be confirmed that the approach that the draft has adopted in this article is a sound and logical approach that takes into account the nature of electronic communication:

(a) The draft has taken the time of dispatch as being the time when the communication leaves the information system of the originator or of the party who sent it on behalf of the originator; otherwise, the time of dispatch is the time when the communication is received;

(b) As regards the time of receipt, the draft has deemed it to be the time at which the addressee becomes capable of retrieving the communication (the message is considered to be retrievable when it reaches the addressee's e-mail address) at the e-mail address he has designated. If the communication reaches the addressee at a different e-mail address, the time at which the addressee becomes aware that the communication was sent to that address is to be taken as the time of receipt.



36. The draft considers that the communication has been received or dispatched at the place of business of the addressee or originator and in this respect the draft does not regard it as significant that the information system is located elsewhere. The draft attempted to provide this controlling provision in order to avoid assumptions that could be created by the possibility of accessing information systems from anywhere in the world, if appropriate electronic communication exists. This possibility arouses controversy as regards both the applicable law and the competent judicial authority.

*Article 11. Invitations to make offers*

37. The unique nature of electronic dealings has made it necessary for the home pages of electronic sites to carry announcements and proposals to conclude a contract. A dispute has arisen as to whether such announcements are proposals to conclude a contract or are merely invitations to make offers. If they are considered proposals to conclude a contract, then the liability of companies and businesses will be limitless, especially when there are a number of restrictions regarding some types of goods or regarding the purchaser's age, nationality or place of residence (for example, when the goods are of limited value, a company may not object to delivering them free of charge in a specific geographical area, while in another and distant area this might represent a huge loss to the company).

38. The draft has therefore avoided these problems by deeming that these announcements and home pages of electronic sites are merely invitations to make offers.

*Article 12. Use of automated message systems for contract formation*

39. In this article, the draft has gone along with the spirit of the times by confirming that it is not permissible to deny the validity of contracts that have been formed by the interaction of an automated message system and a natural person, irrespective of whether the contract is between a natural person and a system or between a system and another system.

*Article 13. Availability of contract terms*

40. This article has ensured the implementation of any legal provision that makes it necessary to grant contractual terms to the other party, together with the legal consequences of doing so.

*Article 14. Error in electronic communications*

41. With a view to avoiding any errors that may conceivably occur in electronic contracting, the draft has dealt with this possibility by permitting the party that has made an input error in an electronic communication to correct that error, on the ground that that system does not provide the person with an opportunity to correct the error. The draft has therefore imposed the condition that that party, as soon as it knows that the error has occurred, must firstly notify the other party as soon as possible and secondly take reasonable steps in order to return the goods or services received or to destroy the goods or services without receiving any material benefit from them. Thus we praise this legislative approach and dwell here on one point relating to the "destruction" referred to in this article. We are astonished at this leap which electronic communications have brought about and in which the destruction of a commodity that has been handed over electronically has been proposed as an alternative to retrieving that commodity.

**Chapter IV. Final provisions**

42. Articles 15-23 of this chapter contain provisions relating to the depositary, signature, ratification, acceptance, participation by regional economic integration organizations, effect in domestic territorial units, declarations on the scope of application, communications exchanged under other international conventions, procedures and effects of declarations, reservations, amendments, entry into force, transitional rules and denunciations.

**A/CN.9/578/Add.1 (Original: Spanish)**

**Draft convention on the use of electronic communications  
in international contracts: Compilation of comments  
by Governments and international organizations**

ADDENDUM

CONTENTS

II. Compilation of comments

A. States

2. Spain

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**II. Compilation of comments**

**A. States**

**2. Spain**

[Original: Spanish]

[9 March 2005]

1. Article 1, paragraph 1. The Secretariat's suggestion that the article should contain a reference to an "agreement", as well as to a "contract", as being included in the scope of application should be accepted.

2. Article 4 (c) (the definition of "data message"). If the intention is to reproduce the definition contained in the UNCITRAL Model Law on Electronic Commerce, the draft text is true to the English version but not to the Spanish: the latter includes the word "*comunicada*", for which there is no equivalent in the English text.

3. Article 6, paragraph 2 (Location of the parties). As suggested by the Secretariat, it would be appropriate to delete the words in square brackets, since the circumstances implied by the provision (where a party has not indicated a place of business) excludes the option of the text in square brackets.

4. Article 6, paragraph 3 (Location of the parties). The provision states that if a natural person does not have a place of business, reference is to be made to the person's habitual residence. In the Spanish text, it might be more accurate, from the purely legal point of view, to replace the words "*se tendrá en cuenta*" ("account shall be taken") by the phrase "*se considerará como tal*" ("shall be considered as such"). The point at issue is not so much to "take into account" the person's habitual residence as to establish that such residence is considered to be the place of business in a given case.

5. Article 9, paragraph 6, concerning non-applicability of the convention with regard to the originals of letters of credit or bank guarantees. This reference in article 9 to a specific area of non-applicability should be deleted. As stated in the note by the Secretariat, a State

wishing to establish non-applicability in specific cases may do so under article 18, paragraph 2. As a last resort, if it is wished to establish a general exclusion of applicability, such exclusion should appear in article 2 (Exclusions), paragraph 2, in the same way as such exclusions as bills of exchange, promissory notes, consignment notes and so on.

Paragraph 6, which appears in square brackets, is inconsistent with the general approach adopted by the convention, which is to provide for wider applicability (art. 1, para. 1) but to give States the option of establishing specific exclusions (art. 18, para. 2). The general exclusions in the convention itself (art. 2) have been reduced to a minimum; and there is a compelling reason for each exclusion.

6. Article 19 bis (Procedure for amendments to article 19, paragraph 1). This provision is redundant and therefore need not be retained. Its content has already appeared in article 19, paragraphs 2, 3 and 4, and in article 22 (Amendments).

7. Submission of instruments to the depositary “in writing” (art. 20, paras. 2 and 4, and art. 25, para. 1). It might be as well to state explicitly in the commentary that, despite the fact that the convention accepts an electronic communication where a communication in writing is required, written notifications to the depositary should be made on paper; the principle of equivalent functions, as provided for in article 9, paragraph 2, should not be applied in this case.

8. Article 22 (Amendments). Variant B is preferable, as being more complete.

**A/CN.9/578/Add.2****Draft convention on the use of electronic communications  
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- II. Compilation of comments
  - B. Intergovernmental organizations
    - 1. Council of Europe

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**II. Compilation of comments****B. Intergovernmental organizations****1. Council of Europe**

[Original: English]

[26 February 2005]

We welcome your work in the area of economic commerce, which is instrumental for “facilitating economic and social progress”, a statutory objective of the Council of Europe.

With the arrival of the technological revolution though, the opportunities for committing economic crimes such as fraud, including credit card fraud, have multiplied. Assets represented or administered in computer systems (electronic funds, deposit money) have become the target of manipulations like traditional forms of property. These crimes consist mainly of input manipulations, where incorrect data is fed into the computer, or by programme manipulations and other interferences with the course of data processing.

We would therefore like to draw your attention to the Council of Europe Convention on Cybercrime (ETS No. 185), which was opened for signature in Budapest in November 2001 and which entered into force in July 2004. This Convention has so far been ratified by 9 States and signed by 32 (European and non-European) States. More States are expected to become Parties to the Convention in the near future.

The Convention on Cybercrime more specifically contains a provision (article 8) aiming at criminalizing any undue manipulation in the course of data processing with the intention to effect an illegal transfer of property. The computer fraud manipulations are criminalized if they produce a direct economic or possessory loss of another person’s property and the perpetrator acted with the intent of procuring an unlawful economic gain for himself or for another person.

Therefore, we should be grateful if, during the further negotiations of the UNCITRAL draft Convention on the Use of Electronic Communications in International Contracts, due account would be paid to this important Council of Europe treaty which is potentially of a global nature and to which all countries around the world could, in principle, become parties.<sup>1</sup>

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<sup>1</sup> The text of the Convention is available in English, French and Russian from <http://conventions.coe.int/>.

**A/CN.9/578/Add.3 (Original: Russian)**

**Draft convention on the use of electronic communications  
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II. Compilation of comments

A. States

1. Belarus

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**II. Compilation of comments**

**A. States**

**1. Belarus**

[Original: Russian]

[14 April 2005]

In article 4, “Definitions”, in order to avoid inconsistencies in legal and technical documents, it is proposed that the terms and definitions established in the following international standards be used:

- ISO/IEC 2382. Information technology—Vocabulary—Part 01: Fundamental terms. 01.01.02. **Data**: a reinterpretable representation of information in a formalized manner suitable for communication, interpretation, or processing;
- [State Standard 24402-88. Data message (message): data that has semantic content and is suitable for processing or use by a user of a remote data processing system or computer network];
- ISO/IEC 2382. Information technology—Vocabulary—Part 01: Fundamental terms. 01.01.22. Information system: an information processing system, together with associated organizational resources such as human, technical, and financial resources, that provides and distributes information.

[This paragraph applies only to the Russian version of the text.]

The following wording is proposed for article 10, paragraph 2: “The time of receipt of an electronic communication is the time when it becomes capable of being retrieved in an unmodified state by the addressee at an electronic address.”

In order to clarify this latter proposal, the following hypothetical situation might be considered. A communication may be physically received by the addressee, i.e. may reach the server for the electronic address in question. However, it may be impossible to read the communication for a number of reasons, in particular, the encoding may be incompatible or the message may be corrupted.

**A/CN.9/578/Add.4 (Original: Chinese)****Draft convention on the use of electronic communications  
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**II. Compilation of comments****A. States****3. China**

[Original: Chinese]

[14 April 2005]

**Comments of the Chinese Government on the Draft Convention on the Use of  
Electronic Communications in International Contracts****The Chinese Government,**

Noting that the United Nations Commission on International Trade Law (hereinafter referred to as “the Commission”), established in 1966, was given the mandate by the General Assembly to promote the progressive harmonization and unification of international trade law,

Appreciating the efforts that the Commission has made over the years in removing obstacles to electronic commerce in existing laws, notably by enacting the Model Law on Electronic Commerce in 1996 and the Model Law on Electronic Signatures in 2001,

Noting that, starting from 2002, the Working Group on Electronic Commerce (hereinafter referred to as “the Working Group”), at its thirty-ninth, fortieth, forty-first, forty-second, forty-third and forty-fourth sessions, conducted extensive and in-depth discussion of a draft convention concerning electronic contracting, examined and adopted articles 1-14, 18 and 19, and carried out preliminary exchanges of views on other articles,

Considering that a convention governing certain legal aspects of electronic commerce, such as electronic communication, will contribute to increasing legal certainty of international contracts, thus promoting the growth of international trade to the benefit of peoples of all nations,



Hereby offers the following views and suggestions with respect to the draft Convention on the Use of Electronic Communications in International Contracts (hereinafter referred to as “the draft Convention”) (A/CN.9/577):

**I. We believe that the draft Convention, on the whole, is rather mature and merits our endorsement, on the ground that the draft Convention**

- Governs only the electronic communication between parties whose places of business are in different States, thus avoiding, to the extent possible, interference in the domestic laws of a State Party (art. 1);
- Recognizes in an explicit way the principle of party autonomy in private law (art. 3);
- Takes into full account the nature of private law to which the instrument of the Commission belongs, thus avoiding provisions of regulatory nature (arts. 7 and 13);
- Governs only the special question regarding the use of electronic communication in the formation and performance of a contract, without touching upon such substantive issues in the contract law as validity of a contract and the rights and obligations of parties to a contract, thus avoiding, to a large extent, the risk of creating a dual system in the contract law;
- Is generally consistent with the United Nations Convention on Contracts for the International Sale of Goods (arts. 2 (1)(a) and 5), and follows the relevant provisions in the Model Law on Electronic Commerce and the Model Law on Electronic Signature of the Commission, in particular the principles of functional equivalence and technological neutrality (arts. 8 and 9), with even better provisions in some aspects (art. 10).

**II. After careful study and extensive consultations with the Chinese experts, we would like to make the following suggestions on some articles of the draft Convention:**

**1. Preamble**

As the Working Group has not made full and thorough discussions on the preamble of the draft Convention so far, we suggest that the Commission at its forthcoming session examine and approve the preamble on a sentence-by-sentence basis.

It should be especially noted that, judging by the provisions on the scope of application in its articles 1 and 19, the draft Convention has a wide scope of application, because, while applying automatically to the use of electronic communication in connection with an international contract not governed by any existing international convention, the draft convention also applies, in accordance with article 19, to the use of electronic communication in connection with a contract governed by other international conventions; however, **references to “trade” or “international trade” that repeatedly appear in the preamble will easily give an impression that this Convention is applicable only to contracts of international trade or contracts related with such trade. Therefore, the Commission might consider whether it is necessary to revise those terms.**

**2. Article 1 on scope of application**

(i) The Working Group is right to recognize that the use of electronic communication is not limited to the formulation of a contract; it also applies when it comes to the exercise of various rights arising from a contract (for example, notification with

respect to cargo receipt, compensation and termination of a contract) and even the performance of a contract.<sup>1</sup> It was pointed out at the Working Group that the term “formulation” in paragraph 1 was used in its broad sense, covering the entire contracting stage from negotiation to invitation to make offers.<sup>2</sup> **We would like to bring to the attention of the Commission two questions: whether the phrase “in connection with the formation or performance of a contract” in paragraph 1 appropriately reflects the intention of the Working Group, and whether that phrase covers, for example, cases involving “notice of cargo receipt”, “notice of claim compensation” and “notice of contract termination”. In addition, it is also likely that electronic communication is used where there is contract modification and transfer. Given the importance of the scope of application to the Convention, we suggest that the Commission clarify, in an appropriate way (for example, by adding notes or comments to the draft Convention), whether the above-cited phrase covers all those cases.**

(ii) As for the proposal of the Secretariat of the Commission to add the words “or agreement” after the word “contract” in paragraph 1, we consider that the formulation of paragraph 1 should be left as it is now, for, in some countries, the term “agreement” is a broad concept with extended meanings, sometimes even beyond the field of law. In this context, the Commission might explain, in a note or comment to the draft Convention, the meaning of the term “contract” as used in the draft Convention.

### 3. Article 6 on location of the parties

Although the Working Group considered the text of this article at its thirty-ninth, forty-first and forty-fourth sessions, we have noted that so far no discussion had been conducted with regard to its title (Location of the Parties).

Given that this article is intended to establish certain rules whereby the parties can identify each other’s **place of business** in order to determine the international or domestic nature of a transaction as well as the place of dispatch and receipt of electronic communications, **the Commission might consider changing the title to “Place of Business of the Parties”.**

### 4. Article 9 on form requirements

As far as we know, there were two variants for paragraph 3. One is based on the UNCITRAL Model Law on Electronic Commerce, the other on the UNCITRAL Model Law on Electronic Signatures. After discussion, the Working Group eventually adopted the former.<sup>3</sup>

We are of the view that, **compared with article 7 of the Model Law on Electronic Commerce, article 6 of the Model Law on Electronic Signatures can significantly increase legal certainty by having set out well-detailed standards for determining the reliability of an electronic signature. Also, in recent years, the Model Law on Electronic Signatures has already had important impacts on quite a number of countries making legislation on electronic commerce. Therefore, we suggest that**

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<sup>1</sup> See the report of the Working Group on the work of its thirty-ninth session (A/CN.9/509), para. 35.

<sup>2</sup> See the report of the Working Group on the work of its forty-fourth session (A/CN.9/571), para. 15.

<sup>3</sup> See the report of the Working Group on the work of its thirty-ninth session (A/CN.9/509), paras. 118-121 and the report of the Working Group on the work of its forty-second session (A/CN.9/546), paras. 54-57.

**article 6 of the Model Law on Electronic Signatures be used as the basis for reformulating paragraph 3.**

#### **5. Article 11 on invitations to make offers**

We recall that the Working Group provided clarification regarding the meanings of “interactive applications”.<sup>4</sup> **We suggest that the Commission clarify its meanings in an appropriate way (for example, by adding notes or comments to the draft Convention).**

#### **6. Article 14 on error in electronic communications**

The current text triggered strong opposition.<sup>5</sup> We would like to bring to the attention of the Commission that the current text, which has gone through many changes, may still have the following problems that were already pointed out:<sup>6</sup>

- i. Providing rules on such complex issues as those involving mistakes and errors may interfere with the established principles in the contract law;
- ii. This draft article is a provision more suitable to the needs of consumer protection than to the actual needs of commercial transactions;
- iii. A provision allowing withdrawal of communication on the ground of input errors will create serious difficulties for the court that is being seized.

We also recall that, in the two variants that were considered by the Working Group at its forty-third session, the consequence for errors in electronic communications is stated as “a contract ... has no legal effect and is not enforceable”.<sup>7</sup> In this connection, it was suggested at that session that those consequences should be concerned only with avoiding the effects of errors contained in the data message and should not automatically affect the validity of the contract.<sup>8</sup> In the amended text submitted by the Secretariat to the Working Group at its forty-fourth session, it is provided that “... has the right to withdraw the electronic communication in which the input error was made”.<sup>9</sup> At its forty-fourth session, the Working Group discussed the question of whether the word “withdraw” should be changed to “correct” or whether it should be amended to “withdraw in whole or in part”, and eventually it came to the decision to keep the word “withdraw”.

We would like to bring the following fact to the attention of the Commission that, in the United Nations Convention on Contracts for the International Sale of Goods (articles 15 and 16) as well as in the domestic laws of quite a number of countries, difference is made between the words “withdraw” and “revoke”. In the case of offer, the word “withdraw” is

<sup>4</sup> See the report of the Working Group on the work of its forty-second session (A/CN.9/546), para. 114.

<sup>5</sup> See the report of the Working Group on the work of its forty-third session (A/CN.9/548), paras. 15 and 16 and the report of the Working Group on the work of its forty-fourth session (A/CN.9/571), para. 185.

<sup>6</sup> See the report of the Working Group on the work of its forty-fourth session (A/CN.9/571), para. 185.

<sup>7</sup> See the report of the Working Group on the work of its forty-third session (A/CN.9/548), para. 14.

<sup>8</sup> See the report of the Working Group on the work of its forty-third session (A/CN.9/548), para. 19.

<sup>9</sup> See the report of the Working Group on the work of its forty-fourth session (A/CN.9/571), para. 182.

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to mean cancellation of an offer before it reaches an offeree so as not to give it any legal effect from the very beginning, whereas the word “revoke” is to mean cancellation of an offer after it has reached an offeree but before the formulation of a contract, so as to avoid, retroactively, the offer that has already come into effect. **The Commission might consider it necessary to change “withdraw” to “revoke”, in article 14, paragraph 1, of the draft Convention.**

## A/CN.9/578/Add.5

**Draft convention on the use of electronic communications  
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- II. Compilation of comments
  - B. Intergovernmental organizations
    - 1. European Commission
    - 2. Organization for Economic Cooperation and Development

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## II. Compilation of comments

### B. Intergovernmental organizations

#### 1. European Commission

[Original: English]  
[14 April 2005]

1. Having taken into consideration the *acquis communautaire*, notably the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), the Commission services would like to propose to insert to the Convention an additional provision for a “disconnection clause”, which would aim at ensuring that national measures taken by European Commission Member States in their mutual relations might not in any event conflict with the existing or future European Commission law.

Such a “disconnection clause”, possibly inserted as an article 1.4 of the draft Convention, might be drafted in the following way:

*“In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned and applicable to the case.”*

2. The Commission services would like to underline the importance of retaining the article 16 bis on participation by regional economic integration organizations in order to allow wider participation in the Convention. Such a clause would also give the positive signal to the external world of the importance of this Convention on electronic commerce.

3. The Commission services would like to reserve the right to make more detailed comments on the July meeting.

## 2. Organization for Economic Cooperation and Development

[Original: English]  
[5 April 2005]

The text of article 9.4 (b) could be amended as follows:

“(b) The information is capable of being **retained and** displayed to the person to whom it is to be presented.”

This suggestion aims to suppress the beginning of the sentence to follow the same presentation as in article 9.4 (a). It also aims to address the issue of **retention** of contract in its original form which is mentioned in article 4 together with the issues of presentation, but currently not addressed in 4 (b).

**A/CN.9/578/Add.6****Draft convention on the use of electronic communications  
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- II. Compilation of comments
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    - 1. Permanent Bureau of the Hague Conference on Private International Law

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**II. Compilation of comments****B. Intergovernmental organizations**

- 1. Permanent Bureau of the Hague Conference on Private International Law

[Original: English]  
[14 April 2005]

**I. Private international law issues**

In light of the mandate of the Hague Conference “to work for the progressive unification of private international law rules” the Permanent Bureau has closely examined the references to private international law which are contained in the draft Convention on the Use of Electronic Communications in International Contracts (hereinafter “E-Contracting Convention”) and the Note by the Secretariat (A/CN.9/577/Add.1; hereinafter “Note”).

The Convention will apply to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States (article 1 (1)). It does not require that both parties be located in Contracting States (Note, paragraph 28).

The following comments assume that there is a contract, which falls within the scope of the Convention. One party then files suit.

### 1. The court seized is located in a non-Contracting State.

One party seizes the court of a *non-Contracting State*. It seems that the UNCITRAL Working Group wanted this court to look into the private international law rules of the State in which it is located, and if these rules designate the substantive law of any State Party to the E-Contracting Convention, the latter will be applied (see Note, paragraph 32), regardless of the fact that the State of the court seized is not a Party to the E-Contracting Convention. Part of the substantive law to be applied then is the E-Contracting Convention. According to its article 1 (1), this Convention will apply whenever the parties' places of business are in different States.

### 2. The court seized is located in a Contracting State.

(a) If one party seizes the court of a *Contracting State*, one possibility to come to the application of the Convention is that this court would equally look into the private international law rules of the State in which it is located. If these rules designate the substantive law of this State or of any other State Party to the E-Contracting Convention, the latter will be applied (see Note, paragraph 32).

(b) However, another possibility for the court of a *Contracting State* to apply the Convention seems to be—similar to the rule in article 1 (1)(a) of the United Nations Sales Convention—that the Convention claims application in any international case (i.e. where the parties have their place of business in different States), even where the law of a non-Contracting State applies. The Note states that this is the case for the United Nations Sales Convention and explains why the requirement for the parties' place of business to be in a *Contracting State* has been dropped (paragraphs 28-32). So it can be assumed that the rest still stands. This order contained in the Convention to apply it regardless of the (otherwise) applicable law can only be given to a court of a Contracting State. If a Contracting State wants to avoid having to apply the Convention even in cases where the applicable law is that of a non-Contracting State, it has to make a declaration under article 18 (1)(b) of the E-Contracting Convention “that it will apply this Convention only (...) when the rules of private international law lead to the application of the law of a Contracting State”. Thus, except in the case of declaration under article 18 (1)(b), the Convention covers all international cases (in the sense of article 1 [1]) without any need for an argument basing its application on the application of the substantive law of a Contracting State.

### 3. Conclusion

Paragraphs 28-32, first sentence of the Note and the existence of article 18 (1)(b) seem to confirm that in the absence of such a declaration, the E-Contracting Convention applies if either (a) the forum State itself is Party to the E-Contracting Convention, regardless of the *lex causae*, or (b) where the law designated by the private international law rules of the forum is the law of a Contracting State (which is only relevant if the court is not located in a Contracting State). However, we note that this conclusion is inconsistent with paragraph 32 of the Note which reads: “It is recognized that in its present form, the draft convention applies when the law of a Contracting State is the law applicable to the dealings between the parties, which is to be determined by the rules on private international law of the forum State, if the parties have not chosen the applicable law.”

What is said in paragraph 32 of the Note is correct for the court of a non-Contracting State, but in light of article 18 (1)(b) and the explanations in the Note concerning the deletion of the requirement for the parties to have their place of business in different



*Contracting* States, it would seem not to be correct for the court of a Contracting State. Such court would also have to apply the Convention if the law of a non-Contracting State applies, as long as the parties have their places of business in different States.

## II. Scope of Application of the Draft Convention on the Use of Electronic Communications in International Contracts and its possible impact on Hague Conventions

The Permanent Bureau has carried out a survey of all existing Hague Convention with a view to identifying requirements of written form that could be affected by the E-Contracting Convention (see the note by Andrea Schulz and Nicola Timmins, “The Effect of the UNCITRAL Draft Convention on Electronic Communications in International Contracts on the Hague Conventions”, Preliminary Document No. 31, March 2005, available at [www.hcch.net](http://www.hcch.net) under “Work in Progress”—“General Affairs”). The survey identified one Hague Convention likely to be affected by the E-Contracting Convention and where the “functional equivalent-rule” established by article 9 (2) and (3) might be incompatible with the spirit of the Hague Convention. This concerns the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes. It is not clear, however, whether matrimonial property contracts under this Convention would be covered by the E-Contracting Convention. This is due to some ambiguity as to both the positive scope of application of the latter and the explicit exclusions from its scope.

### 1. Positive Scope of Application of the E-Contracting Convention

The Convention will apply to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States (article 1 (1)). If a natural person does not have a place of business, reference is to be made to the person’s habitual residence (article 6 (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 the Convention (article 1 (3)).

This suggests that according to its article 1, the Convention applies to all sorts of contracts, regardless of their subject matter, except insofar as some of these subject matters are excluded from its scope by article 2. Accordingly, a matrimonial property contract would per se be included. On the other hand, paragraph 10 of the Note states that: “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.” Although the focus of this statement is on the means of communication used, it seems to be based on the assumption that the Convention would apply to *commercial* contracts only. Paragraph 58 of the Note states that “The Working Group hopes that States may find the draft convention useful to facilitate the operation of other international instruments—*essentially trade-related ones*”. This self-restraint seems logical in light of UNCITRAL’s mandate “to further the progressive harmonization and unification of the law of international trade”. Neither the text of the draft Convention text itself nor paragraph 26 of the Note, however, reflect this self-restraint. In order to avoid any doubt (and any resulting confusion concerning the need to make a declaration under article 19) the Permanent Bureau would prefer a clear

statement in the explanatory report which clarifies that the Convention covers only commercial or trade-related contracts.

## 2. Exclusions from scope

We think that such a clarification is a valid alternative to an additional exclusion in article 2 for “Contracts governed by family law or by the law of succession”. Without at least such a clarification in the explanatory report, the present exclusion of “Contracts concluded for personal, family or household purposes” in article 2 (1)(a), is not sufficient to avoid confusion. While the language as such could in principle be used to exclude matrimonial property contracts from the scope of the E-Contracting Convention, this language—which was initially used in the United Nations Sales Convention—is commonly understood as referring to “consumer contracts” (see paragraph 33 of the Note). Paragraph 35 of the Note accordingly dwells on consumers purchasing goods and states that the Working Group agreed that these cases should be completely excluded from the reach of the draft Convention. In other words, the narrow positive scope of the United Nations Sales Convention (sale of goods) has also narrowed the meaning of the terms “contracts concluded for personal, family or household purposes” in the common understanding.<sup>1</sup>

## 3. Article 19

The Permanent Bureau appreciates the sophisticated mechanism of general opt-out (article 19 (2) at the end), opt-out for specific conventions (article 19 (4)) and, following a general opt-out, a re-opt-in for specific conventions (article 19 (3)). This article provides flexibility for States Parties to conventions, which clearly fall within the scope of the E-Contracting Convention. Concerning the Hague Convention on Matrimonial Property Regimes mentioned above, however, this article is not sufficient to ensure that the E-Contracting Convention does not apply to it, and could lead to fragmentation in the application of this Hague Convention which would be inconsistent with its terms and spirit.

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<sup>1</sup> Including that of other international organizations, such as the Hague Conference on Private International Law. *cf.* article 2, paragraphs 1 (a) and 2, of the preliminary draft Convention on Exclusive Choice of Court Agreements.

## A/CN.9/578/Add.7

**Draft convention on the use of electronic communications  
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## II. Compilation of comments

## A. States

1. Latvia
2. Mauritius

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**II. Compilation of comments**
**A. States****1. Latvia**

[Original: English]  
[19 April 2005]

1. Some provisions of the draft convention could prove difficult to reconcile provisions of Directive 2000/31/EC:
  - Article 14 of the draft convention and article 11 of the directive risk creating inconsistencies between Community provisions and the Convention. The obligation to provide for means of correcting input errors when they are made is probably more consistent with the aim of giving electronic contracts greater certainty. An ex post facto correction clause could undermine the stability of contracts. In this context it is worth pointing out that the 1980 Rome Convention on the law applicable to contractual obligations seeks to multiply the possibilities for validating the formation of a contract in order to avoid delaying tactics by parties fraudulently challenging the validity of a contract in order to evade its substantive obligations.
  - Article 5 of the directive makes it compulsory to provide certain information, a requirement that is enhanced vis-à-vis the regulated professions. According to the EU law, article 7 of the convention would appear to be a simple disconnection clause. It would enable the Directive's provisions to apply to intra Community trade. Extra Community parties would not be obliged to provide any information vis-à-vis their Community co-contractors.
  - The definition of establishment is different and the place of location of the parties is based on the presumption of the validity of the place indicated by one party. As

regards the concept of established service provider, the directive sets out that case law of the European Court of Justice must be taken into account. Other terms such as “place of business” or “non-transitory establishment” also could create problems under EU law.

- The principle of party autonomy is formulated in a way that would allow derogation from any provision of the Convention.
- The exclusion of certain contracts does not cover the list in the Directive and will depend on the reservations entered by each State.

2. The considerable State-by-State variation in the Convention’s scope of application, allowed by the system of declarations and reservations could undermine legal certainty for electronic contracts. The variability of the draft convention’s scope of application could entail legal uncertainty for the sector.

## 2. Mauritius

[Original: English]  
[5 April 2005]

(a) Under article 4, in the definition of the words “information system”, it is suggested that the word “displaying” be added after the word “storing”, the more so article 9 (4)(b) provides that information must be capable of being displayed;

(b) Under article 4, in the definition of the words “Automated message system”, the use of the words “or performances” makes the definition unclear. It is not clear as to what “performances” are being referred to;

(c) Under article 6 (2), the reference to paragraph (1) is not necessary as it refers to the **indication** by the party of his place of business, whereas paragraph (2) deals with the case where no place of business has been indicated;

(d) Under article 8 (1), it must be made clear that a communication or a contract in the form of an electronic communication **shall not be denied legal effect**. It is therefore suggested that the words “legal effect” be added immediately after the words “shall not be denied”:

(e) (i) Under article 10 (1), the Commission may consider using the word “sending” instead of the word “dispatch”;

(ii) Furthermore, notwithstanding the general principles as contained in paragraph (1), the parties may agree between themselves when, for the purposes of them concluding an agreement electronically, is the time and place of the sending and receipt of the electronic communication. It is therefore suggested that the words “Unless otherwise agreed between the originator and the addressee,” be added in paragraph (1) immediately before the words “The time of ...”.

(f) Under paragraph 12, it is suggested that the words “legal effect” be added immediately after the words “shall not be denied”.

## A/CN.9/578/Add.8

**Draft convention on the use of electronic communications  
in international contracts: Compilation of comments  
by Governments and international organizations**

## ADDENDUM

## CONTENTS

## II. Compilation of comments

## A. States

## 1. Germany

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**II. Compilation of comments****A. States****1. Germany**

[Original: English]

[25 April 2005]

1. The German delegation is concerned that the current wording of article 3 of the UNCITRAL draft convention on the use of electronic communications in international contracts may allow the parties to circumvent the requirements imposed by article 9 with regard to the electronic form. Furthermore, article 3 should not apply to article 18 et seq. of the convention, in order to allow that certain matters may effectively be excluded from the convention's scope. The German delegation thus recommends that the wording of article 3 of the draft convention be amended to read as follows:

*“Article 3. Party autonomy*

*The parties may exclude the application of this Convention or derogate from or vary the effects of articles 10 to 14.”*

2. We fully support the provision of article 9, paragraph 6, which has not yet been finally discussed due to lack of time. In order to attain the broadest possible uniformity in terms of its scope, the German delegation prefers this provision to the alternate suggestion of a corresponding exclusion of matters at the national level in accordance with article 18, paragraph 2, of the draft convention.

3. We suggest that in article 14, paragraph 1, the term “rescind” be substituted for the term “withdraw”. This has the advantage that it may be more easily integrated into the national legal systems. Furthermore, the German delegation has concerns about the provisions of article 14, paragraph 1, letters a to c. The Working Group may wish to consider leaving the substantive details of the right of rescission to legislators at the national level. In the event that the Working Group prefers to maintain detailed provisions

with respect to the requirements for such right of rescission in the draft convention, the German delegation considers the following changes and/or additions to be necessary:

(a) In article 14, paragraph 1, letter a, the term “without culpable delay” should be substituted for the legal term “as soon as possible,” which is too indefinite.

(b) In view of the German delegation, it is also necessary to add the following wording to article 14, paragraph 1:

*“(x) it may be assumed that the person or the party on whose behalf that person was acting would not have issued the electronic communication in knowledge of the facts and with a sensible appreciation of the case,”*

This additional requirement is primarily designed to prevent having insignificant or perhaps even intentional input errors (e.g. input of a sum of 100,000.10 EUR instead of 100,000.00 EUR) being misused by the data entry person to subsequently release him from otherwise binding statements (e.g. acceptance of a contract offer) because being bound to the statements is no longer desirable for other reasons (e.g. subsequent awareness of a more economical offer). The legal certainty of trade would suffer significantly from an unrestricted right of rescission.

(c) We also propose that article 14, paragraph 1, letter b, of the draft convention be deleted. The German delegation is of the opinion that the right to rescind an electronic communication due to an input error should not be made dependent upon whether the person making the input error has taken reasonable steps to return or destroy the received goods or services. As this is rather a consequence than a prerequisite of rescission, the issue should be left to legislators at the national level.

(d) Also, article 14 should be amended to include the following:

*“(x) The right of rescission shall be barred if two years have elapsed since the electronic communication has been issued.”*

We believe that, for reasons of legal certainty, the right of rescission should be subject to a time limit.

(e) Finally, we would welcome a provision in article 14, which would leave to national legislators the possibility to provide for compensation claims in favour of the recipient of an electronic communication, who relies on the effectiveness of the communication, against the person challenging the electronic communication on the grounds of an input error.

**A/CN.9/578/Add.9 (Original: Spanish)**

**Draft convention on the use of electronic communications  
in international contracts: Compilation of comments  
by Governments and international organizations**

ADDENDUM

CONTENTS

II. Compilation of comments

A. States

2. Argentina

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**II. Compilation of comments**

**A. States**

**2. Argentina**

[Original: Spanish]

[28 April 2005]

I. The term “parties”, which in the draft convention under consideration is used in reference to persons bound by a contract, might be confused with the concept of “Parties” which in treaty law is used in reference to subjects of international law who are bound under an international convention. For that reason, it would be appropriate to refer to the “parties to a contract”.

II. In the explanatory notes on the draft convention, the following remarks appear in section D (form requirements): “... party autonomy did not mean that the draft convention empowers the parties to set aside statutory requirements on form or authentication of contracts and transactions.”

It is considered appropriate that the substance of this explanation should be contained in the text of the convention, possibly being inserted in article 3 or in article 9.

III. Also with regard to party autonomy or the principle of freedom of form, which is incorporated specifically in article 9 of the draft convention, we feel that a court might question the validity of an international contract if the method employed to validate its authorship and integrity and prevent its repudiation were not sufficient to provide proof of the juridical act. A contract concluded by means of electronic communications is a digital document which meets the written form requirement, while it might additionally be necessary to evidence its existence by means of some authentication procedure.

However, from a reading of the documents referred to above, the recommendation is that the validity of an electronic communication should not be made conditional upon the electronic signature requirement. It could here be construed that, if no requirements are

laid down as regards the contract form, a suitable declaration alone will then be sufficient for the act to have legal consequences.

But the parties' agreement on this point could not nullify the statutory form imposed, which means that the parties may be subject to the principle of freedom of form where the law establishes nothing in that respect or where the parties decide not to strengthen or increase the form conditions by adding others to them, which would have value and be binding on the parties to the contract.

Accordingly, many transactions might be deemed invalid if they are not signed by the parties, and the absence of a signature or the use of weak mechanisms for evidencing authorship and integrity could frequently give rise to repudiation of the communication or contract.

In that case, we believe that, if we are dealing with an international contract, it is important to establish a reliable method that will identify who is sending an electronic communication so that it can be determined with certainty that the communication in question originated from the sender.

However, the draft text refers solely to the use of a method that is as "reliable" as appropriate to the purpose for which the electronic communication was generated. That could give rise to confusion since, if each party uses a reliable method that it considers appropriate, that disparity will mean that the other contracting party may be subject to a different legal regime, with a standard of protection that could be higher or lower. The logical consequence of the foregoing is a possible increase in the level of legal uncertainty between the parties to a contract and commercial unpredictability in international contracts.

We believe that the electronic signature is the most reliable authentication requirement and the regime should consequently not be made flexible by favouring other methods that might prove less reliable.

It is therefore suggested that the authorship and integrity requirement should be strengthened, in order to prevent repudiation of an electronic communication, by replacing paragraph 3 of article 9 with the following wording:

"Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if a reliable electronic signature is used in order to give assurance as to the authorship and integrity of the information contained in the electronic communication.

"An electronic signature is considered reliable if it meets the following conditions:

"(a) If the signature creation data are linked to the signatory and to no other person;

"(b) If the signature creation data were, at the time of signing, under the absolute control of the signatory and of no other person;

"(c) If the signature is verifiable; and

"(d) If any alteration to the content of the electronic communication, made after the time of signing, is detectable."



**A/CN.9/578/Add.10****Draft convention on the use of electronic communications  
in international contracts: Compilation of comments  
by Governments and international organizations****ADDENDUM****CONTENTS****II. Compilation of comments****A. States****8. Singapore**

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**II. Compilation of comments****A. States****8. Singapore**

[Original: English]

[16 May 2005]

**Comment on the draft UNCITRAL Convention on the Use of Electronic  
Communications in International Contracts**

1. Singapore expresses its appreciation to Working Group IV on the completion of its work at the forty-fourth session, and considers that the revised version of the draft Convention (A/CN.9/577) represents a sound basis for consideration and adoption by the Commission.

2. At this juncture, we wish to highlight only certain limited issues which we feel were not fully considered by Working Group IV in its deliberations. We propose that the Commission consider:

(a) Amending paragraph 3 (a) of article 9 of the draft Convention (A/CN.9/577) to recognize that electronic signatures are sometimes required by law only for the purpose of identifying the person signing (“the signor”) and associating the information with the signor, but not necessarily to indicate the signor’s “approval” of the information contained in the electronic communication; and

(b) Deleting paragraph 3 (b) of article 9 of the draft Convention (A/CN.9/577), to achieve functional equivalence between handwritten signatures and electronic signatures, and to avoid the unintended difficulties that would be created by the inclusion of the general legal “reliability requirement” in paragraph 3 (b).

### Issues relating to paragraph 3 (a) of article 9

3. Paragraph 3 (a) of article 9 lays down general criteria for functional equivalence between handwritten signatures and electronic signatures.<sup>1</sup> Paragraph 3 (a) provides that only an electronic signature that fulfils both the function of identification of the party *as well as* the function of indicating that party's approval of the information contained in the electronic communication meets that legal requirement of a signature in relation to an electronic communication.<sup>2</sup>

4. However, there may be instances where the law requires a signature that does not fulfil the function of indicating the signing party's approval of the information contained in the electronic communication. For example, many countries have requirements of law for notarization of a document by a notary or attestation by a commissioner for oath. In such cases, it is not the intention of the law to require the notary or commissioner, by signing, to indicate his approval of the information contained in the electronic communication. In such cases, the signature of the notary or commissioner merely identifies the notary or commissioner, and associates the notary or commissioner with the contents of the document, but does not indicate the approval by the notary or commissioner of the information contained in the document. Similarly, there may be laws that require the execution of a document to be witnessed by a witness, who may be required to append his signature to that document. The signature of the witness merely identifies the witness and associates the witness with the contents of the document witnessed, but does not indicate the approval by the witness of the information contained in the document.

5. The conjunctive requirement in paragraph 3 (a) of article 9 would prevent electronic signatures from satisfying the requirement of law for a signature in such situations where the function of indicating approval of the contents of the electronic communication cannot be fulfilled by such signatures.

6. In order to also allow electronic signatures that are not intended to fulfil the function of indicating the signor's approval of the information contained in the electronic communication, to also satisfy a requirement of law for a signature, we therefore propose that paragraph 3 (a) of article 9 should be amended to read as follows:

“(a) A method is used to identify the party and to associate that party with the information contained in the electronic communication, and as may be appropriate in

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<sup>1</sup> Paragraph 3 (a) of article 9 is based on article 7, paragraph 1 (a), of the UNCITRAL Model Law on Electronic Commerce 1996. Article 7 of the UNCITRAL Model Law on Electronic Commerce states:

(1) *Where the law requires a signature of a person, that requirement is met in relation to a data message if:*

(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 was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.*

<sup>2</sup> It should be noted that under paragraph 3 of article 9, which originated from article 7, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce, the mere signing of an electronic communication by means of a functional equivalent of a handwritten signature is not intended, in and of itself, to confer legal validity on the data message. Whether an electronic communication that fulfilled the requirement of a signature has legal validity is to be settled under the law applicable outside the draft convention. See paragraph 61 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996).

relation to that legal requirement, to indicate that the party's approval of the information contained in the electronic communication; and".

7. The phrase "*A method is used to identify the party and to associate that party with the information contained in the electronic communication*" represents the minimum functional requirements of any signature, handwritten or electronic. This phrase provides that electronic signatures that only fulfil these minimum functions will satisfy the requirement of law for signatures. The phrase "*and as may be appropriate in relation to that legal requirement*" recognizes that the function that the electronic signature is intended to perform will depend on the policy or purpose behind that particular requirement of law in question, and provides that the electronic signature is required to fulfil the function of indicating the signing party's approval of the information contained in the electronic communication, where it is appropriate in relation to that legal requirement. For example, if the law requires a party to sign an offer document to indicate his acceptance of the terms contained in the document, that electronic signature would fulfil the requirements of the proposed paragraph 3 (a) of article 9 if it identifies the signing party, associates that party with the information contained in the document **and** indicates that party's approval of the information contained in the document.

#### Issues relating to paragraph 3 (b) of article 9

8. Paragraph 3 (b) of article 9 contains a requirement that the method of signing must be "as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement" in order for the electronic signature to be legally valid.

9. This "reliability requirement" in paragraph 3 (b) of article 9 has its origins in article 7, paragraph 1 (b), of the UNCITRAL Model Law on Electronic Commerce 1996.

10. In the Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures 2001, it was already noted that article 7 of the UNCITRAL Model Law on Electronic Commerce creates uncertainty as the determination of appropriately sufficient reliability can only be made *ex post* by a court or other trier of fact. In order to create more certainty *ex ante*, article 6, paragraph 3, of the UNCITRAL Model Law on Electronic Signatures 2001 was introduced. Paragraph 118 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures 2001 states:

"... However, under article 7 of the UNCITRAL Model Law on Electronic Commerce, the determination of what constitutes a reliable method of signature in the light of the circumstances, can be made only by a court or other trier of fact intervening *ex post*, possibly long after the electronic signature has been used. In contrast, the new Model Law [on Electronic Signatures 2001] is expected to create a benefit in favour of certain techniques, which are recognised as particularly reliable, irrespective of the circumstances in which they are used. That is the purpose of paragraph 3, which is expected to create certainty (through either a presumption or a substantive rule), at or before the time any such technique of electronic signature is used (*ex ante*), that using a recognised technique will result in legal effects equivalent to those of a handwritten signature. Thus, paragraph 3 is an essential provision if the new Model Law is to meet its goal of *providing more certainty than readily offered by the UNCITRAL Model Law on Electronic Commerce* as to the legal effect to be expected from the use of particularly reliable types of electronic signatures. ..." [Emphasis added]

11. At the forty-second session, the Working Group had considered two variants in paragraph 3 of article 9. Variant A was based on article 7 of the UNCITRAL Model Law on Electronic Commerce, while variant B was based on article 6, paragraph 3, of the UNCITRAL Model Law on Electronic Signatures.<sup>3</sup> The Working Group decided in favour of retaining variant A only.<sup>4</sup>

12. In choosing to retain only variant A, the Working Group may not have fully considered the implications of retaining in paragraph 3 (b) of article 9, the general “reliability requirement” based on article 7 of the Model Law on Electronic Commerce.

13. Under paragraph 3 (b) of article 9, the satisfaction by an electronic signature of a requirement of law for signature depends on whether the signature method was appropriately reliable for the purpose of the electronic communication in light of all the circumstances, as determined *ex post* by a court or other trier of fact. This means that the parties to the electronic communication or contract are not able to know with certainty *ex ante* whether the electronic signature used will be upheld by a court or other trier of fact as “appropriately reliable” and therefore not be denied legal validity, until after a legal dispute arises subsequently. It also means that even if there was *no dispute* about the identity of the person signing or the fact of signing (i.e. no dispute as to authenticity of the electronic signature), a court or trier of fact may still rule that the electronic signature was not appropriately reliable, and therefore invalidate the entire contract.

14. Such a provision will potentially have serious practical implications for electronic commerce:

(a) It will create uncertainty in electronic transactions because whether a signature method is appropriately reliable and hence not be denied legal validity will be determined *ex post* by the court or trier of fact, and not *ex ante* by the parties. Although parties can exercise party autonomy by agreeing on a signature method, it remains that the parties’ agreement is only one of the factors in paragraph 3 (b) of article 9 taken into consideration by the court or trier of fact.<sup>5</sup> Even if the parties were satisfied at the outset as to the reliability of the signature method, a court or trier of fact may rule otherwise.

(b) It could be used to the detriment of the very class of persons that the legal requirements for signature are intended to protect. A party could try to invalidate his own electronic signature as being insufficiently reliable, in order to invalidate a contract, where it is convenient to him. This would be to the detriment of the other party relying on the signor’s signature. This provision then risks becoming a trap for the unwary or a loophole for the unscrupulous.

(c) It may be an impediment to electronic commerce. It will add to business costs if users feel compelled to use more sophisticated and costly technology to ensure that the reliability requirement is satisfied. Conversely, such uncertainty and additional costs may even discourage the use of electronic transactions.

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<sup>3</sup> A/CN.9/546, paragraph 48.

<sup>4</sup> A/CN.9/546, paragraphs 54-57.

<sup>5</sup> This was explicitly noted at paragraph 60 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996), which states, “However, a possible agreement between originators and addressees of data messages as to the use of a method of authentication is not conclusive evidence of whether that method is reliable or not.”

15. It is noted that the reliability requirement originated from language in laws relating to the closed and heavily regulated area of funds transfer.<sup>6</sup> In that context, the question of whether the authentication or security procedure, e.g. a signature, is appropriate relates to the concept of attribution of that signature to the person. The UNCITRAL Model Law on Electronic Commerce originally needed a reliability test because it contained a general attribution rule in article 13.<sup>7</sup> In the Model Law on Electronic Commerce, article 7 and article 13 together affirmed the validity of an electronic signature and allowed the attribution of the data message to an originator as long as the addressee used a method agreed upon with the originator to verify the authenticity of the message, without the need to demonstrate the authenticity of the signature itself.<sup>8</sup> The attribution rule in the UNCITRAL Model Law on Electronic Commerce was ultimately limited to technology agreed between the signor and the relying party.

16. The draft Convention does not deal with the attribution of electronic communications.<sup>9</sup> Therefore, the current paragraph 3 (b) of article 9 of the draft convention imposes a general “reliability requirement” without any corollary attribution provision. In the absence of an acceptable attribution rule, attribution of a signature should be a matter of proof. There is no necessity for a “reliability requirement” to be introduced as a complement to a non-existent attribution rule.

17. It is noted that there is no such “reliability requirement” for the legal validity of handwritten signatures (or any of the other marks on paper that may constitute a signature at law). Common law does not impose any form requirement on signatures. A person can sign by marking a cross “X” on a document. A person can also sign by a machine that prints his name on a document. Both the cross “X” and machine-printed name are legally valid signatures, though questions of proof may arise. In each case, it is a matter of proof whether the purported signor did in fact sign in that manner and intended thereby to sign the document. In order to establish the signature’s function of linking the signor with the signed document, the context of the signing will always have to be demonstrated, whether the signature is on paper or electronic.

18. It is not the form of the signature, but the proven link between the signature and the purported signor based on the context, that gives the signature its legal effect. In our view, electronic signatures are merely another form of signature, and should in principle be legally valid as signatures without any special requirements of reliability. Questions of proof of the making of the signature (which exist for both handwritten and electronic

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<sup>6</sup> See A/CN.9/387, paragraphs 81 to 87. At the 26th session of the Working Group on Electronic Data Interchange, which considered the Draft Provisions for Uniform Rules on the Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Trade Data Communication (which later revisions became the Model Law on Electronic Commerce), an earlier draft of article 7 contained the phrase “and the mode of identification of the sender is in the circumstances a [commercially] reasonable method of security against unauthorized messages”, before it was suggested that the phrase be replaced by “a method of authentication is sufficient if it is **as reliable as is appropriate** in all the circumstances to the purpose for which a communication was made”. The phrase “commercially reasonable” originated from language used in article 5 of the UNCITRAL Model Law on International Credit Transfers, and article 4A of the Uniform Commercial Code (UCC).

<sup>7</sup> If, as a matter of law, a signature is to be attributed to a particular person, then in fairness to that person it is necessary to ensure that the technical features of the signature are technically reliable.

<sup>8</sup> A/CN.9/571, paragraph 127.

<sup>9</sup> A/CN.9/546, paragraph 127.

signatures) should not distort the law on the validity of signatures. If it is recognized that the legal effect of a signature is based on the proven link between the document, the signature and the purported signor, then it is irrelevant whether the signature method was of an appropriate level of reliability. In order to achieve functional equivalence between handwritten signatures and electronic signatures, there should not be any additional reliability requirement for electronic signatures as contained in paragraph 3 (b) of article 9.

19. In commercial transactions, the person relying on a signature always takes the risk that the signature is not genuine, so he evaluates the risk that the signature is not genuine and protects himself accordingly.<sup>10</sup> The risk analysis will of course include the cost of having the signature made more reliable and the cost of its being not genuine. So a history of dealings with the purported signor, or a low-value transaction, may persuade someone to rely on a signature that would not be satisfactory if it were from a stranger or for a high value transaction. These precautions and judgements are not a matter of law but a matter of prudence. That is, a party may not feel comfortable about relying on a signature in the form of a cross “X”, but that is a judgement by that party as a matter of prudence, and not a matter of law, as the signature in the form of a cross “X” is fully valid as a signature at law. We are of the view that this analysis applies equally where electronic commercial transactions and electronic signatures are concerned.

20. We recognize that people have had many years of experience in evaluating how reliable a handwritten signature is, and therefore are able to easily judge what types of handwritten signatures are prudent to be relied upon. People are currently less familiar with the potentials and vulnerabilities of methods of signing electronically, and may be less proficient in making that prudential judgement. However, the law does not add any value to this lack of familiarity by introducing a general reliability requirement such as paragraph 3 (b) of article 9. Such a reliability requirement merely transfers the prudential judgement from the relying party to the judge or adjudicator. The judge or adjudicator may be no more competent to make that prudential judgement, although he or she may have the benefit of expert evidence. Such expert evidence is also available to the relying party, but at a more useful point of time, before the transaction is consummated. As people become more familiar with electronic signatures, they will become more experienced at making that prudential judgement.

21. We note that in order to achieve the objective of harmonization of laws relating to electronic commerce, the draft convention should contain either a uniform standard for the reliability requirement for electronic signatures (which can be in the form of a general “reliability requirement” as in paragraph 3 (b) of article 9), or no reliability requirement (which will be achieved if paragraph 3 (b) of article 9 were deleted). As pointed out above, the current paragraph 3 (b) of article 9 creates significant uncertainty which does not promote the use of electronic commerce, and we are of the view that such a reliability requirement is unnecessary and inappropriate in the circumstances. We therefore propose that the better and more appropriate option is to have no reliability requirement for electronic signatures, and that paragraph 3 (b) of article 9 be deleted.

22. If paragraph 3 (b) of article 9 (and therefore the reliability requirement) is deleted, article 9 will provide that *all electronic signatures* that fulfil the functions described in paragraph 3 (a) of article 9 will satisfy the requirement of law for signatures. This will provide parties with the certainty of knowing that the electronic signatures appended by

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<sup>10</sup> This may involve checking the signature against known genuine versions of it, or getting the signature witnessed, notarized or guaranteed by a bank, etc.

them or being relied upon by them do satisfy the requirement of law for signatures, and therefore would not be denied legal validity on that basis.

**A/CN.9/578/Add.11****Draft convention on the use of electronic communications  
in international contracts: Compilation of comments  
by Governments and international organizations****ADDENDUM****CONTENTS**

- II. Compilation of comments
  - B. Intergovernmental organizations
    - 4. International Institute for the Unification of Private Law (Unidroit)

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**II. Compilation of comments****B. Intergovernmental organizations****4. International Institute for the Unification of Private Law (Unidroit)**

[Original: English]

[18 May 2005]

The *draft UNCITRAL Convention on the Use of Electronic Communications in International Contracts* deals with a number of issues raised by the use of electronic communications in the context of international conventions. A majority of existing conventions were adopted before electronic communication became an accepted way of communicating, or indeed had been developed at all. The issues considered include the requirement of contracts being signed or in writing, the time of dispatch and the time of receipt.

In most cases the instruments adopted by Unidroit deal only marginally with requirements as to the form of a contract or agreement (in most instances merely to exclude any such requirement).

Electronic communications have only in recent years come to the fore and were therefore not contemplated by Unidroit instruments adopted before 2001. The definitions given by the conventions of “writing” are however broad enough to cover also electronic documents. This can clearly be seen in the table appended to this document. This table reproduces the relevant texts with a comment, where necessary. As can be seen from the wording of the provisions cited, the draft UNCITRAL Convention would effectively complement the text of the Unidroit instruments by permitting the use of electronic means of communication to fulfil any requirement of a written document, where applicable. Where no such requirement is specified, the draft effectively makes it possible for electronic communications to be accepted without doubt.



Of the draft instruments presently under consideration at Unidroit, the *preliminary draft Protocols to the Cape Town Convention on International Interests in Mobile Equipment on matters relating to railway rolling stock and space assets* state explicitly that the definitions in the Convention apply also to the protocols, which effectively means that electronic communications are covered.

The *preliminary draft Convention on Harmonised Substantive Rules regarding Securities held with an Intermediary* does not refer to “writing” as such, even if it refers to specific agreements, to instructions given by the account holder to the intermediary, etc., stating however that they are not subject to any form requirement under the draft Convention. The project on *Transactions on transnational and connected capital markets* has a number of parts. One of these is the development of harmonised or uniform substantive rules applicable to so-called “de-localised” transactions. Such de-localisation may be the consequence of mergers between markets located in different jurisdictions or may be technologically induced where “Electronic Communications Networks” (ECNS) are used for trading and even initial offerings of securities. When work on this item is started, it will clearly be seen that the use of modern technologies to all intents and purposes is the most important part.

## Appendix

### Unidroit instruments and form or writing requirements

#### (A) Instruments already adopted

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
Convention relating to a Uniform Law on the International Sale of Goods (ULIS) (The Hague, July 1, 1964)	Art. 15	“A contract of sale need not be evidenced by writing and shall not be subject to any other requirements as to form. In particular, it may be proved by means of witnesses.”	Following the adoption of the <i>UN Convention on Contracts for the International Sale of Goods (CISG)</i> the interest of the two uniform sales laws is more of a historic nature. If the terms of ULIS are considered, however, Article 15 states explicitly that a contract of sale need not be in writing. Electronic contracts should therefore be covered.  This provision should be compared with Article 11 CISG – the Uniform Law does not contain any provision similar to Article 12 CISG.
Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC) (The Hague, 1 July 1964)	Art. 3	“An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form. In particular, they may be proved by means of witnesses.”	Article 3 of ULFC states explicitly that neither an offer, nor an acceptance need be in writing. Furthermore, Article 6(1) states that: “[a]cceptance of an offer consists of a declaration communicated by any means whatsoever to the offeror.” The words “by any means whatsoever” would appear to be sufficient to cover new means of communication. Again, the provision can be compared to Article 11 CISG.
Convention providing a Uniform Law on the Form of an International Will (Washington, D.C., 1973)	Art. 3	“1. The will shall be made in writing. 2. It need not be written by the testator himself. 3. It may be written in any language, by hand or by any other means.”	Whether or not instruments dealing with family law or succession should be included in the scope of application of the draft UNCITRAL Convention is debatable. However, assuming that at least a selection of the instruments should be included, the following may be stated as regards the 1973 Uniform Law on the Form of an International Will.  The Wills Uniform Law states explicitly that the will shall be in writing, although no definition of

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
			writing is provided. The Explanatory Report states that: “The Uniform Law does not explain what is meant by “writing”. This is a word of everyday language which, in the opinion of the Law’s authors, does not call for any definition but which covers any form of expression made by signs on a durable substance” (J.P. Plantard, <i>Explanatory Report on the Convention providing a Uniform Law on the Form of an International Will</i> , in Uniform Law Review, 1974 I, 121 – 123). Not surprisingly, considering when it was written, commenting on para. (3) the Explanatory Report indicates that what the drafters had in mind when they spoke of “by any other means” was a typewriter ( <i>Ibid.</i> ). These words may however easily apply also to electronic means.
Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983)	Art. 10	“The authorisation need not be given in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”	The Explanatory Report states that it was decided not to better define what is intended by writing to leave businessmen the maximum freedom. Although the possibility was considered of including a provision similar to Article 13 CISG, it was decided not to, “since the model in the Vienna Convention had not made full allowance for more modern forms of communications, for example, where information appears on a screen but is subsequently erased” (M. Evans, <i>Convention on Agency in the International Sale of Goods (Geneva, 15 February 1983): Explanatory Report</i> , in Uniform Law Review 1984 I, 115).

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
	Art. 11	“Any provision of Article 10, Article 15 of Chapter IV which allows an authorization, a ratification or a termination of authority to be made in any form other than in writing does not apply where the principal or the agent has his place of business in a Contracting State which has made a declaration under Article 27. The parties may not derogate from or vary the effect of this paragraph.”	Article 11 was introduced principally at the request of the socialist States which required all acts relating to foreign trade concluded by their economic organisations to be made in writing (M. Evans, <i>cit.</i> 115 – 117). Article 27 states that “A Contracting State whose legislation requires an authorization, ratification or termination of authority to be made in or evidenced by writing in all cases governed by this Convention may at any time make a declaration in accordance with Article 11 that any provision of Article 10, Article 15 or Chapter IV which allows an authorization, ratification or termination of authority to be other than in writing, does not apply where the principal or the agent has his place of business in that State.”
UNIDROIT Convention on International Factoring (Ottawa, 28 May 1988)	Art. 1(4)(a) - (c)	<p>“4. - For the purposes of this Convention:</p> <p>(a) a notice in writing need not be signed but must identify the person by whom or in whose name it is given;</p> <p>(b) "notice in writing" includes, but is not limited to, telegrams, telex and any other telecommunication capable of being reproduced in tangible form;</p> <p>(c) a notice in writing is given when it is received by the addressee.”</p>	<p>Art. 1(4)(b) states explicitly that “notice in writing” includes, but is not limited to, “any other telecommunication capable of being reproduced in tangible form”, which would permit the inclusion also of electronic means.</p> <p>The draft UNCITRAL Convention considers both the question of identification of the party (Art. 9(3)(a)), and that of the time of receipt (Art. 10(2)), which would appear to complement the Factoring Convention.</p>
	Art. 3(1)(b)	<p>“1. - The application of this Convention may be excluded:</p> <p>(a) ...</p> <p>(b) by the parties to the contract of sale of goods, as regards receivables arising at or after the time when the factor has been given notice in writing of such exclusion.”</p>	

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
	Art. 8(1)	<p>“1. - The debtor is under a duty to pay the factor if, and only if, the debtor does not have knowledge of any other person's superior right to payment and notice in writing of the assignment:</p> <p>(a) is given to the debtor by the supplier or by the factor with the supplier's authority;</p> <p>(b) reasonably identifies the receivables which have been assigned and the factor to whom or for whose account the debtor is required to make payment; and</p> <p>(c) relates to receivables arising under a contract of sale of goods made at or before the time the notice is given.”</p>	
	Art. 9(2)	<p>“2. - The debtor may also assert against the factor any right of set-off in respect of claims existing against the supplier in whose favour the receivable arose and available to the debtor at the time a notice in writing of assignment conforming to Article 8(1) was given to the debtor.”</p>	
Convention on International Interests in Mobile Equipment (Cape Town, 2001)	Art. 1(nn)	<p>““writing” means a record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion and which indicates by reasonable means a person's approval of the record.”</p>	<p>The definition contained in this provision already refers to “teletransmission” and therefore includes electronic means of communication, as is clear from the Commentary which refers to “electronic and other forms of teletransmission” (R. Goode, <i>Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Equipment Official Commentary</i>, Rome 2002, 58).</p>

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
	Art. 7(a)	<p>“An interest is constituted as an international interest under this Convention where the agreement creating or providing for the interest:</p> <p>(a) is in writing;</p> <p>.....”</p>	
	Art. 8(4)	<p>“4. A chargee proposing to sell or grant a lease of an object under paragraph 1 shall give reasonable prior notice in writing of the proposed sale or lease to:</p> <p>(a) interested persons specified in Article 1(m)(i) and (ii); and</p> <p>(b) interested persons specified in Article 1(m)(iii) who have given notice of their rights to the chargee within a reasonable time prior to the sale or lease.”</p>	
	Art. 11(1)	<p>“1. The debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in Articles 8 to 10 and 13.”</p>	
	Art. 15	<p>“In their relations with each other, any two or more of the parties referred to in this Chapter may at any time, by agreement in writing, derogate from or vary the effect of any of the preceding provisions of this Chapter except Articles 8(3) to (6), 9(3) and (4), 13(2) and 14.”</p>	
	Art. 20(1) - (3)	<p>“1. An international interest, a prospective international interest or an assignment or prospective assignment of an international interest may be registered, and any such registration amended or extended prior to its expiry, by either party with the consent in writing of the other.</p>	

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
		<p>2. The subordination of an international interest to another international interest may be registered by or with the consent in writing at any time of the person whose interest has been subordinated.</p> <p>3. A registration may be discharged by or with the consent in writing of the party in whose favour it was made.”</p>	
	Art. 31(4)	“4. The debtor may at any time by agreement in writing waive all or any of the defences and rights of set-off referred to in the preceding paragraph other than defences arising from fraudulent acts on the part of the assignee.”	
	Art. 32(1)(a)	<p>“1. An assignment of associated rights transfers the related international interest only if it:</p> <p>(a) is in writing;</p> <p>.....”</p>	
	Art. 33(1)(a)	<p>“1. To the extent that associated rights and the related international interest have been transferred in accordance with Articles 31 and 32, the debtor in relation to those rights and that interest is bound by the assignment and has a duty to make payment or give other performance to the assignee, if but only if:</p> <p>(a) the debtor has been given notice of the assignment in writing by or with the authority of the assignor;</p> <p>.....”</p>	
	Art. 38(2)	“2. The priority between any interest within the preceding paragraph and a competing interest may be varied by agreement in writing between the holders of the respective interests but an assignee of a subordinated	

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
		interest is not bound by an agreement to subordinate that interest unless at the time of the assignment a subordination had been registered relating to that agreement.”	
	Art. 42(2)	“2. Any such agreement shall be in writing or otherwise concluded in accordance with the formal requirements of the law of the chosen forum.”	
Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (Cape Town, 2001)	Art. IV(3)	“3. The parties may, by agreement in writing, exclude the application of Article XI and, in their relations with each other, derogate from or vary the effect of any of the provisions of this Protocol except Article IX (2)-(4).”	Article I(1) of the Protocol states explicitly that, except where the context otherwise requires, terms used in it have the meaning set out in the Convention. Thus, “writing” includes also electronic communications.
	Art. V(1)(a)	“1. For the purposes of this Protocol, a contract of sale is one which:  (a) is in writing;  .....”	
	Art. IX(2) and (6)	“2. The creditor shall not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.  .....  6. A chargee proposing to procure the de-registration and export of an aircraft under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed deregistration and export to:  (a) interested persons specified in Article 1(m)(i) and (ii) of the Convention; and  (b) interested persons specified in Article 1(m)(iii) of the Convention who have given notice of their rights to the chargee within a reasonable	



<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
		time prior to the de-registration and export.”	
	Art. X(5)	“5. The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 13(2) of the Convention.”	
	Art. XIII(3)	“3. The person in whose favour the authorisation has been issued (the “authorised party”) or its certified designee shall be the sole person entitled to exercise the remedies specified in Article IX(1) and may do so only in accordance with the authorisation and applicable aviation safety laws and regulations. Such authorisation may not be revoked by the debtor without the consent in writing of the authorised party. The registry authority shall remove an authorisation from the registry at the request of the authorised party.”	
	Art. XV	“Article 33(1) of the Convention applies as if the following were added immediately after subparagraph (b):  “and (c) the debtor has consented in writing, whether or not the consent is given in advance of the assignment or identifies the assignee.””	
	Art. XXII(2)	“2. A waiver under the preceding paragraph must be in writing and contain a description of the aircraft object.”	
Model Franchise Disclosure Law (2002)	Article 4(1)	“Disclosure must be provided in writing”.	The Explanatory Report to the Model Franchise Disclosure Law specifies why it is desirable for disclosure to be made in writing. It also states that it must not necessarily be paper-based, and refers to the <i>UNCITRAL Model Law on Electronic Commerce</i> . Considering its nature of a model, the proviso is of course added that it

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
			will depend on the State concerned whether or not disclosure by electronic means is acceptable (see <i>Model Franchise Disclosure Law</i> , Rome 2002, p. 37-38)
Principles of International Commercial Contracts 2004	Art. 1.2	“Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses.”	In the 2004 Principles a number of provisions were slightly amended to ensure that the needs of electronic commerce were covered. The provisions therefore speak of “form” rather than “writing”.
	Art. 2.1.18	“A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.”	
	Art. 2.1.8	“A period of acceptance fixed by the offeror begins to run from the time that the offer is dispatched. A time indicated in the offer is deemed to be the time of dispatch unless the circumstances indicate otherwise.”	

**(B) Conventions under preparation**

<i>Convention</i>	<i>Article</i>	<i>Text of Provision</i>	<i>Comment</i>
Preliminary draft protocol on matters specific to railway rolling stock	III	“In their relations with each other, the parties may by agreement in writing, derogate from or vary any of the provisions of this Protocol except Article VII(2).”	Article I(1) of the preliminary draft Protocol states explicitly that, except where the context otherwise requires, terms used in it have the meaning set out in the Convention. Thus, “writing” includes also electronic communications.
	XI	“Article 33(1) of the Convention applies as if the following were added immediately after subparagraph (b):  “and (c) the debtor has not been given prior notice in writing of an assignment in favour of another person”.	
	XIX(2)	“2. A waiver under the preceding paragraph must be in writing and contain a description of the railway rolling stock as specified in Article V of this Protocol.”	
Preliminary draft protocol on matters specific to space assets	IV	“The parties may, by agreement in writing, exclude the application of Article XI and, in their relations with each other, derogate from or vary the effect of any of the provisions of this Protocol except Article IX(2) -(3).”	Article I(1) of the preliminary draft Protocol states explicitly that, except where the context otherwise requires, terms used in it have the meaning set out in the Convention. Thus, “writing” includes also electronic communications.
	V(1)(a)	“1. – For the purposes of this Protocol, a contract of sale is one which:  (a) is in writing;  .....”	
	X(5)	“[5. – The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 13(2) of the Convention.]”	

<i>Convention</i>	<i>Article</i>	<i>Text of Provision</i>	<i>Comment</i>
	XIV	<p>“Article 33(1) of the Convention applies with the following being added immediately after subparagraph</p> <p>(b):</p> <p>“and (c) the debtor has consented in writing, whether or not the consent is given in advance of the assignment or identifies the assignee.””</p>	
	XX(2)	<p>“2. – A waiver under the preceding paragraph must be in writing and contain a description, in accordance with Article VII, of the space asset.”</p>	
Preliminary Draft Convention on Harmonised Substantive Rules regarding Securities held with an Intermediary			<p>A number of provisions speak of “agreement”, but there is no requirement that the agreement be in writing. Indeed, the Explanatory Notes to the preliminary draft Convention specifies that there are no form requirements as regards account agreements (see the note to Article 1(1)(e), Study LXXVIII - Doc. 19 p. 23).</p>

**A/CN.9/578/Add.12 (Original: French)****Draft convention on the use of electronic communications  
in international contracts: Compilation of comments  
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**II. Compilation of comments****A. States****9. Belgium**

[Original: French]

[19 May 2005]

The present contribution focuses on paragraphs 4 to 6 of article 9 of the draft convention, which define the electronic equivalent of an original and which, in the view of the Belgian delegation, constitute the main difficulty which the draft still poses.

The Belgian delegation considers that these three paragraphs, which it has not been possible for the Working Group to examine in depth, should not be included in the draft convention.

The Belgian delegation in fact feels that it would be inappropriate for the draft convention to incorporate provisions that legally establish the electronic equivalent of an original when those provisions do not address the question of electronic equivalents for the transfer of rights by means of documents of title or negotiable instruments (which are excluded under article 2, paragraph 2, of the draft) and such transfer is specifically dependent on possession of an original document.

As indicated in the Secretariat's latest study on this issue (A/CN.9/WG.IV/WP.90), the particular problem involved in creating an electronic equivalent for the transfer of a paper-based original is how to provide a guarantee of uniqueness equivalent to possession of the original of a document of title or negotiable instrument. That study and the note by the Secretariat accompanying the present draft convention state that it has so far not been possible to develop a wholly satisfactory solution to ensure this "singularity or originality" (A/CN.9/577/Add.1, para.37).

Under such circumstances, it seems surprising that article 9, in paragraphs 4 and 5, should purport to define the electronic equivalent of an original when it does not make

such equivalence subject to the requirement of singularity of the original, which is intrinsically linked to the very function and nature of an original, and will thus be unable to address the question of the transfer of a negotiable instrument.

In order to avoid any inconsistency in this respect, the Belgian delegation thus considers it preferable to deal simultaneously, in a single overall approach, with the question of the electronic equivalent of an original and that of electronic equivalents for the transfer of rights by means of negotiable instruments. In this connection, the Working Group's current work on transport law aimed at defining an electronic equivalent of negotiable transport documents should naturally be taken into consideration.

The Belgian delegation also notes that paragraph 6 of article 9 excludes the application of paragraphs 4 and 5 if a party is required to *present* certain original documents for the purpose of claiming payment, whereas paragraph 4 specifically refers to the possibility of *presenting* information as one of the requirements for an electronic communication to be recognized as having the value of an original.

The Belgian delegation sees this as further evidence of the fact that paragraphs 4 and 5 of article 9 cannot, as they stand, be regarded as satisfactorily addressing the question of the electronic equivalent of an original.

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**II. Compilation of comments****A. States****10. United States of America**

[Original: English]  
[1 June 2005]

1. We generally support the revised text of the draft Convention on the Use of Electronic Messages in international contracts (A/CN.9/577), subject to the recommendations below and to such drafting and other recommendations as may be made at the Plenary. We believe that the Commission's Working Group IV on Electronic Commerce has done an effective job of developing wide support amongst States for the draft convention, which will establish common basic rules to facilitate and validate electronic commerce between widely separated markets with differing legal regimes, thus linking many paths to world trade and domestic development. The convention system would not require anyone to use or accept electronic messages and recognizes party autonomy by protecting the right of parties to vary the substantive provisions of the treaty, as well as protecting government agencies' needs to determine the appropriate methods for conduct of public matters.

2. The convention would also facilitate application of existing treaties and other international instruments to the extent that States wish to do so. While electronic commerce has become integral to many national economies, it is still too early in its development to apply rules without allowing States to adjust that application in various sectors or with regard to particular transactions or practices or otherwise to meet their economic needs. Thus, in addition to exclusions in article 2, States would be able to exclude other matters under articles 18 and 19.

3. Our comments fall into two groups. The first group relates to Chapters I-III and articles 18 and 19 of Chapter IV of the draft convention, which have been substantially reviewed by the Working Group, so our comments are limited to several matters which,

given further consultations, we believe should be clarified in the commentary or modified. The second group of comments deals with those provisions of Chapter IV on which the Working Group did not conclude its work.

#### **Articles 1 and 19 (scope)**

4. We support the broad application promoted by both articles, which States can limit as appropriate by declaration.

#### **Article 3 (party autonomy)**

5. We support the recognition of party autonomy, including the understanding that the article as drafted encompasses variation of terms by implication, such as by contract terms at variance with the transactional provisions of the convention. While some have felt that this critical aspect should be set out in the black letter terms, others have felt that the language should not vary from the Vienna Convention on contracts for the international sale of goods (CISG), and believe that the desired result is necessarily drawn from that language. We believe that a clear statement in the commentary is needed reflecting this understanding so as to provide necessary transactional certainty, or alternatively the words “explicitly or implicitly” should be inserted after the word “derogate”, if statutory clarification is preferred.

#### **Article 6, paragraph (2) (“location”)**

6. Paragraph 1 provides a location rule where a party has indicated its location; paragraph 2 is intended to apply where there is no such indication. As drafted, neither paragraph would cover cases where there is no indication of location, but the party has only one place of business as defined in article 4. Deleting the clause in the first line of paragraph (2) “and has more than one place of business” as well as deleting the bracketed language that follows that will correct the problem.

#### **Article 9, paragraphs 4 and 6 (originality)**

7. Application of the convention’s terms to letters of credit, direct demand guarantees and similar undertakings needs to be adjusted. Replacing the term “presented” in the chapeau and subparagraph (b), which can have specific meaning in those areas of practice, with “made available” will avoid the implication that e-documents can be presented to support payment where not so authorized by the terms of the letter of credit or demand guarantee or other independent undertaking. This change, together with a clear statement in the commentary as to its intended effect, may make retention of paragraph (6), now in brackets due to lack of time to conclude deliberations on it at the last meeting of the Working Group, no longer necessary.

8. To assure that the expected results are reached, the language in article 2, paragraph 2 should be clarified in the commentary that undertakings such as letters of credit, stand-bys and demand guarantees, as distinct from documents to be presented under them for payment, are not excluded by article 2.

#### **Article 10, paragraph 2, rules on receipt**

9. Paragraph (2) embodies compromise language which was to assure that the “capable of being retrieved” standard under the first sentence is subject to a rebuttable presumption under the final sentence of paragraph 10 (2), and that deployment of reasonable security



protection would be available to rebut a conclusion that receipt had occurred. Many States that concurred in the compromise language felt that that result necessarily flowed from the provisions of this paragraph as drafted. We on the other hand, along with some States, had preferred statutory confirmation.

10. Because of the criticality of this rule, at a time when e-message systems are increasingly managed with security mechanisms which regulate the flow of incoming electronic messages due to mounting concerns worldwide about viruses, spam and a variety of invasive content embedded in incoming data, the result intended should be confirmed by a clear commentary.

#### **Article 14 (error correction involving certain automated transactions)**

11. We believe that the right to avoid or withdraw an input error should be limited to that error, rather than be applied to the message in its entirety. This change will leave unaffected portions of a message which are not subject to an obligation to provide error correction, and which a sender should not therefore have an option to withdraw from.

### **Chapter IV provisions**

#### **Article 16 (period for signature)**

12. We recommend that the period be three (3) years so as to provide ample time for States to take that action and thus promote the convention.

#### **Article 19 (application to other treaties)**

13. We support the purpose of this article and related provisions, which provide a treaty mechanism for States to enhance application of existing international agreements by applying modern e-commerce rules, where those are consistent with the intent and expected results of those treaties. As drafted, no State is required to apply these rules to other treaties, but may do so either by option in or option out techniques, and can make further adjustments by declaration under article 18 (4).

#### **Article 20 (application of declarations)**

14. We support the article generally. International private law conventions have since the 1970s employed treaty-authorized declarations which adjust particular provisions only as to that State. These are not reservations as that term is used in the Vienna Convention on the law of treaties, but treaty authorized adjustments which do not give rise to reciprocal actions. Notice of formal declarations and rules on when their terms apply to transactions is important for commercial predictability.

##### *Paragraph (1)*

15. The reference to article 17 should be consistent with that article, i.e. a declaration under that article can be made only at the time of ratification, accession, etc., although it may be amended thereafter. All other declarations should be able to be made and amended at any time.

##### *Paragraph (3)*

16. We have no objection to the usual six-month time period. The Commission may want to note that in order to assure timely application of the convention to commercial

transactions, receipt of declarations and their content can be made available promptly by e-notice either by the Depository or another unit such as the Trade Law Branch.

#### **Article 22 (amendments and functions of the Commission)**

17. Under existing practices in international private law, changes to concluded texts are usually produced by the same multilateral formulating bodies, acting through their general membership, and not only States party to a particular treaty (although State parties can also always agree to amendments *inter se*). UNCITRAL, for example, amended its first Convention (the 1974 Convention on the Limitation Period in the International Sale of Goods) not by action of the States parties but by the Commission elaborating a 1980 amending Protocol to the Convention, which applies to States that adopt it by ratification.

18. Article 22 is therefore unnecessary. If retained however, proposed Alternative (B) is consistent with existing practices of the Commission (Paragraph (3) of variant B should refer to approval by the General Assembly upon recommendation of the Commission). Alternative (A) is unnecessary in any event since States parties could in all cases amend provisions as between themselves. It would add a level of complexity not previously incorporated in private law conventions, and absent actual significant problems in the field of private international law, which we believe do not exist, should not be included.

#### **Article 23 (entry into force)**

19. We believe the convention should come into force upon the ratification of the first three (3) States. This in keeping with the modern trend in commercial law conventions, which promote their application as early as possible to those States that seek to apply such rules to their commerce. There is no need to have widespread adoption before application, and bringing the convention into force at the earliest opportunity will promote its use.

#### **Article 24 (transition provisions)**

20. We believe this is a very important article, because commercial transaction practice requires a significant level of predictability as to rules that would apply. Without the addition of paragraphs (2) to (5), there would be substantial uncertainty as to how paragraph (1) would be applied. Although no transition rule will clarify all possible cases, these proposed rules, developed in consultation with other States and transacting interests, will give guidance at least for generally expected cases.

#### **Article 25 (withdrawal)**

21. We believe the common provision of twelve (12) months for withdrawal is appropriate here as it has been in other international private law instruments.

#### **Final provision, signature**

22. This provision may need to be reformulated depending on whether approval is expected by action of the General Assembly upon recommendation of the Commission, or through a diplomatic conference.

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**II. Compilation of comments****A. States****11. Macedonia**

[Original: English]

[8 June 2005]

We consider that this matter should be regulated at the international level. Taking into consideration the expansion of the international trade this Convention would mainly enable improvement of the efficiency of the trade activities among subjects from different countries. We point out that this Convention includes trade agreements that are concluded among economic entities headquartered in different countries.

Regarding the open issues that still are not harmonized at the Working Group level, we propose the following:

1. Article 1: proposal to add “or agreement”. It would be preferable that the Commission explains, in its comments on the Draft Convention, the meaning of the “contract”. We propose this because if the expression “contract or agreement” is added in article 1, then the words “or agreement” should be added to the word “contract” throughout in the text, starting from the title.

2. Article 16 bis: this proposal is acceptable since it is a common provision in the multilateral agreements.

3. Article 19 bis: regarding paragraph 1, we consider that it is better to use the formulation “relevant conventions, treaties or agreements” in order not to be confined only to the UNCITRAL conventions.

4. Article 24: transitional provisions. We consider that the proposal by the United States is appropriate since the new paragraphs regulate, in more details, the different possible situations regarding the obligations of the States.

**A/CN.9/578/Add.15 (Original: English/French)**  
**Draft convention on the use of electronic communications**  
**in international contracts: Compilation of comments**  
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ADDENDUM

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II. Compilation of comments

A. States

12. Canada

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**II. Compilation of comments**

**A. States**

**12. Canada**

[Original: English/French]  
[9 June 2005]

**Preamble of the Convention**

1. It is important to include the preamble presented in the working document WP.110 (A/CN.9/WG.IV/WP.110) in the draft Convention since it explains what the international community is actually looking for: freedom of choice and medium interchangeability and relevant technology, to the extent that the selected means allow for the objectives of the relevant legislation in this area to be reached.

2. The preamble, in particular paragraph 5, states the international desire to broaden the use of information technologies without creating parallel legal regimes based on the technology used. Moreover, it is a logical extension of the principle of technological neutrality and functional equivalence submitted by UNCITRAL. It emphasizes the consequences of these principles, meaning if various methods can produce functionally equivalent results, the same rules of law should apply to all these methods. Different methods are therefore interchangeable, to the extent that they lead to the results set out by law.

3. In short, this part of the preamble shows that information technologies should be considered means of communicating and that their use does not change the core values of the law, nor should it. Technologies can be seen as serving the law and justice.

### **Reliability of electronic signatures**

4. This comment relates to subparagraph 9 (3)(b), the requirement that an electronic signature method must be “as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances.” In our view, this reliability test will do more harm than good. It does not create certainty, but rather reduces it, and thus runs counter to the purpose of the draft Convention.

5. The Working Group on Electronic Commerce considered deleting the reliability condition, at its forty-fourth session. However, the Working Group decided to retain the provision (A/CN.9/571, paragraphs 127 and 128).

#### **(a) Principles**

6. The core principles of UNCITRAL in the field of electronic commerce are technological neutrality and functional equivalence. According to these principles, the goal is not to create a new parallel legal regime but to integrate communications through technological means into the existing regime. Standards have been created so that such communications are recognized in our legislation. It would therefore be preferable not to have different rules for communications through different means.

7. The text proposed at article 9 contravenes these principles. It specifically creates a double legal regime for signatures. In both common law and civil law legal traditions, the notion of signature does not include a reliability test. A signature is simply the distinctive mark that a person regularly uses to signify his or her intention. Traditionally, that notion does not include a reliability test. Such test should not be imported because electronic means are used to affix such a mark. Doing so would create a double legal regime for signatures, which would only bring confusion in the law and would create another obstacle to the use of electronic communication. We believe that this result is not desirable.

#### **(b) The issue: the reliability test is not sufficiently flexible**

8. It is sometimes said that “a signature has to be reliable”. The question is who decides whether it is reliable: the person who chooses to rely on it, or someone outside the transaction in which it was used. The draft Convention is limited to contracts between businesses. No consumers are involved. Business parties should be able to choose what they will rely on, just as they decide who to do business with—an even more important decision. The party relying on a signature, whether handwritten or electronic, takes the risk that the signature is not valid or that it is a forgery. It is up to the relying party to decide what evidence it needs to support reliance. Sometimes it may be a particular technology; another time it may be the presence of a notary or trusted witness; another it may be the content of the contract itself that shows persuasively (reliably) that it came from the party purporting to sign.

9. No single factor suits all cases. The draft Convention appears to recognize this in its reference to “all the circumstances”. The difficulty is that the evaluation of these circumstances, and thus the decision on what is reliable, is given to a court, not to the parties. The agreement of the parties is relevant, but a court can overrule it, based on circumstances. Who knows the circumstances better than the parties to the transaction? Who is better placed to estimate the business and legal risk of relying on the method used?

**(c) Difficulties in applying the reliability test in practice**

10. We are concerned about two situations. In the first, one of the parties to a transaction in which a signature is required tries to escape its obligations by denying that its signature (or the other party's signature) was valid—not on the ground that the purported signer did not sign, or that the document it signed has been altered, but only on the ground that the method of signature employed was not as reliable as appropriate in the circumstances. In other words, the language of the draft Convention permits a bad-faith undermining of the contract.

11. Some may argue that the previous situation is unlikely to happen given the difficulty to prove an intention or facts contrary to one's own acts. However, the conclusion would be different in cases where third parties are involved. Business transactions offer many situations where a third party, not involved in the transaction, has an interest in having the transaction held invalid. One thinks of creditors with claims on the assets of one of the parties, or a trustee in bankruptcy, or a government regulator. The draft Convention would allow a court to invalidate a transaction at the suit of a third party, on the ground of insufficient reliability of the signature, even if the parties have proved the act of signing as a matter of fact. The law can make the fact irrelevant. In our view, setting up a test of reliability that is independent of the will of the parties and independent of the fact of signature creates uncertainty about the validity of an electronic signature. Nothing is gained in return for this uncertainty. In most business-to-business transactions, the only parties whose views on reliability should count are the parties to the transaction.

**(d) Historical perspective on proposed article 9**

12. Subparagraph 9 (3)(b) of the draft Convention is taken almost verbatim from subparagraph 7 (1)(b) of the Model Law on Electronic Commerce. It is important to note, however, that when that provision was first drafted, the Model Law contained a rule attributing signed data messages to the purported signer. If the law is going to presume attribution, then that attribution has to rest on a standard of reliability. However, the final text of the Model Law is somewhat different. Current article 13 of the Model Law on Electronic Commerce gives no particular effect to a signature. The reliability test is thus not needed. Several national laws implementing the Model Law on Electronic Commerce have not incorporated a reliability test, notably the American and Canadian implementations. Those countries that have adopted it do not appear to have judicial interpretations to show how it will work.

13. It is worth noting that the European Union Directive of 1999 on Electronic Signatures does not have a reliability test. On the contrary, it prohibits Member States from discriminating against any signature method on the sole ground that it is in electronic form. The Directive gives special legal status—equivalence to a handwritten signature—only to what it calls 'advanced electronic signatures', but it allows legal effect to others. It is up to the parties to prove who signed a particular document, but once they prove this, they need not prove anything special about the method of signature itself.

14. The Working Group tried in 1997 and 1998 to devise an attribution rule to accompany its prescription of a standard of reliability. It decided after considerable effort to abandon the attempt. There were too many variables of commercial practice and technologies, not to mention desired legal results.

15. It is one thing to put a technology-based test like the reliability test into a model law, where implementing countries can decide whether to take it or not, and they can amend it

relatively easily if it does not work or if the technology evolves. It is far less desirable to put such a test into a convention that States either adopt or not, without modification, and which is extremely difficult to change once it is made.

**(e) The public need for a trustworthy signature**

16. It may be thought that the law may require a signature at times to ensure that the identification of the parties or the expression of consent is trustworthy, to protect a party or a public interest. In our view, the simple reliability test of the draft Convention is not adequate to serve this purpose. It is too flexible, too tied to the circumstances of the case. If public policy requires reliability for a particular purpose, it has to set a more precise standard of reliability for that purpose.

17. In short, the reliability test in subparagraph 9 (3)(b) of the draft Convention is too strict for business purposes, and too flexible for regulatory purposes. It does however create a potential and unpredictable risk for consensual business transactions. This is contrary to the purpose of the draft Convention and could constitute an obstacle to its acceptance. We submit that it should be deleted.

**Presumption relating to the time of dispatch of an electronic communication**

18. The current proposed wording for paragraph 10 (3) of the draft Convention says that a communication “is deemed to be received” at particular places. In our view, the rule here should be a presumption, rebuttable by the appropriate evidence. We propose therefore that the word “deemed” should be replaced by “presumed” in that paragraph. We believe that UNCITRAL’s standard usage of the words of presumption refer to a rebuttable presumption. In the case of any doubt, this interpretation should be spelled out in the text or in a commentary, but in any event the words of presumption should be in the text. A similar change should also be incorporated in paragraph 10(4).

**Final Provisions**

**(f) Territorial units provision**

19. Working Document WP.110 (A/CN.9/WG.IV/WP.110) also proposes a territorial unit extension provision. The wording of the provision as initially proposed included a reference to territorial units in which different systems of laws exist according to the State’s constitution. It is understood that this provision is based on wording that was elaborated decades ago and that new provisions pertaining to this subject, such as the UN Convention on the Assignment of Receivables in International Trade and the UNIDROIT Cape Town Convention, do not make reference to State’s Constitution. In light of these developments, we are of the view the words “according to its constitution” should not be referred to in the territorial unit extension provision.

**(g) Amendment procedure**

20. The Government of Canada is of the view that the amendment procedure to the Convention, as contemplated under article 21 of Working Document WP.110 (A/CN.9/WG.IV/WP.110), is not desirable as it would effectively impose new obligations on States which may not have agreed to the amendments. In addition, the amendment procedure may cause difficulties for States that have to adopt international texts into domestic legislation. We are therefore of the view that any amendment to the Convention should be binding on States expressing the desire to be bound by conventional means.

**A/CN.9/578/Add.16 (Original: French)****Draft convention on the use of electronic communications  
in international contracts: Compilation of comments  
by Governments and international organizations**

## ADDENDUM

## CONTENTS

## II. Comments received from Member States and international organizations

## A. Member States

## 13. France

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**II. Compilation of comments****A. States****13. France**

[Original: French]

[10 June 2005]

1. The draft convention is designed primarily to remove legal obstacles to electronic commerce that may result from form requirements relating to commercial contracts that were concluded prior to the development of electronic communications. To that end, the draft incorporates the solutions developed by UNCITRAL in the Model Law on Electronic Commerce. The approach adopted consists in recognizing the functional equivalence between electronic and paper documents where guarantees for their storage and integrity are assured. *In that respect the contribution of the Convention will be to extend the application of those solutions to international trade*, particularly by enabling countries that do not have related legislation to apply such solutions to their trade activities. In this regard the draft presents few difficulties.

2. However, it is insufficient to transpose rules designed for application within a national context. International law does not possess the complete and homogeneous set of standards that characterizes national jurisdictions. Furthermore, international electronic commerce presents particular risks for the contracting partners. Lastly, it can serve as a vehicle for phenomena which are of great concern such as commercial fraud in various forms, money-laundering and the financing of terrorism. It is therefore vital to draw up additional provisions in order to promote *confidence in electronic communications*. The provisions that have been adopted relating to place of business—which is a concept vital to the legal security of electronic partners—or those relating to *information requirements* remain partial and lag far behind the useful rules introduced by other legislation.



3. Moreover, the convention as drafted would have a very extensive spatial and material scope of application. The task with which the Working Group was initially entrusted was to explore ways to remove obstacles to the use of electronic communications in all conventions relating to international trade. As no conclusive results were reached in this area, the task now rests with the draft convention. Thus, *ratione materiae*, the convention would apply to international instruments preceding in time. It would likewise apply, *ratione loci*, to international contracts concluded between operators located in different States. These provisions, combined with those relating to party autonomy, would render the convention applicable even to those States that had neither signed nor ratified it. *It is therefore important to limit the scope of application of the convention.*

**The removal of legal obstacles to electronic commerce: a useful transposition to the international order of UNCITRAL Model Law rules.**

4. With regard to the validity of electronic contracts, article 8 of the draft convention, “Legal recognition of electronic communications”, sets out the currently accepted<sup>1</sup> principle according to which a contract may not be denied legal validity on the sole ground that it has been concluded electronically.

5. As regards the *form* of an electronic contract, the conclusion of such a contract is not subject to any requirement as to form. The draft reaffirms the principles of consensuality and freedom of form which are standard in the law of obligations and reflected in the United Nations Convention on Contracts for the International Sale of Goods (CISG).<sup>2</sup>

6. However, international trade requires written and often very detailed contracts in the majority of situations. It is therefore appropriate to ensure *equivalence, in terms of reliability*, between messages exchanged in electronic form and paper documents.

7. The provisions envisaged are based largely on the UNCITRAL Model Law, which sets out to recognize the functional equivalence between electronic documents and various types of paper documents. They will therefore greatly facilitate the development of electronic commerce.

8. However, these form requirements would apply only “where the law requires that ... a contract should be in writing” (article 9, paragraph 2, of the draft convention), or “where the law requires that ... a contract should be signed” (paragraph 3). Given that operators often refer not to a law but to a convention or to accepted practices, this would considerably diminish the scope of the provision. It would therefore be desirable for the following wording to be used: “where the applicable international conventions, international trade rules and practices or the law require [...]”.<sup>3</sup>

9. As regards the important question of *errors in electronic communications*—such transactions presenting particular risks—the Working Group has drawn up provisions which have the disadvantage of giving parties the possibility of calling into question contracts that have already been concluded.

<sup>1</sup> Cf. Uniform Electronic Transactions Act of the United States of America; Uniform Electronic Commerce Act of Canada; European Directive 2000/31/EC; articles 1108-1, 1316-1 et seq. of the Civil Code of France.

<sup>2</sup> Article 11 of the United Nations Convention on Contracts for the International Sale of Goods: “A contract of sale need not be concluded in or evidenced in writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”

<sup>3</sup> Or “as required by the relevant rules of law”.

10. These provisions would weaken contracts concluded electronically, potentially slowing the development of electronic commerce.

11. Once concluded, it should not be possible for a contract to be denied validity. Purchasers of goods and services should have the opportunity to correct input errors *immediately prior to confirmation of acceptance (double click)*. The establishment of an obligation for service providers—which technically is quite practicable—would make it possible to retain functional equivalence.

12. It should also be recalled that the aim agreed on in the Working Group was to ensure that the ordinary law of obligations—which differs in each State—*was not affected* by the establishment of specific rules for electronic commerce.

### **Confidence in electronic communications: inadequate legal provision**

13. The scope of the draft provisions is uncertain as regards place of business, which is a vital concept in establishing confidence in electronic communications.

14. Certain arguments that operators might have a “virtual domicile”, namely their Internet site or electronic mailbox, appear to have influenced the work of the Working Group on Electronic Commerce.<sup>4</sup> However, such concepts present great risks in that they would make it difficult to identify the domicile of an international operator. Such an operator could establish an artificial location for its “virtual domicile”, leaving the contracting partner in ignorance as to the country of establishment of the website or server and potentially requiring that partner to institute a procedure in a country, in a language or in accordance with rules previously unforeseen.

15. The draft convention may therefore create inopportune procedural obstacles. It could create favourable conditions for commercial fraud, the rapid development of which has rightly caused concern among UNCITRAL member States. In that connection it should be recalled that, during the last session of the Commission, Member States were urged to *ensure that those concerns were taken into account in the activities of the Working Groups*.

16. UNCITRAL must consider not only strictly trade-related matters but also the need to *combat money-laundering and the financing of terrorism*, which are currently the object of international negotiations. In that regard it is appropriate to refer to the recommendations of the Financial Action Task Force (FATF) relating to the financing of terrorism. In this light, it may seem obvious that operators should be required to declare their *place of business*.

17. In this field, it would be wise to adhere to some basic rules from which the convention as currently drafted appears to be diverging. Thus the text creates a presumption that *a party's place of business is the location indicated by that party* (draft article 4).

18. The draft is also minimalist where it limits itself to referring to national law with regard to *information requirements* to which contractual parties are subject (draft article 7). Moreover, the potential impact of this provision is rendered uncertain by the provision that

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<sup>4</sup> During the previous session of the Working Group, the Group reversed its original approach and decided not to include in the draft a provision relating to “virtual companies”. It would be appropriate to draw all the conclusions from this change in approach in reviewing those provisions relating to place of business.

the draft convention makes elsewhere for contractual freedom (article 3, “Party autonomy”).

19. *Given also the extensive scope of spatial application envisaged, parties could use these provisions to avoid the obligations imposed on them by national law. It is the view of the French delegation that the Convention should contain five core elements:*

(a) The location of the parties should be their place of business. This basic requirement should be incorporated in article 6.

(b) The place of business should be set out in a declaration, or information thereon should be mandatory. Draft article 6 envisages an optional declaration, combined with the major disadvantage that a presumption is created—favouring the declaring party—that a party’s place of business is the location indicated by that party. Paradoxically, this would have the effect of immediately protecting the vendor rather than the other contracting partner. The declaration should therefore be required to indicate place of business, identity and registration number in the trade register. It is necessary, if their effect is not to be nullified, to remove these minimal obligations, as well as those relating to place of business, from the ambit of the provisions from which the parties may derogate by exercising their contractual freedom (draft article 3).

(c) It is helpful to state—as the draft rightly does—that the technological facility with the help of which electronic commerce is effected does not constitute place of business.

(d) Finally, clear rules should be established that make it possible to determine the location of the parties in order to avoid legal uncertainty, particularly in the case of disputes. The failure of the United Nations Convention on Contracts for the International Sale of Goods to be specific in that regard has generated substantial disagreement. The generally accepted concept of “place of business” should be used. However, there appears to be no need to include a specific definition in the text: this approach has the disadvantage of giving rise to a different interpretation of the same concept in each international convention, leading to an undesirable fragmentation of the law. The concept of “place of business” is characterized by a combination of features: it is a facility having premises; the installations have a certain degree of permanence, depending on the activity in question; part of or all trade activity is carried out at the place of business. The degree of permanence of the facility may vary according to the activity concerned. It is likewise helpful to highlight, as the draft rightly does, that if a party has more than one place of business the place of business to be considered is that which has the closest relationship to the relevant contract.

#### **Scope of application of the convention: too extensive**

20. *With regard to the spatial scope of application*, the draft convention applies to contracts “*between parties whose places of business are in different States*” (draft article 1). Unlike with other international instruments, there would thus be no requirement that the parties should be located in a State that is party to the convention. This provision would result in rendering the convention applicable even to States that are not party to the convention, having neither negotiated nor adopted it. For the text to be universally applicable would require no more than ratification by a small number of countries, depending on what conditions were adopted for the entry into force of the convention.

21. This provision clearly exceeds the scope usually considered normal for international rules. For example, the United Nations Convention on Contracts for the International Sale of Goods, the uniform law instrument most similar to the draft convention in terms of subject area covered, applies in cases where the parties are located in contracting States or if the rules of private international law lead to the application of the law of a contracting State.

22. All UNCITRAL conventions require that at least one of the parties should belong to a contracting State. This is true not only of CISG but also of the Convention on the Limitation Period in the International Sale of Goods,<sup>5</sup> the Convention on Independent Guarantees and Stand-by Letters of Credit<sup>6</sup> and the Convention on the Assignment of Receivables in International Trade,<sup>7</sup> as well as the Convention on the Liability of Operators of Transport Terminals in International Trade, which has not entered into force.

The scope of spatial application should therefore be limited.

23. With regard to the scope of application *ratione materiae*, the draft contains additional provisions providing for States parties to make a declaration in which they undertake to apply the new convention to international trade-related instruments that preceded it.

24. Of the six instruments considered to merit this general treatment, two have not yet entered into force,<sup>8</sup> and a third,<sup>9</sup> which is in force, has been signed by only a small number of States. The Convention on the Limitation Period in the International Sale of Goods relates to a subject area that is not covered by CISG. In practice, therefore, only CISG and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) would be affected. *From the point of view of promoting the future convention at the international level*, it might be better simply to include in the preamble of the text a reference to CISG, a uniform law instrument that is widely recognized and applied around the world.

25. Lastly, the complex system of reservations set out in article 18 and of variable scope of application in article 19 is questionable in that it will create variable modalities of implementation for the different States adopting the convention. Such a regime would be a source of legal uncertainty.

26. The main *amendments* proposed by France are as follows (see italics):

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<sup>5</sup> “This Convention shall apply only (a) if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States; or (b) if the rules of private international law make the law of a Contracting State applicable to the contract of sale.”

<sup>6</sup> “This Convention applies to an international undertaking [...] if the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State.”

<sup>7</sup> “This Convention applies to (a) assignments of international receivables [...] if, at the time of conclusion of the contract of assignment, the assignor is located in a Contracting State.”

<sup>8</sup> Convention on the Liability of Operators of Transport Terminals in International Trade and Convention on the Assignment of Receivables in International Trade.

<sup>9</sup> Convention on Independent Guarantees and Stand-by Letters of Credit.

**Preamble**

27. *Desiring to remove legal obstacles to the use of electronic communications in international contracts, particularly those which are subject to the Convention on Contracts for the International Sale of Goods*

28. The preamble could be shortened considerably. It could simply indicate the two objectives envisaged, namely encouragement of the use of electronic communications in international trade and creation of the conditions required to establish confidence in electronic communications.

**Article 1. Scope of application—paragraph 1**

“This Convention applies [...] in different Contracting States.”

**Article 3. Party autonomy**

“The parties may exclude [...], *with the exception of those provisions relating to location of the parties, information requirements, legal recognition of electronic communications and form requirements.*”

**Article 6. Location of the parties**

1. *The location of the parties shall be their place of business.*
2. *The parties shall inform one another of their respective places of business.*
3. Paragraph 2 becomes paragraph 3. Deletion of the words “has not indicated a place of business and”. Renumbering of paragraphs 3, 4 and 5, which remain unchanged.

**Article 7. Information requirements**

*The parties shall disclose their identity, place of business and registration number in the trade register.*

**Article 9. Form requirements**

Replacement of the words “the law” with the words “*the applicable international conventions, international trade practices or the law*” (paragraphs 2, 3 and 4).

**Article 14. Error in electronic communications**

*Each party shall have the opportunity to correct input errors prior to confirmation of acceptance.*

**A/CN.9/578/Add.17****Draft convention on the use of electronic communications  
in international contracts: Compilation of comments  
by Governments and international organizations****ADDENDUM****CONTENTS****II. Compilation of comments****A. Observer States****14. Azerbaijan**

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**II. Compilation of comments****A. States****14. Azerbaijan**

[Original: English]

[1 July 2005]

1. To incorporate the following new paragraph in article 2:

“The Convention does not apply to the contracts requiring by law the involvement of activities of courts, public authorities or professions exercising public authority; notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority; the representation of a client and defense of his interests before the courts.”

2. To delete the definitions “communication” in article 4 and incorporate the following new definitions:

“‘commercial communication’ means any form of communication designed to promote, directly or indirectly, the goods, services or image of a parties pursuing a commercial, industrial or craft activity or exercising a profession. The following do not in themselves constitute commercial communications: information allowing direct access to the activity of the parties, in particular a domain name or an electronic-mail address; communications relating to the goods, services or image of the parties compiled in an independent manner, particularly when this is without financial consideration”.

“‘Intermediary’ with respect to a particular data message, means a person who, on behalf of another person, sends, receives or stores that data message or provides other services with respect to that data messages.”

3. To amend paragraph 2 of article 10 to read as follows:

“Unless otherwise agreed between the originator and the addressee, the time of receipt of an electronic communication is the time when it enters the designated information system if the addressee has designated an information system for the purpose of receiving commercial communication. If the addressee has not designated an information system the time of receipt of an electronic communication is the time when the commercial communication is retrieved by the addressee or enters an information system of the addressee. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressees.”

4. To incorporate the following new paragraph in article 11:

“The parties which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by an intermediary established in their territory shall be identifiable clearly and unambiguously as such as soon as it is received by the recipient. The parties shall take measures to ensure that an intermediary undertaking unsolicited commercial communications by electronic mail consult regularly and respect the opt-out registers in which natural or legal persons not wishing to receive such commercial communications can register themselves.”

## II. PROCUREMENT

### A. Report of the Working Group on Procurement on the work of its sixth session (Vienna, 30 August – 3 September 2004) (A/CN.9/568) [Original: English]

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## I. Introduction

1. At its thirty-seventh session, in 2004, the Commission decided that the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services<sup>1</sup> (“Model Law”) would benefit from being updated to reflect new practices, in particular those that resulted from the use of electronic communications in public procurement, and the experience gained in the use of the Model Law as a basis for law reform. However, it was pointed out that in updating the Model Law care should be taken not to depart from the basic principles of the Model Law and not to modify the provisions whose usefulness had been proven.<sup>2</sup>

2. The Commission decided to entrust the elaboration of proposals for the revision of the Model Law to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, and the Secretariat was requested to present to the Working Group appropriate notes further elaborating on issues discussed in document A/CN.9/553, in order to facilitate the considerations of the Working Group.<sup>3</sup>

## II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its sixth session in Vienna from 30 August to 3 September 2004. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Belarus, Belgium, Brazil, Canada, China, Colombia, Czech Republic, France, Germany, Japan, Lithuania, Mexico, Morocco, Nigeria, Poland, Qatar, Republic of Korea, Russian Federation, Rwanda, Singapore, Spain, Sri Lanka, Sweden, Thailand, Tunisia, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

4. The session was attended by observers from the following States: Afghanistan, Mali, Peru, Philippines, Saudi Arabia, Ukraine and Yemen.

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

(a) *United Nations system*: United Nations Secretariat and Programme (Office of Legal Affairs (General Legal Division) and United Nations Office for Project Services (UNOPS)), United Nations Industrial Development Organization (UNIDO) and World Bank;

(b) *Intergovernmental organizations*: Banque Ouest Africaine de Développement (BOAD), European Commission and International Development Law Organization (IDLO);

(c) *International non-governmental organizations invited by the Commission*: Center for International Legal Studies (CILS), International Bar Association (IBA), International Federation of Consulting Engineers (FIDIC) and the Arab Planning Institute (API).

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

<sup>2</sup> *Ibid.*, *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 81.

<sup>3</sup> *Ibid.*, para. 82.

6. The Working Group elected the following officers:  
*Chairman:* Mr. Stephen R. Karangizi (Uganda)  
*Rapporteur:* Mr. Marek Slegl (Czech Republic)
7. The Working Group had before it the following documents: the provisional agenda (A/CN.9/WG.I/WP.30); a note by the Secretariat setting out issues arising from the use of electronic communications and technologies in procurement (A/CN.9/WG.I/WP.31), and another note by the Secretariat presenting possible additional points for review in the Model Law (A/CN.9/WG.I/WP.32).
8. The Working Group adopted the following agenda:
  1. Opening of the session.
  2. Election of officers.
  3. Adoption of the agenda.
  4. Future work in the area of procurement.
  5. Other business.
  6. Adoption of the report of the Working Group.

### III. Deliberations and decisions

9. At its sixth session, the Working Group began its work on the elaboration of proposals for the revision of the Model Law, pursuant to a decision taken by the Commission at its thirty-seventh session (see above, para. 2). The Working Group used the notes by the Secretariat referred to in paragraph 7 above (A/CN.9/WG.I/WP.31 and 32) as a basis for its deliberations.
10. The Working Group decided to entrust the Secretariat with the preparation of drafting materials and studies reflecting the deliberations of the Working Group for consideration at its future session. It further decided that at its next session it would proceed with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence.
11. At the end of its substantive deliberations, the Working Group was given presentations by the World Bank and FIDIC on the topic of the avoidance of fraud and corruption in public procurement, followed by question-and-answer sessions. The Working Group heard that the World Bank had recently revised its procedures in addressing allegations of fraud and corruption with a view to enhancing the efficiency and effectiveness of that process. The Working Group also heard that FIDIC had developed an integrity management system, the aim of which was to prevent corruption through, among other things, encouraging integrity throughout an organization. The Working Group welcomed those presentations and noted that, in its ongoing work, the question of fraud and corruption avoidance would be one aspect to be taken into account when revising the Model Law.

## **IV. Consideration of topics for future work**

### **A. Recent developments in public procurement—procurement application of electronic communications and technologies**

#### **1. General remarks**

12. It was noted that two main technological developments in the last ten years had changed the manner in which procurement had been undertaken: first, the use of electronic means of communication had become widespread and, secondly, certain States now operated some parts of their procurement electronically. Such use, it was pointed out, was rapidly increasing and was being considered under a variety of domestic laws and by international and regional organizations. It was further observed that the use of electronic procurement offered many potential benefits, including improved value for money and enhanced transparency in the procurement process.

13. The Working Group recalled that the Model Law had been used in many jurisdictions as a model for modern government procurement systems, and that in its further deliberations, the Working Group should work towards promoting the increased use and effective implementation of the Model Law. It was also observed that, consequently, the Model Law should avoid becoming overly prescriptive in its approach, and should retain the flexibility that underscored it when adopted in 1994. Further, the Working Group stressed that the Model Law should be retained as an instrument that was relevant for all systems and should not be directed at any type of system in particular. Additionally, it was noted that revisions to the Model Law should seek to remove obstacles to the use of modern procurement methods.

14. The Working Group noted that the potential benefits of electronic procurement summarized above were consistent with the main aims and objectives of the Model Law. The Working Group proceeded to consider the extent to which the Model Law might need to be reviewed so as to enable full advantage of electronic procurement to be taken by enacting States.

15. It was pointed out that the use of electronic procurement would depend on the availability of appropriate infrastructure and other resources. For example, laws regulating the use of written communications, electronic signatures, on what should be considered an original document and the admissibility of evidence in court might be an obstacle to the use of electronic procurement. Those issues, the Working Group noted, had been addressed in the UNCITRAL Model Law on Electronic Commerce (1996) and the UNCITRAL Model Law on Electronic Signatures (2001), and were the subject of ongoing work by the Commission. Nonetheless, the view was expressed that the Guide to Enactment might usefully refer legislators to those documents and the ongoing work of the Commission in that field.

16. The Working Group was generally of the view that, for purposes of consistency, those issues should be addressed by measures other than procurement laws in enacting States, and that the issues should be addressed in a manner that sought to promote access to procurement opportunities. However, the view was also expressed that the Guide to Enactment might usefully offer some guidance on such issues.

17. The Working Group expressed strong support for the proposition that, as a consequence of rapid technological advances and of the divergent level of technical

sophistication in Member States, the provisions of the Model Law should be formulated in a technologically neutral manner.

18. In summary, the Working Group noted three key principles that should form the basis for including the use of electronic communications and technologies in the Model Law. First, the Model Law should, to the extent possible, encourage the use of those communications and technologies in procurement. Secondly, it should make appropriate provisions in a technologically neutral manner and, thirdly, further and more detailed guidance might be provided in the Guide to Enactment, as appropriate. The Working Group agreed that the formulation should cover all means of communication and provide guidance on the controls that are needed for their use.

## **2. Possible areas of work relating to electronic procurement**

19. It was observed that the main policy issues concerning the use of electronic procurement arose in the following areas: advertisement of procurement-related information (including the publication of the laws and regulations governing procurement contracts), of solicitation documents and related information, and of contract awards, the use of electronic communications in the procurement process, and the use of electronic (reverse) auctions. The Working Group proceeded to consider the scope of future work in respect of each of those areas.

### **(a) Electronic publication of procurement-related information**

20. Electronic publication of procurement-related information, it was said, may provide wider dissemination of such information than would be achieved through traditional paper means by making it more accessible to more suppliers. It was stressed that the aim of such publication is to improve the access of the public to procurement opportunities.

21. The Working Group expressed the view that the Model Law should encourage the electronic publication of information that the Model Law currently required States to publish. Furthermore, it was felt that it might be desirable to provide guidance in the Guide to Enactment as to the value of electronic publication.

22. It was also noted that article 5 of the Model Law provided for a general principle of accessible publication for the law itself as well as “procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law”, such that the information “[should] be promptly made accessible to the public and systematically maintained”. The Working Group noted that article 5 of the Model Law appeared to be sufficiently broad in scope as to encompass publication in any manner—electronic or by paper means—as it addressed the issue from the standpoint of accessibility.

23. On the other hand, the Working Group noted that the provisions of article 24 of the Model Law implied that the relevant publication would be made in paper form. Bearing in mind the potential benefits of disseminating information on procurement opportunities through electronic means, the Working Group agreed that it should consider options for making appropriate revisions to that article to remove obstacles to electronic publication of the information referred to therein.

24. Given the aim of promoting the use and implementation of the Model Law, it was agreed that flexibility should be retained, and the Working Group in its work should achieve a balance between the provisions in the Model Law, which would address the

issues from the standpoint of the policies and principles, and the Guide to Enactment, which would address them in more detail, where appropriate, and also provide guidance to legislators. Consequently, the Working Group considered that there should be limited regulation beyond appropriate statements of the governing principles in the Model Law itself, but that appropriate further guidance might usefully be provided in the Guide to Enactment. For example, a discussion of the need for and ways of ensuring sufficient public access to the information concerned might be provided.

25. The Working Group noted that a significant issue was the extent to which electronic publication should be mandatory or optional, that is, in a particular case effected by electronic means alone, or by electronic means as an addition to traditional paper-based means.

26. Strong support was expressed for the view that electronic publication should be permitted, but on an optional basis, notably so as to preserve the principle of flexibility and reflecting differing situations prevailing in enacting States. The Working Group further noted that consistency in the manner of communication should be provided for, such that the public would be able to locate all relevant information pertaining to a particular procurement.

27. The Working Group also considered the issue of mandatory use of electronic publication. The Working Group was of the view that the use of electronic publication under the Model Law should remain optional. Nonetheless, the Working Group agreed that the Guide to Enactment might set out considerations to assist legislators in establishing thresholds of technological maturity and market access after which they might wish to consider the mandatory electronic publication of information.

28. As regards the content of information to be published, the Working Group noted that it should further consider whether additional information relevant to potential suppliers, which the Model Law did not currently require to be published, might be brought within the scope of any new provision or guidance given. Such information, it was observed, might include some internal policies or guidance, and general information, such as general forthcoming procurement opportunities. It was observed that the Model Law did not currently address such information, as, for example, article 24 of the Model Law addressed the publication of invitations to participate in a forthcoming procurement, such as an invitation to tender or to prequalify, and there was no equivalent provision governing steps in the procurement process earlier in time. It was observed that any further information to be contemplated might need to be defined in the Model Law, or that appropriate further guidance in the Guide to Enactment might be warranted. The Working Group requested the Secretariat to provide it with a further note addressing those issues for consideration at its next session.

29. The Working Group requested the Secretariat to prepare draft materials reflecting its deliberations, in the form of draft model provisions and draft guidance texts, as appropriate, for future consideration by the Working Group.

**(b) Use of electronic communications in the procurement process**

30. With regard to the use of electronic communications in the procurement process, it was noted that the main policy issues included the following: (a) whether the law should permit or require procuring entities to use electronic communications by consent with suppliers or authorize either party to require electronic communications; and (b) whether those rules should attach conditions to the use of electronic means to safeguard the

objectives of the procurement law, so as to prevent the electronic means chosen from operating as a barrier to access, to secure confidentiality, to ensure authenticity and security of transactions, and the integrity of data.

31. It was observed that article 9 (1) of the Model Law, which addressed the form of communications to be used in the procurement process, provided that subject to any requirement of form specified by the procuring entity when first soliciting participation, all communications should be in a form that provided a record of the content of the communication. There was general agreement in the Working Group that the Model Law gave the procuring entity broad discretion in establishing any “requirement of form” for communications when initially soliciting participation by suppliers.

32. It was noted, however, that several provisions of the Model Law suggested that suppliers could not be required to submit tenders electronically under the Model Law as currently drafted. Under article 30 (5)(a), for example, tenders were to be submitted “in writing, signed and in a sealed envelope”, or “in any other form specified in the solicitation documents”, subject to certain conditions. Article 30 (5)(b) specifically provided for the right of a supplier to submit a tender by the “usual” method set out in article 30 (5)(a), namely in writing, signed and in a sealed envelope. According to the Guide to Enactment, this was an “important safeguard against discrimination in view of the uneven availability of non traditional means of communication such as [Electronic Data Interchange (EDI)]”. The Model Law should not operate or be seen as a barrier to the most efficient use of electronic communications, nor should it lag behind practical developments in its approach to the use of electronic communications. These and related provisions might need to be adjusted so as to ensure that they did not create obstacles to the use of electronic communications.

33. As regards the extent to which electronic communications (including the electronic submission of tenders) could be required or made mandatory, the Working Group generally agreed on the desirability of approaching the issue in a flexible manner. There was broad agreement to the effect that the Working Group’s deliberations should preserve that situation and should not aim, for instance, at enabling a supplier to impose a particular means of communications on the procuring entity. As regards, however, the procuring entity’s right to require electronic communications, it was generally felt that it would be unwise to craft a rule that contemplated that possibility for all cases and circumstances.

34. It was pointed out that, in certain circumstances, a requirement for use of electronic communications in a given case might effectively result in discrimination against or among suppliers. Article 9 (3) of the Model Law, however, stated that the procuring entity should not discriminate against or among suppliers on the basis of the form in which they transmitted or received communications. Consequently, mandatory electronic communications might not be permissible if the means used to engage in electronic communications were not reasonably accessible to potential suppliers.

35. It was considered whether, even if time limits for submitting requests to pre-qualify or for submitting tenders were the same for all suppliers, it might be *prima facie* discriminatory under article 9 (3) of the Model Law if those time limits were set with regard to the sufficiency of time for those communicating by electronic means only. It was noted that the fact that two suppliers used different means of communications did not by itself mean that there was discrimination. There was broad agreement that the rule in article 9 (3) did not necessarily require all suppliers to use the same methods for communication with the procuring entity. After discussion, it was agreed that the essential

element that needed to be preserved was the effective equivalence of the means of communication used in order to avoid discrimination.

36. In further support of a flexible approach on the matter, it was also observed that in practice there might be situations in which electronic communications did not function properly, for instance, because of limitations in the capacity of the systems used, such as insufficient bandwidth for the transmission of large electronic files, technical failure or other external circumstances such as a power cut or a natural disaster.

37. Accordingly, it was suggested that the Working Group should allow for appropriate options regarding the use of electronic communications in the Model Law. One possible option, it was said, might be to provide that the mandatory use of electronic communications should not be imposed as a general requirement.

38. In response to those suggestions, it was stated that the Working Group should not undertake to draft detailed provisions as to the circumstances that allowed the use of electronic communications or the types and conditions of appropriate approval or justification for the use of electronic communications. Government procurement varied greatly in size, commercial and technical requirements, and the existence of those variations made it unwise to attempt to formulate rules that suited all legal systems. Rather, it might suffice to point out the issues that legislators in different States might wish to take into consideration when introducing or enabling electronic communications in public procurement in the Guide to Enactment.

39. The Working Group took note of those concerns. Nevertheless, it was generally agreed that it would be useful to formulate provisions that expressly enabled and, in appropriate circumstances, promoted the use of electronic communications, possibly subject to a general requirement that the means of communication imposed by the procuring entity should not unreasonably restrict access to the procurement. Additional guidance and explanations on various options regarding the kind of means available and the controls that might be needed should be included in the Guide to Enactment.

40. The Working Group took note of those options and decided that they should be reflected in any draft model provisions that the Secretariat might prepare for future consideration. The Working Group agreed that, regardless of the final decision, the Guide to Enactment might usefully provide detailed guidance on the matter.

**(c) Controls over the use of electronic communications in the procurement process**

41. The Working Group recognized that efficient and reliable electronic procurement systems required appropriate controls as regards security, confidentiality and authenticity of submissions, and integrity of data, for which special rules and standards might need to be formulated. In particular, it was noted that the following guiding principles might form a useful basis for any future rules or guidance on the use of electronic communications in the procurement process:

(a) The means of communication imposed should not present an unreasonable barrier to participation in the procurement proceedings (a principle that would allow a requirement for paper-based or electronic communications in appropriate circumstances);

(b) There should be appropriate procedures and systems to establish the origin of communications (authenticity);

(c) The means and mechanisms used should be such as to ensure that the integrity of data was preserved;

(d) The means used should enable the time of receipt of documents to be established, if the time of receipt were significant in applying the rules of the procurement process (i.e. for submission of requests to participate and tenders/proposals);

(e) The means and mechanisms used should ensure that tenders and other significant documents were not accessed by the procuring entity or other persons prior to any deadline, so as to prevent procuring entities' passing information on other tenders to favoured suppliers and to prevent competitors from gaining access to that information themselves (security);

(f) The confidentiality of information submitted by or relating to other suppliers is maintained.

42. There was general agreement within the Working Group that the above principles provided a good basis for the formulation of specific rules, standards or guidance on the matter. The views differed, however, as to the form and desirable level of detail in which those principles should be expressed.

43. One view was that most of those principles already applied to paper-based procurement procedures—for example, the principle that tenders should be authentic or should remain confidential during the tendering procedure. Therefore, the Working Group should carefully consider the need for any specific additional standards or rules, and should take into account the extent to which the relevant background law, such as general laws on electronic commerce and electronic signatures, already addressed the issues that the proposed principles were concerned with. The Working Group should avoid duplicating work that had already been accomplished by the Commission, for instance through the UNCITRAL Model Law on Electronic Commerce.

44. Another view expressed was that if the Working Group intended to formulate legislative guidance that enabled use of electronic communications in the procurement process without mandating it, it would be useful to spell out in the Model Law itself the conditions under which electronic communications should be used.

45. The Working Group agreed that the exact form of its guidance was a matter for further consideration by the Working Group. There was general agreement, however, that such guidance should be formulated in a manner that covered all means of communication, giving a general idea on the controls that were needed, and should not be overly prescriptive.

**(d) Electronic reverse auctions**

46. The Working Group noted that electronic reverse auctions, in their several variants, while still in their infancy, might become a wider used procurement procedure. Reverse auctions were structured as tendering proceedings in which suppliers were provided with information on the other tenders, and could amend their own tenders on an ongoing basis in competition with the other suppliers, normally without knowing the identity of the latter. In an electronic reverse auction, suppliers posted tenders electronically through an electronic auction site, using information on ranking or amount required to beat other suppliers' offers. Suppliers could view in electronic form the progress of the tenders as the auction proceeds and amend their own tenders accordingly. The auction might take place over a set time period, or may operate until a specified period had elapsed without a new



tender. Reverse auctions, it was pointed out, were most commonly used for standardized products and services for which price was the only, or at least an essential, award criterion, since it was generally price alone that featured in the “auction” process. However, other criteria could be used and built in to the auction phase, or evaluated in a separate phase in the overall procedure.

47. The Working Group noted that the Model Law did not address auctions. The tendering method used for goods and works procurement assumed a single-tendering stage, and prohibited substantial changes to tenders—including to the price—after submission (article 34 (1) (a)). It also prohibited procuring entities from disclosing tender information (article 34 (8)), thus preventing auctions by agreement between the entity and suppliers. The provision conferring a right to tender in writing in a sealed envelope also precluded an auction in the absence of consent by the suppliers (articles 30 (5) (a) and (b)). The same rules applied to restricted tendering (article 47 (3)). It was suggested that the obstacles to implement reverse auctions and other procedures involving electronic means should be removed from the Model Law.

48. The question was raised as to whether the Working Group should also consider whether other types of auctions, not currently regulated under the Model Law, should also be subject to its provisions. In response, it was noted that the general policy objections that had led to the original decision by UNCITRAL not to mention reverse auctions in the Model Law, above all the risk of collusion among suppliers, was one that could be sufficiently controlled only in electronic reverse auctions, in which the identity of the bidders was not disclosed and that, therefore, only electronic reverse auctions should be acknowledged in a revised version of the Model Law.

49. There was strong support for the suggestion that the Working Group should formulate legislative guidance dealing with electronic reverse auctions. It was said that in the experience of some countries, electronic reverse auctions could generate significant savings, as they stimulated suppliers to offer their best possible price. They were also said to promote transparency, since they provided an incentive to the procuring entity to specify non-price award criteria precisely. Modern technology had allowed the traditional objections to the use of reverse auctions, which existed at the time the Model Law was prepared, to be overcome. Indeed, information technology made it possible to operate reverse auctions in a transparent manner (in that information on other tenders was available and the outcome of the procedure visible to participants), while at the same time preserving confidentiality, which was essential to reduce the risk of collusion among suppliers. Electronic technologies had facilitated the use of reverse auctions by greatly reducing the transaction costs.

50. As to the manner in which provisions on electronic reverse auctions could be incorporated in the regime of the Model Law, it was suggested that auctions should be treated as a distinct procurement method, in view of its special features, such as the publication of prices during the tender process (otherwise prohibited) and a two-phase evaluation of tenders, which deviated from traditional tendering procedures and required specific provisions. Another proposal was to treat electronic auctions as a version of traditional procurement methods, rather than as an entirely new method requiring separate rules.

51. However, there were also strong notes of caution in view of the possible difficulties of electronic reverse auctions. They included, for example, the risk of encouraging an excessive focus on price, the risk that suppliers might be induced to offer abnormally low

prices (a phenomenon called “auction fever”), leading to significant problems during the administration phase if the selected supplier was unable to meet its obligations. Moreover, it was said that it was difficult for procuring entities to recognize whether suppliers used electronic reverse auctions to collude, a situation particularly dangerous in markets dominated by oligopolies, where participants could use auctions for signalling prices among themselves. A better alternative, at least for certain markets, might be other methods, such as “dynamic purchasing”, in which market prices were established using electronic catalogues (see para. 58), which had also the advantage of being more flexible than electronic reverse auctions.

52. The countervailing view was that, if appropriately conceived and conducted, the benefits of electronic auctions outweighed their possible disadvantages. In view of their increasing use, the desirable course of action would be to make provision for electronic reverse auctions in the Model Law and to attempt to provide guidance on how to eliminate or reduce the possible risks entailed by them. For example, as regards the types of procurement that might be suitable for an electronic reverse auction procedure, it was generally felt that enacting States should be advised that the potential benefits of auctions would accrue only to the extent that an initial common specification against which tenders were submitted could be drafted, and for procurements for which non-price criteria could be effectively quantified. The risk of abnormally low prices, it was said, could be addressed by provisions similar to those that existed in some regional systems, which allowed a procuring entity that had reasons to suspect that prices quoted by a supplier were unrealistic to require that supplier to provide additional information to substantiate its prices.

53. It was pointed out, in that context, that the issue of abnormally low prices was broader than the so-called “auction fever” phenomenon sometimes found in electronic reverse auctions. In fact, the risk of attractive but unrealistic low prices might conceivably occur in the course of any type of procurement procedure. That general issue, it was further noted, had not been expressly addressed in the Model Law, apparently in view of the difficulty in formulating appropriate solutions for the problem. Provisions aimed at preventing abnormally low prices by establishing minimum prices might not be entirely consistent with the principle of competition that underlay the Model Law. Other approaches, such as provisions authorizing a procuring entity to reject specific bids on the grounds that they contained abnormally low prices, in turn, might lend themselves to abuse and would need to be carefully considered.

54. The Working Group concluded its consideration of the matter by recognizing the reality of electronic reverse auctions and confirming its willingness to consider the appropriateness of enabling provisions for the optional use of electronic reverse auctions in the Model Law. However, before making a final decision on the matter, the Working Group agreed that it would be useful to have more information on the practical use of electronic reverse auctions in the countries that had introduced them. The Secretariat was requested to provide that information in the form of a comparative study of practical experience, including as regards existing approaches for handling the risk of abnormally low prices in electronic reverse auctions. In addition to the analysis of current practice in respect of electronic reverse auctions, the Working Group requested the Secretariat to conduct a comparative study on how procuring entities handled abnormally low-prices. It was agreed that the study should also consider the relationship between the practice of abnormally low prices and competition law.

## **B. Possible areas for review in the Model Law**

### **1. The use of suppliers' lists**

55. It was noted that suppliers' lists (also known as qualification lists, qualification systems or approved lists) identified selected suppliers for future procurements and could operate as either mandatory or optional lists. Mandatory lists required registration of the supplier on the list as a condition of participation in the procurement. A supplier might choose to register on an optional list, but not doing so did not prejudice eligibility for a particular contract. Admission of a supplier to a list might involve a full assessment of the supplier's suitability for certain contracts, some assessment or no assessment at all. However, there was normally an initial assessment of some qualifications, leaving others to be assessed when the supplier was considered for specific contracts.

56. It was also observed that, in addition to what were commonly known as "suppliers' lists", there existed analogous arrangements including "contractors' registers" and other compilations of suppliers. It was agreed that the discussions would address all manner of registration that operated de facto as a suppliers' list, whatever its appellation, and whether the registration concerned was with the procuring entity or a third party.

57. The Working Group noted that the Model Law did not address the subject of suppliers' lists, although it did not prevent procuring entities from using optional lists to choose suppliers in procurement that did not require advertising, such as restricted tendering, competitive negotiations, requests for proposals or quotations and single-source procurement. It was suggested that, at the time the Model Law was drafted, the Commission was not in favour of promoting the wide use of suppliers' lists, because their use was then diminishing, and because of the opportunity presented to procuring entities to restrict competition and engage in protectionism by the use of such lists. That approach was in line with the policy of many international lending institutions, which did not regard the use of lists as good practice. It was also noted that the regulation of suppliers' lists would have involved issues that the Commission did not consider appropriate to address at that time, including whether either or both optional and mandatory lists should be regulated, and the number of controls that would be necessary to include in the Model Law. At the same time, however, the Commission had not wished to go as far as to express a recommendation against their use.

58. It was observed that suppliers' lists were increasing in use and frequency in many States, particularly in the case of bulk purchases of commodity items. Such use had also arisen from the rise of electronic catalogues—that is, product catalogues with single or multiple suppliers. Following a tender, the suppliers were selected to provide an electronic catalogue from which the procuring entity could choose and order goods and services, and this procedure might also lead to more procurement being conducted in a way that involves de facto reliance on suppliers' lists.

59. The advantages and disadvantages encountered in the use of the suppliers' lists were noted. Such lists, it was said, assisted in streamlining the procurement process, leading to cost savings both to the procuring entity and the suppliers, and thereby promoting efficiency and economy, aims of the Model Law itself. In particular, it was observed that lists might save time and cost by eliminating the need to provide and evaluate separate qualification information for each contract, and reduce costs for suppliers in finding contract information. However, it was noted that their use had not always led to the possible cost savings identified, and that in some cases they had operated in practice to

restrict competition, and even to facilitate collusion and corruption. Also, lists were observed to operate as mandatory lists even where they were stated to be optional. In addition, it was considered that the greatest risks arose where lists were operated in a disguised manner.

60. It was pointed out that those regimes that regulated the use of lists limited in some cases the entities that might use them and controlled their use to ensure that the lists operated in a reasonable and transparent way. Control measures typically included requirements such as registration remaining permanently open, that the time taken to register suppliers should be as short as possible, and that registration through mail and (where feasible) applications using the Internet should be permitted.

61. Accordingly, and recognizing that, whether or not they were viewed as consistent with the aims and objectives of the Model Law, suppliers' lists were in use in various States, it was agreed that it would be appropriate to acknowledge their existence and use. Indeed, failure to do so would undermine the principles of the Model Law, in that their operation would not be subject to minimum standards of transparency. As a separate consideration, it was agreed that regulating suppliers' lists could provide a transparent and non-discriminatory way of selecting suppliers for those restricted procurement methods in respect of which there was no control over the selection of suppliers in the Model Law, and of addressing informal compilations of suppliers (including registrations with third parties). The aim would be to ensure that fairer and more transparent access to the lists for suppliers was put into place. Further, given that suppliers' lists were recognized under other international procurement regimes to which certain member States were subject, some degree of harmonization would be necessary as well as desirable.

62. With a view to contributing to enhanced transparency and preventing discrimination in the use of suppliers' lists, the Working Group then considered the manner in which they might be regulated. The view was expressed that the use of lists should be addressed with caution, given the inherent risks to competition and transparency that they involved. The Working Group noted that a balance between the provisions of the Model Law and guidance provided in the Guide to Enactment was required, and recalled that, as a general principle, neither text should be overly prescriptive in any event.

63. There was strong support in the Working Group for the use of optional rather than mandatory suppliers' lists. It was recalled that the main procurement methods under the Model Law, i.e. tendering proceedings, necessarily excluded the use of mandatory lists in that they involved a fully open solicitation of bids or the equivalent. It was argued that to permit the use of mandatory lists in tendering proceedings, under which a full and open pre-qualification would be replaced by selection of those invited to submit a tender from a list, would be a retrograde step that would undermine the entire basis of the main procurement methods under the Model Law.

64. It was further noted that the Working Group might elect to seek to restrict the use of suppliers' lists in general to defined circumstances or for defined purposes. In particular, it was suggested to restrict the use of mandatory lists to procurements not subject to tendering procedures and to certain compilations of suppliers (such as contractors' registers). A divergence of views was expressed as to whether such restrictions were desirable, noting that some compilation system would necessarily operate in such limited procedures.

65. It was suggested that the requirement for the publication of the existence of lists would add a significant element of control over the use of lists. It was agreed that the

existence of lists should be advertised with reasonable frequency and on an ongoing basis. In that respect, it was noted that the Model Law did not allow advertisement of a list to serve as a substitute for advertising a specific contract, with the aim of improving efficiency. The Working Group agreed to revisit at a later date the issue of whether advertising the existence of a list rather than a specific procurement should be permitted in a revised Model Law.

66. Additionally, the Working Group agreed that all suppliers should be given an opportunity to become aware of the lists and so to register and to apply for qualification at any time, to be included within a reasonably short period (so as to ensure that unjustified delays in registration do not effectively reduce competition), and to be notified of any decisions to terminate a list or remove them from it. A related control that could be considered would be that suppliers not yet registered, where the registration was delayed pending receipt of government certification as regards taxation or similar matters, be considered if there were sufficient time to complete the registration process.

67. As to the extent to which the provisions should be included in the Model Law itself, or in the Guide to Enactment (and in some cases they could be left to implementing regulations in individual States), the Working Group agreed that a decision on this matter would be possible only when draft provisions were before them for consideration. The issues upon which there was as yet no consensus could also be reconsidered at that stage.

## **2. Framework agreements**

68. It was noted that framework agreements were arrangements for securing the repeat supply of a product or service over a period of time, which involved a call for initial tenders against set terms and conditions, the selection of one or more suppliers on the basis of the tenders, and the subsequent placing of periodic orders or contracts with the supplier(s) chosen as particular requirements arose. Their main use arose in circumstances in which procuring entities required particular products or services over a period of time but did not know the exact quantities, nature or timing of their requirements. Framework agreements could be in the form of single-supplier or multi-supplier framework agreements and were said to be widely used. In some countries they were regulated by national law, and their use was also acknowledged by some regional bodies or by international lending institutions.

69. The potential benefits of using framework agreements, rather than commencing a new procurement procedure for each requirement, were said to include the saving of procedural costs and time in procurement. In particular, the arrangements avoided the need to advertise individual contracts and to assess suppliers' qualifications for every order placed, as that phase of the process was carried out once only at the conclusion of the framework agreement. Framework agreements, it was said, could also enhance value for money and other procurement objectives by providing a more transparent procedure than would otherwise exist for small purchases. In particular, it was observed that aggregation of contract amounts under a framework agreement might justify the costs of advertising, and framework suppliers had an interest in monitoring the operation of purchases under the arrangement.

70. It was stated that the Model Law did not contain specific provisions on framework agreements. To some extent, single-supplier and some multi-supplier agreements could arguably be operated under existing procedures, for instance, if they were treated as tendered procurements divided into lots. However, under the Model Law, the tender

solicitation documents had to state the quantity of goods required (though accompanying regulations might permit an estimate alone) and, under a framework arrangement, the quantity was normally unknown. It was further noted that the Model Law's tendering proceedings did not contemplate arrangements that involved entering into a binding contract, for example, when orders were placed. In particular, article 36 (4) provided that a contract arose when a tender was accepted, and did not provide for contracts that would arise only when the procuring entity later decided to make specific purchases. It was suggested that the requirement for publishing a public notice of a "contract award" under article 14, which applied to all procedures, did not appear to be suited for providing publicity for frameworks. There was, on the other hand, no requirement to publish the results of a competition to choose framework suppliers, nor, arguably, to publish details of contracts awarded to the various suppliers.

71. The view was expressed that the Working Group should approach framework agreements with caution. It was stated that some countries with extensive experience with framework agreements were currently undertaking a thorough revision of the way they operated. It had been recognized that framework agreements in those countries had generated significant savings in the overall procurement budget. However, framework agreements had also generated less easily measurable, yet not insignificant costs. They included, for instance, lost opportunities for procuring entities and suppliers that did not have access to framework agreements, lack of transparency and loss of competition.

72. It was further said that adequate management of framework agreements required constant efforts to maximize transparency and competition at every step of the procurement process, even including giving notice of procurement requirements as they arose and publishing notices of contract awards with a view to stimulating direct response from the market where the solution contemplated in the framework agreement was not optimal. Without sufficient transparency and competition, however, framework agreements tended to create a marketplace that was based on relationships between suppliers and purchasers, rather than competition among suppliers, an undesirable situation that should not be promoted. Further control measures included a shift towards non-binding forms of frameworks, following costly litigation with suppliers challenging contract awards to suppliers that were not original participants in a framework. There were also expressions of concern about the duration of a framework, which generally should be no longer than technology involved would last or government requirements would remain unchanged.

73. In response, the Working Group heard explanations about the positive experience with the implementation of framework agreements in other regions. Single-supplier frameworks had been used in some countries for small repetitive purchases of certain products where quantities were expected to vary within a certain range, but it was not known when a procurement requirement would arise and how much would be needed in each stage. To avoid a whole series of contracts that would not be interesting for suppliers, framework agreements with estimated quantities had been entered for one or more years. The aim in those systems was to avoid successive competitions at greater cost. It was recognized that framework agreements also created some problems, but those were not regarded as insurmountable. For instance, the risk of loss resulting from purchasing at fixed prices at times when market prices were falling—as was frequently the case with information technology products—could be overcome by introducing a second stage of competition at each time a procurement requirement arose, in the form of a mini-tender. Other common controls included limits on the duration, with possibility of extensions only

upon justification. Also, review procedures could address risks of excess price if the suppliers are seen not to be following the rules.

74. There was general agreement that the Commission should acknowledge the fact that framework agreements, even if not currently mentioned in the Model Law, were used in practice. However, the views differed on how to deal with framework agreements.

75. There was strong support in the Working Group that guidance on the matter beyond merely acknowledging the existence of practice should be given. Indeed, enacting States would expect guidance from the Commission on how best to take advantage of framework agreements. Such guidance should offer advice on certain minimum protective measures to avoid misuse and ensure efficiency in public spending. There were several suggestions on matters that the Working Group should consider, including the following: (a) the desirable level of competition in a multi-supplier framework; (b) whether framework agreements should be exclusive; (c) appropriate criteria for establishing the duration of framework agreements; (d) suitable types of procurement for framework agreements; (e) procedures for selecting the participants in a framework agreement and for awarding purchase orders. However, even some of those who favoured a more comprehensive treatment of framework agreements cautioned the Working Group against the risk of limiting the usefulness of framework agreements by formulating too many conditions for their use. Some matters, it was said, should be left for the procuring entity to decide.

76. However, there was some support to the proposition that nothing in the Model Law appeared to preclude an enacting State from using framework agreements. If anything needed to be done, it would be sufficient to acknowledge their existence in the Guide to Enactment and provide some information on issues related to their implementation. It was suggested that the Working Group should adopt a flexible and pragmatic approach and should avoid formulating overly prescriptive guidance on the matter. For instance, objective external factors, such as technology type and market conditions, rather than arbitrary time limits, should govern the duration of a framework agreement. Likewise, it would be undesirable to attempt to draw up a list of situations where the use of a framework agreement might be appropriate, since conditions varied greatly among States, and in view of the fact that the Model Law should be able to operate adequately everywhere.

77. In response, it was observed that the Guide to Enactment could provide advice as to how framework agreements could be brought into line with the Model Law, only to the extent that the Model Law could be said to accommodate framework agreements. The Model Law itself, it was said, did not deal with framework agreements and, in a few instances, it appeared to create obstacles to their use. Consequently, general statements on framework agreements in the Guide to Enactment would not provide a sufficient basis for dealing with the matter and the Guide would not be the adequate place to deal with framework agreements if the Working Group were to conclude that the Model Law did not support their use.

78. With a view to facilitating further deliberations by the Working Group on the general approach to framework agreements, including the level of detail with which they should be treated and the appropriate way of dealing with them (i.e. whether by model provisions, legislative guidance or both), it was agreed that the Working Group should first examine whether and to what extent the Model Law, in its current form, created obstacles to the use of framework agreements. The Working Group agreed to request the Secretariat to prepare

a note on the matter, including as appropriate, draft guidance materials, for consideration by the Working Group at a future session.

### 3. Procurement of services

79. The discussions focused on the question of whether the Model Law should be revised so as to narrow down the scope of services for which the “principal method for procurement of services” provided for in articles 37-45 of the Model Law could be used. It was observed that that method had in practice worked satisfactorily for certain types of procurement, notably intellectual services that did not lead to measurable physical outputs, such as consulting or other professional services. Questions were raised, however, about the appropriateness of that method, for instance, in connection with services for which the procuring entity could provide quality and quantity specifications in advance of the procurement concerned. It was observed that considering services separately in the Model Law had led to a focus on the special characteristics of some services procurement, rather than on the common features of many procurements of goods and construction and those of services.

80. The Working Group took note of the background information in paragraphs 41 to 44 of a note by the Secretariat (A/CN.9/WG.I/WP.32) about the provisions in the Model Law governing the “principal method for procurement of services”. The experience of national and regional organizations in this matter was also considered. A common feature noted was that the provisions for the procurement of services were more flexible than for goods and construction.

81. The procedures in one regional organization allowed the use of a flexible form of competitive negotiations, including a prior publication of the procurement opportunity, as the main procurement method in cases in which it was not possible to draw up specifications with precision. This situation applied in particular to financial services and “intellectual services”, defined as those with no physical output (though their main feature was an intellectual element), but the critical aspect of the services was the qualitative aspect—the technical merit—of the proposals. Its use, however, was not limited to those cases. The initial responses of suppliers would lead to the finalization of the specification at issue. In order to address the issue of transparency and to preserve flexibility, material changes to the specification during the process, and the point at which it was finalized, were disseminated. The best and final offer of each supplier would be recorded as a safeguard.

82. One multilateral lending institution had adopted a different approach. Noting that development banks did not become involved in certain less complex types of services procurement (such as cleaning services), “intellectual services”, as described above, had been separated from all other types of services procurement. After an open call for expressions of interest, a limited number of short-listed suppliers would be invited to submit a proposal, possibly after a formal process of pre-qualification. The qualitative merit of proposals was factored into their evaluation and combined with their price, in a manner that varied according to the type of service, and the winner thereby selected. Since the relative cost of preparing a good proposal was high in the context of the value of the project, it was considered inappropriate to invite many suppliers to bear such costs with little chance of selection, as they would operate as a disincentive to participation and the cost of so doing would ultimately be borne by the procurement process as a whole. It was also observed that the high relative cost might deter small- and medium-sized enterprises from participating, which might run counter to certain States’ general industrial policies.



83. National regimes were said to take widely divergent approaches to that issue, but even the most flexible systems, it was observed, did not allow for free use of all the selection procedures provided for in the Model Law's principal method for the procurement of all types of services. Rather, entities were required to use the ordinary methods for procurement of goods when purchasing services, unless specific exceptions applied. The Working Group agreed that the Model Law should take note of current practice and relevant experience.

84. The view was expressed that the use of the Model Law's principal method for the procurement of services should be treated with caution because of the risks to transparency and of potential abuse arising from the flexibility and use of discretion in subjective questions inherent in that method.

85. It was noted that the objectives and processes of procurement under the Model Law were the same irrespective of the type of procurement (services or others), and so even if the evaluation criteria should be different, an attempt should be made for a consistent approach in the selection of the procurement method.

86. It was recalled that the aim of ensuring value for money in procurement led to the conclusion that if a detailed specification could be drafted at the outset, tendering proceedings would be the optimal method of procurement. It was noted that the issue before the Working Group was how to address the situation in which such a specification could not be drafted and tendering was not appropriate. It was agreed that all four procurement methods other than tendering available to procuring entities should be provided for, but the Working Group should address consideration of the choice among such methods. It was also acknowledged that there was little guidance in either the Model Law or the Guide to Enactment as currently drafted on this choice.

87. The Working Group considered three main aspects of the issue. First, whether the Model Law should specify when particular procurement methods should be available, possibly by reference to particular types of services, and notably whether it should restrict the principal method for the procurement of services to certain types of services. If so, should those services be defined, for example by reference to the type of services at issue or prevailing circumstances? A further aspect of that issue was whether there could be a clear definition of the services, for example, of intellectual services. Thirdly, in the light of the Working Group's wish to avoid too prescriptive an approach and of the experience of States and organizations as described above, how detailed should any new provisions be and where should they be found?

88. An example of how the above issues might interrelate was the fact that certain projects might comprise several stages, with each giving rise to a separate procurement with different characteristics. Accordingly, a construction project might include an architectural design and a construction phase. It was important to recognize that the costs of the construction phase must be borne in mind when assessing the relative merits of the design proposals (which may themselves be submitted in a design contest) in order to achieve the best value for money for the entire project.

89. The Working Group considered the proposed limitation on the use of the principal method for the procurement of services. Possible alternatives included whether tendering should be the principal method for the procurement of services, and whether tendering should be the second preferred alternative after the request for proposals procedure (or vice versa). In response to those suggestions, however, there was strong support for the view that there should be no changes to the Model Law as it was currently drafted.

90. As regards the notion of services, the Working Group agreed that the question of whether intellectual services were amenable to precise definition was pivotal to its deliberations. It was observed that definitions should, to the extent possible, be consistent with definitions provided in other systems. It was also noted that a definition would be more difficult if a project might involve a mixture of goods and services, and the cost element of each might not reflect their relative importance to the project. For example, in the context of computerization project, the initial hardware might comprise the most significant cost element, but the ongoing services component might dictate the success or otherwise of the project. Should such a project be defined as an intellectual services project? Similarly, some types of services might in some circumstances require specialized knowledge and not in others, so that the approach for intellectual services might be appropriate in some cases only.

91. Furthermore, it was pointed out that if the principal method for the procurement of services were available only for intellectual services defined as those not measurable by output, there was a risk that too much procurement would be contracted through tendering. It was observed that it was increasingly common to structure services contracts, including those with very significant intellectual components, as performance-based, so that they were in fact measurable by output. The fact that they had a measurable output, however, was not sufficient reason to subject them to the tendering procedure (which was not appropriate for complex procurement).

92. Finally, it was added that there was an increasing tendency in some systems to treat all complex projects as services procurement. For example, a hydroelectric power plant could be treated as a service for the provision of power, and the procuring entity would not need to purchase the plant itself.

93. In conclusion, and after considerable discussion reflecting the difficulties in defining intellectual services, the Working Group agreed that the Model Law should retain all the various options in methods for the procurement of services currently provided, and that therefore there was no need to revise it in that respect. However, the Working Group also agreed on the need to formulate guidelines in the Guide to Enactment for the use of each method, depending on the type of services at issue and the relevant circumstances. In so doing, the main aims and objectives of the Model Law should be expressly related to the guidance so provided.

#### **4. Evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies**

94. The Working Group noted that, when the Model Law was drafted, it was recognized that States might use procurement to promote other policy goals, which might be economic or non-economic, such as industrial, social or environmental. That concept was reflected in article 34 (4) of the Model Law and discussed in the Guide to Enactment. It was noted that the Model Law did not mandate the use of procurement for such purposes, but suggested ways to do it in a transparent way. The Working Group was invited to consider whether the Model Law provided for the right balance between the aims of maximizing economy and efficiency in procurement, and other policy goals, and if not, what measures should be taken to achieve a better balance either through amending the Model Law, or giving relevant guidance in the Guide to Enactment.

95. In consideration of these issues, the attention of the Working Group was drawn to two subparagraphs of article 34 (4) of the Model Law: subparagraph (c)(iii), dealing with

non-objective factors permitted to be taken into account in determining the lowest evaluated tender; and subparagraph (d), dealing with granting a margin of preference for domestic needs. Some overlap between provisions of those subparagraphs was said to exist since both of them aimed at promoting the domestic economy.

96. It was noted that, despite possible objections, as a matter of principle, to the use of public procurement to promote other policy goals, rather than only obtaining “value for money”, it was acknowledged that in practice States often used public procurement to achieve those other goals. Moreover, the view was expressed that in certain instances, it was appropriate and important to use procurement as a tool to achieve those goals provided that such use did not undermine the main objectives of the procurement process, such as economy, efficiency, transparency, competition and equitable treatment of all suppliers and contractors. However, it was generally felt that the focus of the Model Law should remain that of procurement rather than the promotion of other policy goals.

97. Two ways were considered to limit the potential for abuse if the procurement were used for such purposes: (a) to include the promotion of other policy goals in specifications; or (b) make such goals quantifiable evaluation criteria and disclose them at the solicitation stage, as already envisaged in article 34 (4) (b)(ii) of the Model Law. Additional control measures might include requirements such as the following: that other policy goals must relate to the object of the procurement; that their evaluation should not be left entirely to the discretion of the procuring entity; and that their use as evaluation criteria must preserve essential principles of good procurement practice, such as equal treatment of suppliers and the need to promote competition. Another way of enhancing transparency, it was said, was to use such evaluation criteria in such a way that their misuse might be challenged through the bid protest mechanisms.

98. The Working Group considered those suggestions extensively. Generally, it was felt that the Model Law did provide for sufficient balance and there was no need to amend it. If, however, the Working Group decided to amend it, that should be done without prejudice to the principles of the procurement as enumerated in the preamble of the Model Law. A better alternative, however, might be to leave the Model Law intact and provide for more explanations in the Guide on when the procurement could be used to promote other policy goals and how to ensure that such uses were transparent.

99. Concern was expressed with respect to the retention of shadow pricing of foreign exchange and counter-trade arrangements as factors to be taken into account in determining the lowest evaluated tender (article 34 (4) (d) of the Model Law). The Working Group did not exclude the possibility of reconsidering, in due course, the appropriateness of those references in the Model Law.

100. The Working Group also noted that enacting States might be restricted in their ability to use non-economic criteria in evaluating and comparing tenders under international or regional treaties or agreements binding on them. It was agreed, however, that article 34 (4) of the Model Law, did not mandate the use of domestic preferences and that article 3 of the Model Law adequately dealt with that issue by affirming the precedence of treaty obligations over the provisions of the Model Law.

101. The Working Group concluded by recognizing that existing provisions of the Model Law provided sufficient balance between the need for the economy and efficiency and possibility for an enacting State to address other policy goals through the procurement. However, some of those other policy goals listed in the Model Law seemed to be outdated and the Working Group could consider at a later stage the desirability or otherwise of

retaining them. No final decision was taken at this stage by the Working Group on the need for or desirability of formulating additional control mechanisms to ensure transparency in the use of procurement to promote other policy goals in the text of the Model Law. It was agreed, however, that the Working Group might consider formulating additional guidance on means to enhance transparency and objectivity in the use of other policy goals within evaluation criteria.

## 5. Remedies and enforcement

102. The Working Group noted that the issue of remedies and enforcement touched upon the question of the legality of government acts and upon the separation of powers between the executive and the judicial branches of a particular State. There would be a broad range of approaches to those questions in different legal systems, which made it important to address the issue of review in a measured way. Indeed, States differed significantly in their approach to enforcement and in the extent to which they offered review at the instigation of the supplier. In some countries, there was a long-standing system of review before specialist authorities and courts, while in other countries there was no general legislative provision for such review (except to the extent required by international obligations and subject to judicial review procedures). In some legal systems there were administrative sanctions for breaches of procurement law by organs of the State, and proceedings were brought before an administrative tribunal, while in yet other legal systems there was a combination of administrative review, including possible suspension of procurement proceedings, and judicial review of procurement decisions through the ordinary courts and special criminal proceedings for violations of procurement laws by procuring entities.

103. In recognition of those factors, the provisions of chapter VI of the Model Law were limited to general guidance, and a footnote to chapter VI suggested that enacting States might not incorporate some or all of the articles, leaving considerable room for the enacting State in implementing the Model Law. Furthermore, the Model Law left certain areas unregulated, such as the question of the independence of the administrative review body, the form of the relief to be given (which might include orders or recommendations), and there were no provisions for a judicial or quasi-judicial proceeding. There was no provision creating a right to judicial review, though article 57 allowed enacting States that operated judicial review to include procurement review within the relevant courts' jurisdiction.

104. Recognizing that caution should be exercised in any attempt to expand the review and enforcement provisions of the Model Law, the Working Group considered the following issues:

(a) Whether there should be a more articulate recommendation as to the inclusion and operation of review provisions in the national law and further guidance, including draft model provisions, in the Guide to Enactment;

(b) Whether the administrative review provisions should be strengthened, for example, by requiring an independent review process;

(c) Whether more detailed advice and guidance should be given concerning the judicial review process, including in respect of the powers of the courts and time frame for the review, the possible reversal of incorrect procurement decisions and remedies that were available; and

(d) Whether the scope of provisions relating to exceptions to review (article 52 (2)) should be revisited.

105. With respect to the issue in (a) above, doubt was expressed as to whether it would be feasible at all to propose a model for review and enforcement that would be acceptable in various jurisdictions. It was suggested that it would be better not to attempt to include detailed provisions in the Model Law itself, as the Guide to Enactment was better suited for explaining the various approaches and policy options, including their practical implications and possible advantages or disadvantages. For example, the Guide to Enactment might explain that review procedures would enhance the oversight interests of the government and would protect the rights of prospective contractors.

106. The views differed with respect to the issue in (b). The need for an independent administrative review mechanism was stressed because it might be unrealistic to expect that review by the procurement entity of its own acts and decisions would always be impartial and efficient. It was suggested that the Guide to Enactment should provide for details for the establishment of an independent administrative review body (e.g. whether it should function on a permanent basis or established for each case). It was noted that effective independent review in some countries was already achieved through the court system. Thus, the establishment of additional structures for those States would not be desirable if to do so might distort the structure and functioning of the government.

107. It was agreed that the identity of the body entrusted with the review function was less important than its independence from the procuring entity and political pressure in making decisions, and its efficiency. Examples of powers that should be available to the reviewing body included the following: the possibility to intervene without delay and to suspend or cancel the procurement proceedings; the power to implement other interim measures, such as giving restraint orders and imposing financial sanctions for non-compliance; the power to award damages if intervention was too late (e.g. after the contract was awarded); and the ability to proceed swiftly within a reasonably short period of time (4-5 weeks were suggested as an optimal time-frame). At that juncture, the Working Group was referred to the discussions on the independence and powers of regulatory bodies that had been held in connection with the formulation of advice on the regulatory framework for public utilities during the preparation of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects. Reference was also made to the relevant provisions of the Agreement on Government Procurement of the World Trade Organization (GPA), in particular its article 20, which provided for the review by a court or impartial independent review body that did not have interest in the outcome of the procurement. The view was expressed that the provisions in the GPA might be used to assess the areas for improvement in the review and enforcement mechanisms provided for in the Model Law.

108. As for the suggestion in (c) above that more detailed advice and guidance should be given concerning the judicial review process, the view was expressed that such guidance would be useful especially if it would encourage the swift disposition of procurement-related disputes by courts. It was observed, however, that excessive reliance on judicial review might not always be the best solution, because in many jurisdictions court proceedings were lengthy and courts lacked procurement-related expertise. That situation was said to be unsatisfactory. Indeed, speed of intervention was an essential factor in any effective review process because meaningful results for aggrieved parties could only be expected if effective remedies were available at pre-award stages. In recognition of that, it was noted that certain national and regional regulations provided for a period between the

award and final formation of a procurement contract to allow protests by aggrieved parties. It was therefore important to inform courts of the possibility of suspending procurement proceedings as a worthwhile option to pursue. The Working Group took note of those views and agreed that enacting States might benefit from advice on how to improve the effectiveness of judicial review. Such advice, which might also help to harmonize law and practice in that regard, should, however, respect the various legal traditions in different States and should not be overly prescriptive.

109. As for the revision of the scope of provisions relating to exceptions to review (article 52 (2)) referred to in (d) above), it was suggested that some—if not all—of those exceptions should be deleted from the Model Law. In particular, the exception relating to the selection of the procurement method under article 52 (2)(a) was criticized on the ground that lack of accountability in respect of the selection of procurement methods was one of the areas that had led to most abuses in practice. As a whole, the exceptions in article 52 (2) were said to undermine the integrity of the procurement system and should be deleted. It was also noted that GPA did not provide for exceptions to review.

110. In response, it was pointed out that allowing review, including judicial review, of all matters mentioned in article 52 (2) might give rise to difficulties in some legal systems. For instance, the judicial branch in certain jurisdictions had limited powers to challenge decisions of executive bodies alleged to be taken in the public interest. Furthermore, in some legal systems a prospective supplier might lack standing to challenge decisions such as the selection of a procurement method, which were typically taken by the procuring entity prior to initiation of procurement proceedings. The Working Group was invited to recognize the fact that different legal systems provided various ways for controlling the acts of procuring entities, not all of which relied on challenge by bidders. It was also pointed out that irrespective of the Working Group's decision on that issue, the review of the issues identified in article 52 (2) would in some cases still be possible under provisions of other laws, for instance, on the ground that the decision by the procuring entity was based on improper motive.

111. The Working Group also considered whether alternative dispute settlement procedures in procurement proceedings were appropriate. The view was expressed that, while those procedures might be useful at the post-award stage, their utility in pre-award stages was doubtful. Furthermore, in some jurisdictions it had been found that recourse to arbitration and other extrajudicial dispute settlement methods might not always contribute to the development of the law, to the extent that in many legal systems arbitral awards of settlement agreements were not conducive to establishing a binding precedent. While it would be appropriate to recognize the use of alternative dispute settlement procedures in procurement proceedings, it was emphasized that the impression that those procedures could always substitute for judicial review should be avoided.

112. The Working Group concluded its deliberations by agreeing on the following:

(a) That it would be useful to provide further guidance, probably in the Guide to Enactment, on review provisions that national laws could incorporate;

(b) Recognizing the fact that there were different systems, some of which favoured review through the courts while others favoured independent administrative review, the Working Group should leave various options open for States, taking into account that the Model Law was sufficiently flexible in this regard and that the independence of the reviewer is paramount. If there was a need for additional comments on that subject, they could be reflected in the Guide;

(c) Provisions related to the judicial review process should be left for enacting States; and

(d) The list of exceptions in article 52 (2) should be deleted. However, the Guide to Enactment should indicate that enacting States might wish to exclude some matters from the review process, which could include some of those currently listed in that article and other matters. The Guide to Enactment should indicate the rationale for such exclusions and explain the implications of any exclusions, such as the risk that they might preclude effective review and control of the proper management of the procurement process.

113. The Working Group requested the Secretariat to prepare draft materials that took into account the above deliberations, for consideration by the Working Group in due course.

## **6. Other matters**

### **(a) Alternative methods of procurement**

114. It was suggested that it might be useful to review the need and conditions of use of some “[a]lternative methods of procurement” set out in Chapter V of the Model Law, so as to address concerns expressed by certain multilateral lending institutions and other bodies that the number of such alternative methods was excessive. Although it was noted in the Model Law itself that an enacting State need not and perhaps should not enact all such methods, the Working Group was invited to consider whether the provisions relating to certain of the alternative methods should be reviewed.

115. In particular, the following suggestions were made: the “two-stage tendering” procedure (article 46) could be treated as a form of open tendering, aimed at refining specifications throughout the first stage of the tendering process in order to achieve a transparent selection in the second stage, instead of being categorized as an “alternative method”. Secondly, in view of the fact that methods other than open tendering procedures might have been used in practice more widely than had been anticipated, the grounds for using those methods should be restricted. For example, the grounds for “restricted tendering” (articles 20 and 47) could be narrowed from “disproportionate” cost of other procedures and “limited number of suppliers” to the latter only, and the justifications for using “single-source procurement” should be restricted so as not to include extrinsic considerations such as transfer of technology, shadow-pricing or counter trade (as was currently the case under article 22 (2) of the Model Law). An additional suggestion was that the “request for proposals” and “competitive negotiation” procedures (articles 48 and 49) might be deleted altogether.

116. The Working Group generally agreed that it should in due course consider the need for and desirability of circumscribing more clearly the conditions under which the so-called alternative methods of procurement could be resorted to, with a view to reducing the risk of abuse in their use. The Working Group agreed that it might further consider in the future eliminating some of those methods and presenting them in a manner that stressed their exceptional, rather than alternative, nature within the system of the Model Law.

117. The Working Group took note of a concern that treating the “two-stage tendering” procedure (article 46) as a form of open tendering might undermine the objectivity of the tendering method under the Model Law and agreed that the proposal needed to be carefully considered in due course. The Working Group further agreed that article 22 of the Model Law needed to be revisited (in particular, paragraph 2 of the article should be deleted) with

a view to enhancing transparency and that, generally, the justification requirements for all “alternative methods” under article 18 might be strengthened.

118. Lastly, the Working Group agreed that it should revert to the proposal to delete subparagraph (b) of article 20—which allowed the use of restricted tendering when the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, construction or services to be procured—after it had had an opportunity to consider how that provision would relate to other procurement methods, such as framework agreements, which the Working Group had tentatively agreed to consider (see para. 78).

**(b) Community participation in procurement**

119. It was pointed out that the most efficient way to implement a project might sometimes be through the participation of users (known as community participation). Those users had an incentive to ensure good quality in the performance of work affecting them directly. For example, community participation might lead to a sustainable delivery of services in sectors unattractive to larger companies such as health, agricultural extension services and informal education. It might offer benefits including the improvement of the quality of the end product, in that: (a) local people would be motivated to see that adequate standards were achieved and that work was completed on time; (b) the potential for on-site disputes could be reduced; and (c) bureaucracy might also be reduced through the use of less formal procedures. There could also be other potential benefits, including the provision of local employment using labour-intensive technologies, the utilization of local know-how and materials, the encouragement of local businesses and the improvement of municipal accountability, which might form part of enacting States’ social goals. In practice, however, many countries could not avail themselves of community participation in project execution in view of the fact that their procurement laws did not provide for that possibility. The Working Group was therefore invited to consider ways in which community participation might be recognized in the Model Law.

120. The Working Group recognized the potential value of community participation in the implementation phase of a procurement project, by enhancing public scrutiny on public expenditure. Experience had shown that community control could be effective if the community in question had sufficient knowledge about the project, which was typically the case for small-scale projects. In case of larger projects, however, the need for appropriately informing the community about essential elements of the project might place an unreasonable burden on the procuring entity. Community participation, it was further stated, was generally welcome where it added to the overall transparency and efficiency of the procurement process, but should be carefully considered where it rendered the decision-making process less transparent or resulted in added costs or loss of competition. The view was also expressed, in that connection, that community participation was not per se a method of procurement, but an implementation modality for publicly funded projects and that the authority to carry out projects with community participation would not normally derive from the procurement laws of a country, but from other rules and regulations governing public expenditure.

121. In response, it was pointed out that, in practice, the involvement of the local community might be one of the criteria for the selection of the method of procurement or for the award of the contract. Alternatively, tenderers might offer their best solutions, including community participation if they so choose, and those solutions might then be compared, or the conditions of implementation might be set to include the employment of



local labour or materials, or part of the budget for the project might be set aside for community participation.

122. The Working Group felt that most issues raised by community participation related primarily to the planning and implementation phases of a project, more than to the procurement process. As such, community participation was not a matter that could be easily addressed in the Model Law. Being aware, however, of the growing importance of community participation and the possible need for enabling legislation in many jurisdictions, the Working Group agreed that it should review the provisions of the Model Law with a view to ensuring that they did not pose obstacles to the use of community participation as a requirement in project-related procurement. The Guide to Enactment, it was further agreed, might provide additional guidance on the matter.

**(c) Simplification and standardization of the Model Law**

123. It was observed that some enacting States had chosen not to enact some of the more detailed parts of the Model Law, finding that they had not proved necessary for legislation in the States concerned. It was also suggested that some restructuring of the presentation of the Model Law might also prove useful as a tool to assist enacting States in formulating domestic legislation.

124. It was said, in particular, that certain provisions currently found in the text of the Model Law might be moved to an annex to the Model Law, or to model provisions that the Guide to Enactment could provide. Examples included article 7 (3), listing the contents of pre-qualification documents, article 11, listing information in the record of the proceedings, article 25, listing the contents of invitations to tender and pre-qualify in tendering procedures, article 27, listing the contents of the solicitation documents, article 38, concerning the contents of a request for proposals for services under the principal method for the procurement of services, and article 48 (4), concerning the content of a request for proposals under the relevant procedure.

125. The need for shortening the Model Law was questioned. It was explained that some States would prefer to have a more comprehensive instrument and, in any event, enacting States could exercise their discretion regarding the level of details and structure they deemed appropriate for their local conditions, including drafting techniques and traditions.

126. The Working Group agreed that there was some room for improving the Model Law's structure and for simplifying its contents, by some reordering or by eliminating unnecessarily detailed provisions or moving them to the Guide to Enactment. It was generally felt that the desired result should be a more user-friendly Model Law where all essential elements would be preserved and presented in an improved structure and in a simpler way. The same principles should be observed in preparing the revised Guide to Enactment. Recognizing that, in the process of introducing new topics into the Model Law, changes would inevitably have to be made in its structure, the Working Group was of the view that it would be preferable to revert to the proposals for simplification of the Model Law at a later stage.

**(d) Legalization of documents**

127. It was noted that article 10 of the Model Law provided that if the procuring entity required the legalization of documents, it should not impose any requirements other than those provided by the general law for the type of documents in question. However, that article imposed no restrictions on the power of procuring entities to call for legalization of

documents. In practice, it was said, procuring entities sometimes required the legalization of documents by all those who needed to demonstrate their qualifications to participate in a procurement procedure, which could be time-consuming and expensive for suppliers. In addition to the deterrent effect, all or part of the increased overheads for suppliers might be passed on to procuring entities.

128. The Working Group generally agreed that it would be desirable to limit the power of procuring entities to require legalization of documentation from a successful supplier alone. In doing so, the Working Group agreed that it could consider in due course whether article 10 could be combined with article 6 (5).

**B. Note by the Secretariat on recent developments in the area  
of public procurement – Issues arising from the increased use of electronic  
communications in public procurement, submitted to  
the Working Group on Procurement at its sixth session  
(A/CN.9/WG.I/WP.31) [Original: English]**

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## I. Introduction

1. The UNCITRAL Model Law on Procurement of Goods, Construction and Services (the UNCITRAL Model Procurement Law or the Model Law), and its accompanying Guide to Enactment, are intended to serve as a model for States for procurement legislation and to promote procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process. Legislation based on or largely inspired by the UNCITRAL Model Procurement Law has been adopted or the Model Law has influenced legislation in a large number of jurisdictions, and the use of that law has resulted in widespread harmonization of procurement rules and procedures.

2. In its report on the thirty-sixth session, the Commission expressed strong support for the inclusion of procurement law in the work programme of the Commission, *inter alia*, so as to allow novel issues and practices that have arisen since the adoption in 1994 of the UNCITRAL Model Procurement Law to be considered (*Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/58/17)*, para. 229). The Commission further indicated that the work of the Working Group should focus on two main areas in respect of which the Model Law may benefit from some revision: first, issues arising from

procurement conducted through electronic means, and, secondly, issues that have arisen during the application of the Model Law itself.

3. This note is the first of two papers prepared by the Secretariat in anticipation of future work by the Commission on the question of public procurement, and considers the issues that have arisen from the increasing use of electronic communications and technologies in public procurement, including the use of procurement methods based on the Internet. The second of the two papers, entitled “Recent developments in the area of public procurement—issues arising from recent activities and experience of international organizations and lending institutions in the application of the UNCITRAL Model Law on Procurement of Goods, Construction and Services” (document A/CN.9/WG.I/WP.32). For the ease of the reader, this note uses the term “electronic procurement” to refer to the use of electronic communications and technologies in public procurement.

4. This note also considers various policy options that the Working Group may wish to consider so as to address the issues raised by the use of electronic procurement within the UNCITRAL Model Procurement Law. The Working Group may consider that some of these issues can be accommodated within its existing provisions (or through the interpretation of existing laws and rules, including as set out in the Guide to Enactment). However, further provision in the Model Law may be required in some cases. The Secretariat has focused on policy issues rather than on how relevant provisions may be drafted at this stage and, accordingly, this note does not seek to provide drafting suggestions.

5. The Secretariat’s work has been carried out in close cooperation with organizations having experience and expertise in the area, such as the World Bank, and has received the benefit of consultations with experts in the field.

## **II. Recent developments in public procurement—procurement application of electronic communications and technologies**

6. Two main technological developments in the last ten years have changed the manner in which procurement has been undertaken: first, the use of electronic means of communication has become widespread and, secondly, certain States now operate some parts of their procurement electronically (that is, submission of tenders for contracts, or other means of awarding contracts, is conducted online, commonly using the Internet). Such use is rapidly increasing and is being considered under a variety of domestic laws and by such international bodies and agreements as the Asia-Pacific Economic Cooperation (APEC), the European Union (EU), the draft Free Trade Area of the Americas Agreement (FTAAA), the North American Free Trade Agreement (NAFTA), the Organization of American States (OAS) and the World Trade Organization’s (WTO) Agreement on Government Procurement (GPA).

### **Potential benefits and possible difficulties of the use of electronic procurement**

7. The use of electronic procurement offers many potential benefits, including improved value for money from more rigorous competition in a broader supplier market, better information for suppliers and more competitive techniques, savings of time and costs, improved administration of contracts awarded, and, through the possibility of better monitoring and less direct contact between suppliers and procuring entities, improved compliance with rules and policies and less corruption and abuse. Further, electronic

procurement provides valuable opportunities to enhance public confidence and transparency in the procurement process.

8. It is also clear that electronic procurement can operate throughout the procurement cycle, and its potential benefits may extend beyond the procurement arena alone, in that it may yield valuable synergies with other domestic policies. For example, electronic procurement can stimulate a more competitive local supply base by speeding up private sector adoption of modern public procurement practices and promoting standardization. For further general discussion on this topic, see International Trade Centre, Public Procurement Training System, Module 5, E-procurement, at paragraph 3.2, Talero, Electronic Government Procurement: Concepts and Country Experiences, World Bank Discussion Paper (Sept. 2001), section B, and the United Kingdom Office of Government Commerce, A Guide to Procurement for the Public Sector (available at [www.ogc.gov.uk](http://www.ogc.gov.uk)), chapter 2.

9. On the other hand, the potential benefits set out above may come into conflict with other socio-economic aims in enacting States, for example, in that improving efficiency through the use of larger contracts and framework agreements may tend to favour large, rather than small and medium-sized enterprises, the promotion of which as an engine of economic growth forms part of many domestic policies.

10. Further, the relative novelty of electronic communications and fears over confidentiality and authenticity may deter suppliers from participating in procurements for which electronic communications are mandatory.

#### **Possible objectives of the Model Law on Procurement of Goods, Construction and Services as regards electronic procurement**

11. The potential benefits of electronic procurement summarized above are consistent with the main aims and objectives of the UNCITRAL Model Procurement Law as set out in its preamble, but it has been suggested that the Law may need to be reviewed so as to enable full advantage of electronic procurement to be taken by enacting States.

12. The extent to which individual States can benefit from electronic procurement will depend on the availability of appropriate infrastructure and other resources, the adequacy of the applicable law on electronic commerce, and the extent of standardization within the State concerned. The general legal environment in a State (as opposed to measures specific to government procurement) may or may not provide adequate support for electronic procurement. For example, laws regulating the use of written communications, electronic signatures, what is to be considered an original document and the admissibility of evidence in court may be an obstacle to the use of e-procurement. These issues are addressed through the UNCITRAL Model Law on Electronic Commerce (1996) and the UNCITRAL Model Law on Electronic Signatures (2001). The Working Group may therefore consider that such issues should be addressed by measures other than procurement laws in enacting States. For example, the Model Laws referred to above provide for the principle of functional equivalence of electronic and paper-based messages. However, the Working Group may wish to consider whether the Guide to Enactment should recommend that appropriate laws to address such issues should be promulgated in enacting States.

13. A related point is that, as a consequence of rapid technological advance and of the divergent level of technical sophistication in Member States, the Working Group may consider that any additional provisions to the UNCITRAL Model Procurement Law should be technologically neutral. That is, any provisions governing the use of electronic

procurement should address the principles and not the mechanics of the relevant communications and technologies. Accordingly, this note does not consider the technologies involved beyond insofar as they affect policy considerations.

14. The main policy issues identified to date concerning the use of electronic procurement arise in the following two areas:

(a) Advertisement of procurement-related information, including the publication of the laws and regulations governing procurement contracts, of solicitation documents and related information and of contract awards; and

(b) The use of electronic communications in the procurement process, including the use of electronic (reverse) auctions.

15. Each of these issues will be addressed by summarizing relevant potential benefits and difficulties, summarizing the extent of current use, briefly considering relevant provisions in other international regimes (where they exist) and in some domestic systems, referring to relevant provisions in the UNCITRAL Model Procurement Law as it currently stands and, finally, setting out some policy options that the Working Group may wish to consider. The provisions considered are those of APEC and WTO, the main trade agreements considered are those of the EU, the draft FTAAA, GPA and NAFTA, and the main domestic provisions considered are those of Brazil, France, Singapore, the United Kingdom of Great Britain and Northern Ireland and the United States of America and, to a more limited extent, Canada and Hong Kong. The latter were selected so as to be representative of different regulatory traditions and also because they have significant experience with electronic procurement practice or regulation.

## **1. Electronic publication of procurement-related information**

### **A. Background**

16. Article 5 of the UNCITRAL Model Procurement Law provides for a general principle of accessible publication for the law itself as well as “procurement regulations and directives of general application in connection with procurement covered by this Law ...”, and continues that such information “shall promptly be made accessible to the public and systematically maintained”. In considering issues of publication of procurement-related information as a whole, the Working Group may consider that it would be appropriate to expand this principle to all procurement-related information in all media.

#### **Potential benefits and possible difficulties**

17. Electronic publication of procurement-related information may provide wider dissemination of such information than would be achieved through traditional paper means, by making it more accessible to more suppliers. Procuring entities may make more, and better-quality, information available electronically using the Internet than would be the case using paper media (as to do so may be seen reaching a greater number of suppliers). However, such potential benefits assume efficient Internet search facilities and/or adequate notification when new information is added. Notification itself would in turn require that suppliers be registered in some form. (The interrelated issues of supplier registration and lists, and electronic catalogues, are addressed in document A/CN.9/WP.32, section II.A, entitled “The use of suppliers’ lists”.)

18. Electronic publication and advertising are frequently less expensive than traditional hard copy forms, but the costs of being required to advertise in paper media as well as optionally by electronic means may operate as a disincentive to the use of electronic publication. This disincentive may arise because the benefits of electronic publication may be outweighed by increased costs, especially in the early stages of implementing electronic systems, and if information not previously stored electronically has to be made available in electronic format.

19. A common view is that electronic publications are at their most effective when they are mandatory (that is, when paper publications are not permitted in addition). However, there may be significant benefits even when electronic means are optional, and mandatory electronic publication may not be suitable in all cases.

20. For example, the use of mandatory electronic publication may limit access to contract information if infrastructure is inadequate, access technically difficult, electronic advertisement displaces more accessible paper means, and if charges are made for access. Although these issues may be regarded as a temporary and geographically limited phenomenon, the Working Group may consider that they are of significant current concern. A related point arises in that ensuring the equivalence of electronically available information and available paper media becomes more difficult if the former can be updated more or less instantaneously, but the latter requires documents to be sent out to suppliers (which may also be expensive and time-consuming).

## **B. Contract opportunities**

### **Extent of current use and relevant provisions in international and domestic regimes**

21. States that use electronic publication frequently issue advance information about forthcoming projects or general information about contract opportunities with particular entities.

22. Relevant information may appear on both procurement entities' individual web sites, or in centralized electronic systems covering many entities. In those States in which such procurement procedures are regulated, procuring entities are normally required to use a centralized electronic system for publishing information that must be published under the applicable law (such as invitations to participate). However, the Secretariat has not found that requirements to publish contract opportunities as a normal feature of domestic systems.

23. Electronic publication of forthcoming contracts, however, was found in nearly all the domestic systems considered. Procurement regimes have differing methods of publication: one regional body, for example, issues information regarding opportunities in electronic form only, but other bodies allow for any medium that satisfies requirements as to accessibility.

24. The EU regime operates a centralized publication and translation system for all member States that must be used for all regulated contracts, notice of which appears in the Official Journal of the European Communities, available only in electronic form (Internet and on CD-ROM). However, entities may publish additional notices in other publications and usually do so (often in hard copy form and/or in additional electronic media). The EU regime requires entities to publish general notices of opportunities when their purchases in certain product or service areas exceed a specified amount, plus advance notice of major

works projects, although under its new directives this publication is to be made optional. (Entities that publish such information can shorten the time limits for certain tendering procedures. Under the new EU directives, entities will need to publish these advance notices only if they wish to take advantage of such of shorter time limits, and also will be able to publish them on their own web pages rather than through the Official Journal.) Another international instrument, the GPA, contains no obligation to provide further information, either in electronic form or otherwise (although many GPA parties do so in practice).

### **Position under the UNCITRAL Model Procurement Law**

25. Article 24 of the UNCITRAL Model Procurement Law has two limbs, addressing the publication of invitations to participate in a forthcoming procurement. The first limb requires such invitations to be advertised. The Model Law does not itself specify where such publication is to be effected, but it suggests in parentheses that it should be in an official publication specified by the enacting State when implementing the Model Law (such as an official gazette).

26. The second limb addresses international procurements, and may be viewed as supplementary to the first. It requires an invitation to participate to be advertised in a “newspaper” or “relevant trade publication or technical or professional journal” of wide international circulation.

27. These provisions imply a paper means of publication in either case.

28. On the other hand, article 27 of the UNCITRAL Model Procurement Law considers the information to be included in solicitation documents. Although there is no specific reference to information on use of electronic means, article 27 (z) enables the procuring entity to include requirements that it has established relating to the procurement proceedings, a provision that may be interpreted as providing for the inclusion of information on the use of electronic means of communication and tendering. The Guide to Enactment suggests that States may wish to make further regulations on such matters.

### **Policy options**

29. The Working Group may consider that a specific provision in the UNCITRAL Model Procurement Law addressing the issue of mandatory or optional use of electronic publication as regards contract opportunities may be appropriate, with the aim of providing for wider publication at limited cost.

30. The Working Group may, however, consider that requiring electronic publication may compromise the general principle of accessibility so long as adequate infrastructure remains unavailable in some States. If so, a provision could address publication in terms of accessibility alone, without specifying the technical means to be used, as is the case in the example described above, and appropriate guidance may be provided in regulations and the Guide to Enactment. One advantage of such an approach is that it is technologically neutral, and so future developments in technology would not require further revision to the provisions, and the principle of flexibility in publication medium is preserved. However, a disadvantage is perceptible, in that enforcement of the accessibility requirement may be difficult in many systems, and transparency and public confidence may be correspondingly jeopardized. That disadvantage could be mitigated to some extent by the provision of advice and clarifications in the Guide to Enactment.



31. Nonetheless, as the current text of the Model Law implies paper advertising alone, it is suggested that statements in the Guide to Enactment setting out the benefits, desirability and possible methods of electronic publication alone, rather than further provision in the UNCITRAL Model Procurement Law itself would not be sufficient to promote the use of electronic procurement. If in agreement with that suggestion, the Working Group may wish to consider whether to include an appropriate provision in the text of the Model Law.

32. If the Working Group considers that such a specific provision is warranted:

(a) As regards the first limb, it may choose to redefine “publication” in the first limb to include (optional) or to be effected by (mandatory) electronic publication in accessible electronic media. Alternatively, a parenthetical reference in the text indicating that enacting States should where possible insert a reference to a (specified) electronic medium may be considered;

(b) If the principle of optional electronic publication is preferred, but it is desired to promote mandatory electronic publication in time, electronic publication could be required if it is or becomes possible in the State concerned, or if a threshold of use of electronic communications has been reached. Such a threshold may be set out in regulations (easier to alter in times of change than primary legislation), or discussed in the Guide to Enactment. Alternatively, if the Working Group considers that a consensus on a threshold could be achieved, and so as to preserve transparency, the Working Group may wish to set it out in the UNCITRAL Model Procurement Law itself;

(c) As regards the second limb, it may choose similarly to redefine the terms “newspaper” or “relevant trade publication or technical or professional journal” to be or to include electronic publications, or to take an equivalent to alternative set out in the preceding subparagraph. It should be noted that the use of the Internet for international electronic publication implies near-universal accessibility of the information concerned, but (as noted in para. 17 above), entities and in particular overseas entities may not know where to find it without efficient search engines, nor be aware of changing information.

33. As to the extent of information to be provided, a greater amount of information may be required in cases of electronic publication. However, the Working Group may consider that the requirement to publish substantial information on forthcoming opportunities beyond the announcement of a future contract would be too onerous if such information has historically been maintained only in paper form. Accordingly, and given that the appropriate further information to be published would vary from case to case and State to State, the Working Group may consider that such guidance should be provided in the Guide to Enactment and through recommendations for enacting States’ own regulations rather than in the UNCITRAL Model Procurement Law itself.

34. Additionally, the Working Group may wish to address whether the provision of detailed guidance would be required, either in the UNCITRAL Model Procurement Law or the Guide to Enactment, to cover, inter alia, such issues as flexibility as to the use of a publication medium, who should decide on a publication medium, whether the use of electronic publication only or the non-use of electronic means should be justified, upon what grounds such decisions may be taken, whether such a decision is to be open to review (see, further, section II.E of document A/CN.9/WG.I/WP.32) and who should bear the responsibility of an omission. Finally, the issue of ensuring equivalence between electronic and paper-based publication should be considered.

35. The Working Group may also wish to consider whether the provisions of article 27 (z) are sufficiently broad in their current scope or whether the Model Law should be revised to make specific reference to the use of electronic communications in such circumstances.

## **C. Publication of the laws and regulations governing procurement contracts**

### **Extent of current use and provisions in other international regimes**

36. Many States provide extensive information in electronic form on the legal rules governing procurement, rulings interpreting those rules, and on the procurement policies and procedures of particular procuring entities—in some cases on centralized web sites, in others on those entities' own web sites.

37. Under the GPA Article XIX, certain measures relating to procurement must be published, though no medium is specified. (In the WTO, government procurement is largely excluded from the key non-discrimination obligations of the multilateral agreements, but it is not excluded from transparency obligations of the General Agreement on Tariffs and Trade (GATT) Article X.1 and the General Agreement on Trade in Services (GATS) Article III.1.) Nonetheless, the WTO Secretariat has sought to make available some of the key information on national systems through its own home pages. The draft FTAAA requires in article 10 that such information to be published in print or electronic media that are “widely disseminated and readily accessible to the public as identified in Annex XX” of the draft FTAAA. In addition, it provides that States should “endeavour to develop an electronic information system” that can provide access to such information. The APEC non-binding principles on government procurement (APEC Government Procurement Experts Group, Non-binding Principles on Government Procurement, paragraph 5, available at [http://www.apecsec.org.sg/content/apec/apec\\_groups/committees/committee\\_on\\_trade/government\\_procurement](http://www.apecsec.org.sg/content/apec/apec_groups/committees/committee_on_trade/government_procurement)) suggest that the above information should be available in an accessible medium, and APEC seeks to promote easy access to such information electronically via its own web site.

### **Position under the UNCITRAL Model Procurement Law**

38. Article 5 of the Model Law requires regulations, administrative rulings and directives of general application to government procurement to be “promptly made accessible to the public and systematically maintained”.

### **Policy options**

39. Article 5 appears to be sufficiently broad in scope as to encompass publication in any manner—electronic or by paper means, and addresses the issue from the standpoint of accessibility.

40. However, the Working Group may wish to include more detailed provisions on this topic, such as an express provision permitting or requiring electronic publication of all information that the UNCITRAL Model Procurement Law currently requires States to publish. The same policy considerations as set out in paragraphs 29 to 31 above would apply on the questions of optional or mandatory electronic publication, accessibility and thresholds.

41. It may also be desirable to provide guidance in the Guide to Enactment as to the value of electronic publication, and to stress the relative ease of maintenance and updating of information using electronic means.

42. Further, relevant information relevant to potential suppliers (such as internal policies or guidance) that the UNCITRAL Model Procurement Law does not currently require to be published may be brought within the scope of any new provision or guidance given.

## **D. Publication of contract awards**

### **Extent of current use and provisions in other international regimes**

43. Many States are making use of electronic media for publishing extensive information about award procedures that are being conducted or have taken place. For example, Singapore provides information on all bids submitted after bid-opening (available at <http://www.gebiz.gov.sg> under Business Opportunity-> More opportunities -> Tender Schedules) and in Brazil a current draft bill would require entities to publish on the Internet information on both ongoing procurements and awarded contracts, including successful suppliers and their ultimate controlling entities. (Substitute by the Senate to Draft Bill No. 75, from the Lower House, of 2000.)

44. Most international regimes require procuring entities to publish contract award notices giving certain basic information about contract awards, subject to confidentiality provisions. GPA Article XVIII, NAFTA Article 1015.7 and the draft FTAAA Chapter XVIII draft Article 24.3 require entities to publish contract award notices, without reference to specific media (though the latter implies that electronic publication alone may be acceptable). The EU directives require procuring entities to publish contract award notices in electronic form only.

### **Position under the UNCITRAL Model Procurement Law**

45. Article 14 of the Model Law requires procuring entities to publish notices of contract awards above a threshold specified by the enacting State, and that regulations may provide for the manner of publication. Again, this article appears to be sufficiently broad in scope as to encompass publication in any manner—electronic or otherwise.

### **Policy options**

46. Similar issues arise as in the question of the publication of the laws and regulations governing procurement contracts.

47. The Working Group may therefore wish to consider whether there should be some provision in the UNCITRAL Model Procurement Law for publishing in electronic form information that the Model Law currently requires States to publish, and does not require States to publish, or refer to the value of such publication in the Guide to Enactment. (As noted above, States are not required to publish entities' internal policies or guidance, which do not constitute "directives" in the sense of the Model Law.)

## 2. Use of electronic communications in the procurement process

### Background

48. In addition to the legal issues set out in paragraph 12 above, enacting States may be interested in ensuring that procurement contracts concluded electronically within their domestic systems are fully enforceable, and to protect the corresponding interests of their suppliers. To the extent that they are suitable for regulation, these latter questions may fall to be dealt with by specific provisions in government procurement law rather than in other legislation in those systems.

49. From this perspective four main regulatory issues arise:

(a) Whether legal rules on government procurement should permit or require procuring entities to use electronic communications by consent with suppliers;

(b) Whether those rules should permit or require procuring entities to require suppliers to use electronic communications;

(c) Whether those rules should provide that suppliers may require procuring entities to use electronic communications; and

(d) Whether those rules should attach conditions to the use of electronic means to safeguard the objectives of the procurement law, so as to prevent the electronic means chosen from operating as a barrier to access, to secure confidentiality, to ensure authenticity and security of transactions, and the integrity of data.

50. Each of these issues will be considered in the sections that follow.

51. A further issue is how a requirement for tenders to be in “writing” should be addressed. It is noted that measures to define “writing” or “written” communications as including electronic means have appeared (sometimes along the lines of the Model Law on Electronic Commerce) in general or government procurement law. The Working Group may wish to recommend, for example in the Guide to Enactment, that enacting States address such matters in their domestic systems.

### Extent of current use and provisions in other international regimes

52. Many international regimes include or propose provisions recognizing the reality of the use of electronic communications in procurement, including mandatory electronic communications.

53. There are proposals for amending the EU and GPA regimes that currently have limited provisions concerning the use of electronic communications, if at all, so as to allow the use of electronic communication by consent, to allow procuring entities to insist on them, and to introduce controls, such that electronic means used are accessible, and to ensure authenticity, confidentiality and integrity.

54. Under NAFTA, article 1015 (1) provides that tenders by any electronic means are permitted, but it is silent on mandatory electronic communications. The draft FTAAA assumes that procuring entities may use electronic means and also seems to envisage that they may require suppliers to deal electronically. The APEC non-binding principles on government procurement do not deal explicitly with electronic communications in the procurement process, except to mention the value of the Internet as a transparent and non-discriminatory means for providing information and publicizing procurement rules.

However, promotion of e-procurement systems among members has been one of APEC's main recent objectives.

55. In France, procuring entities may use electronic means for sending various documents, without the agreement of suppliers, but the converse will not be true until January 2005. Controls address the certainty of the date of receipt, authenticity and confidentiality. In Hong Kong, electronic tendering is also now used, but suppliers are allowed the option of submitting a hard copy. In Singapore, electronic communication is used extensively and is sometimes mandatory, including for the submission of tenders. In Brazil, too, procuring entities in practice require suppliers to use electronic means to communicate. In the United Kingdom, mandatory use of electronic communications (at the discretion of the procuring entities themselves) is common. Controls cover standards for authentication and confidentiality, in government activity generally. Similarly, in the United States, at the federal level the means of communicating with suppliers is at the discretion of procuring entities, some of which have required tenderers to deal electronically.

#### **Position under the UNCITRAL Model Procurement Law**

##### **(a) Use of electronic procurement by consent**

56. Article 9 (1) of the Law addresses the form of communications to be used in the procurement process. It provides that communications are to be in a form that provides a record (or, as an alternative for most communications, otherwise to be confirmed in a form that provides a record under article 9 (2)), a provision that could include electronic means of communications. The use of electronic means of communications by consent is therefore permitted.

##### **(b) Mandatory use of electronic communications**

57. Article 9 (1) states that the general rule on form of communications is "subject to ... any requirement of form specified by the procuring entity" when first soliciting participation. Although this article might be interpreted as authorizing mandatory electronic communications, background papers from the sessions of Working Groups at which the (then) draft UNCITRAL Model Procurement Law was considered indicate the intention at the time was to permit the use of electronic communications by consent only. See, for example, the views of the Australian and Canadian delegations on article 9 of the draft Model Law, found in UNCITRAL's 1993 Yearbook, Vol. XXIV (available at [www.uncitral.org](http://www.uncitral.org), under Yearbook Volume XXIV, Item I, document D, "Model Law on Procurement: compilation of comments by Governments" (documents A/CN.9/376 and Add.1 and 2)), and paragraphs 82-90 of the "Report of the Working Group on the New International Economic Order on the work of its fifteenth session (New York, 22 June-2 July 1992)" (document A/CN.9/371), available under same reference.

58. Article 9 (3) states that the procuring entity shall not discriminate against or among suppliers on the basis of the form in which they transmit or receive communications, and it is clear that mandatory electronic communications could be seen as infringing this article. For example, even if time limits for submitting requests to pre-qualify or for submitting tenders are the same for all suppliers, it is *prima facie* discriminatory under article 9 (3) if these time limits are set with regard to the sufficiency of time for those communicating by electronic means only. On the other hand, formally different treatment may in fact ensure equality of treatment in practice.

59. In addition to questions relating to the fair and non-discriminatory treatment of suppliers, the mandatory use of electronic communications needs to be considered from the point of view of the formal requirements in the UNCITRAL Model Procurement Law. A written requirement for communications is imposed only in the case of tenders which, under article 30 (5)(a), are to be submitted “in writing, signed and in a sealed envelope”, or “in any other form specified in the solicitation documents”, subject to certain conditions. Thus electronic submission of tenders is permitted when both parties accept it, but whether the “other form” in article 30 (5)(a) may include mandatory electronic submission is not expressly stated. Article 30 (5)(b) specifically provides for the right of a supplier to submit a tender by the “usual” method set out in article 30 (5)(a), namely in writing, signed and in a sealed envelope. According to the Guide to Enactment, this is an “important safeguard against discrimination in view of the uneven availability of non-traditional means of communication such as [Electronic Data Interchange (EDI)]”. Consequently, it appears that suppliers cannot be required to submit a tender electronically under the Law as currently drafted.

**(c) Controls over the use of electronic means**

60. Apart from the rules on the requirement for a record in article 9 (1), and general transparency provisions, the UNCITRAL Model Procurement Law does not provide any explicit controls over use of electronic means, other than the case of electronic submission of tenders.

**Policy options**

61. The Working Group may find it desirable to apply the same standards and principles in electronic as in paper-based procedures—for example, to ensure tenders remain confidential during the tendering procedure—and also take steps to ensure that suppliers and the public have the same degree of confidence in electronic procedures as in paper-based procedures. The specific provisions that will be included in a State’s procurement law on these matters will depend to an extent on the relevant background law, such as the treatment of and legal framework for electronic signatures in a particular country.

62. Specific areas that the Working Group may wish to address include:

**(a) Possibility for the procuring entity to require suppliers to use electronic communications**

63. There are two aspects to this issue: first, whether procuring entities should be able to require the use of electronic communications in general and, secondly, to require the electronic submission of tenders. Recalling that market conditions have changed since the prohibition on mandatory electronic tendering was adopted, and that proprietary EDI systems have been replaced by the Internet, it could be argued that for some States, in some circumstances, a requirement for electronic tendering and other electronic communications, is a reasonable commercial requirement that also promotes the objectives of the UNCITRAL Model Procurement Law. The Working Group may also consider that it is important the Model Law should not operate or be seen as a barrier to the most efficient use of electronic communications, nor should it lag behind practical developments in its approach to the use of mandatory electronic communications.

64. However, the Working Group may also wish to recognize that the current circumstances in some States are such that requiring the use of electronic communications would not be desirable.

65. The Working Group may therefore wish to acknowledge the fact that different approaches are suitable in different countries and circumstances, that circumstances may continue to change, and to consider allowing for appropriate options regarding the mandatory use of electronic communications in the UNCITRAL Model Procurement Law.

66. One possible option might be to provide that the use of electronic communications may not be imposed as a general requirement except to the extent authorized in procurement regulations. The Guide to Enactment could then address issues to be considered in the drafting of relevant regulations, such as the issue of timing (that is, when or under what circumstances the prohibition should be lifted, though it may be appropriate to encourage the use of electronic communications in the interim by providing that electronic communications are permitted and that they may be required in certain (specified) circumstances). This approach would also have the advantage that the regulations could be adapted to address the issues in the way most suitable for each State, bearing in mind the matters set out in the preceding paragraphs. For example, the regulations may provide which procuring entities could make use of mandatory electronic tenders, and in what circumstances and under what conditions, possibly subject to a justification and/or approval requirement.

67. Alternative options may be to allow mandatory electronic communications in the UNCITRAL Model Procurement Law itself, subject to appropriate conditions (such as a justification requirement), to allow mandatory electronic communications at the discretion of procuring entities (with or without a justification requirement), or only in defined and limited cases—for example, for particular types or methods of procurement.

68. The Working Group may consider that setting any definitions and limits to the use of mandatory electronic communications, particularly in the UNCITRAL Model Procurement Law itself, may be viewed as rigid and difficult to adapt to changing market conditions. The Working Group may therefore adopt the position that the Model Law should continue to enable those States that wish always to give suppliers the right to communicate in non-electronic form to do so, but to allow a change in that stance to be effected by regulation. Additionally, the Working Group may wish to allow States to require suppliers to use electronic communications in formal tendering, perhaps with the decision on whether to do so to be addressed in regulations, or to be left for each procurement resting with the procuring entity.

69. In all cases, the Guide to Enactment may usefully provide detailed guidance on the matter.

**(b) Possibility for suppliers to require the procuring entity to use electronic means**

70. The Working Group may consider that to allow suppliers to require the use of electronic means has the potential benefits of efficiency but also the possible difficulties noted in paragraph 20 above.

71. The Working Group may also wish to consider to provide that allowing suppliers to require the use of electronic communications does not affect the right of procuring entities to insist on the use of particular means of communication. The aim of such a provision would be to preserve the primacy of the procuring entity's position. It may also wish to

address in the Guide to Enactment the issue that States are likely to wish to give suppliers the right to use electronic communications in certain cases, perhaps to be set out in regulations on this subject.

72. Further, the Working Group may consider that the differences in use of electronic communications in different States indicate that any such right would have to be limited to cases in which the procuring entity has reasonable access to the electronic means chosen. As with the case of procuring entities, options in the UNCITRAL Model Procurement Law may be an appropriate course.

73. The Working Group may alternatively consider whether to include a general provision that the means of communication imposed by the procuring entity should not unreasonably restrict access to the procurement, and to set out more detailed rules on what kind of means can be used and the controls that must exist in the Guide to Enactment.

**(c) Discrimination**

74. The Working Group may also wish to clarify the provisions of article 9 (3), for the reasons set out in paragraph 58 above.

**(d) Controls over the use of electronic means**

75. The Working Group may wish to consider the desirability of establishing controls as regards security, confidentiality and authenticity of submissions, and integrity of data. The Guide in its commentary on article 30 suggests that where the possibility for using electronic tendering exists, additional “rules and techniques” may be needed for some of these matters, and also to deal with other issues such as the form the tender security will take.

76. However, the Working Group may wish to consider whether the general principles applicable to all means of communication should be set out in the UNCITRAL Model Procurement Law.

77. The Working Group may wish to consider whether the following would constitute appropriate guiding principles:

(a) That the means of communication imposed should not present an unreasonable barrier to participation in the procurement proceedings (a principle that would allow a requirement for either paper-based or electronic communications in appropriate circumstances);

(b) That it should be possible to establish the origin of communications (authenticity);

(c) That the means and mechanisms used should be such as to ensure that the integrity of data is preserved;

(d) That the means used should enable the time of receipt of documents to be established, when the time of receipt is significant in applying the rules of the procurement process (i.e. for submission of requests to participate and tenders/proposals);

(e) That the means and mechanisms used ensure that tenders and other significant documents are not accessed by the procuring entity or other persons prior to any deadline, so as to prevent procuring entities’ passing information on other tenders to favoured



suppliers, and to prevent competitors from gaining access to that information themselves (security);

(f) That the confidentiality of information submitted by or relating to other suppliers is maintained.

78. The Working Group may wish to adopt a formulation that covers all means of communication, perhaps using the concept of functional equivalence for electronic communications (so as to address, for example, the requirement that paper tenders must be signed and sealed), and to consider the issues of storage and handling of electronic data. Such a formulation could be found in the UNCITRAL Model Procurement Law, or as guidance as to appropriate regulations to be issued pursuant to the Model Law in the Guide to Enactment.

### **3. Electronic (reverse) auctions**

#### **Background**

79. An electronic reverse auction, of which there are several variants, is an increasingly popular tendering process. A reverse auction is a tendering procedure in which suppliers are provided with information on the other tenders, and can amend their own tenders on an ongoing basis in competition with those other tenders, normally without knowing the identity of other suppliers. In an electronic reverse auction suppliers then post tenders electronically through an electronic auction site, normally via the Internet (the use of which has largely superseded proprietary systems), using information on ranking or amount required to beat other suppliers' offers. Suppliers can view in electronic form the progress of the tenders as the auction proceeds and amend their own tenders accordingly. The auction may take place over a set time period, or may operate until a specified period has elapsed without a new tender.

80. Reverse auctions are most commonly used for standardized products and services for which price is the only, or at least a key, award criterion, since it is generally price alone that features in the "auction" process. However, other criteria can be used and built in to the auction phase, or evaluated in a separate phase in the overall procedure.

#### **Potential benefits and possible difficulties**

81. Electronic auctions pressurize suppliers to offer their best possible price, and provide an incentive to the procuring entity to specify non-price award criteria precisely. They operate in a transparent manner (in that information on other tenders is available and the outcome of the procedure visible to participants, matters that also disfavour abuse and corruption), can also speed up the tendering process and reduce transaction costs. Electronic technologies have facilitated the use of reverse auctions by greatly reducing the transaction costs.

82. However, there are also possible difficulties, of which the most often cited are encouraging an excessive focus on price. Moreover, the speed of the electronic auction is such that there may be an issue of "auction fever": that is, the suppliers may be induced to offer a price that is not realistic. This issue can lead to significant problems during the administration phase if the contract is awarded to such a supplier. A possible solution to this issue would be to select with care the types of contracts for which this procurement method is suitable.

**Extent of current use and provisions in other international regimes**

83. Some States and international bodies have begun to regulate or provide guidance on the use of electronic reverse auctions. Such guidance addresses both the mechanics of holding an electronic auction and legal issues such as the ability to make substantial changes to tenders—including to the price—after submission.

84. At the international level, there is nothing at present in the GPA, EU directives or NAFTA on electronic reverse auctions, nor is this method mentioned in the draft FTAA or APEC (perhaps unsurprising, since the latter regime describes general principles rather than detailed rules). However, an explicit provision on electronic reverse auctions is included in the current draft revisions of the GPA (Article XI.3 bis of the draft text as at 4 November 2003) stating that this procurement method may be used and regulating its operation. The new EU procurement directives also include a specific provision for electronic auctions, to remove prior legal uncertainty and to apply relevant controls. (See, in particular, new public sector directive Article 54; new Utilities Directive Article 56.)

85. At the national level, for example, Brazil and France have enacted legally binding provisions. (In Brazil: Federal Law No. 10.520/2002 of 17 July 2002, Article 2 (1), authorizing electronic auctions to be carried out in accordance with rules to be specified, and Decree No. 3697, of 21 December 2000, laying down precise rules for conducting electronic auctions; and in France, Public Procurement Code Article 56 (3) and Decree No. 2001-846 of 18 September 2001.) In the United States, on the other hand, regulators have not adopted specific legal rules or formal guidance to address them. In the United Kingdom, rules on public procurement are mainly limited to those of EU law, which does not at present regulate electronic reverse auctions. However, the British Government considers that EU law allows scope for such auctions, has endorsed their use and has issued guidance (“eAuctions” at <http://www.ogc.gov.uk/index.asp?docid=1001034>). Anecdotal evidence suggests that the lack of regulation in the United Kingdom and the United States deters some procuring entities from using such auctions.

**Position under the UNCITRAL Model Procurement Law**

86. The UNCITRAL Model Procurement Law does not address auctions. The tendering method used for goods and works procurement assumes a single-tendering stage, and prohibits substantial changes to tenders—including to the price—after submission (article 34 (1)(a)). It also prohibits procuring entities from disclosing tender information (article 34 (8)), thus preventing auctions by agreement between the entity and suppliers. The provision conferring a right to tender in writing in a sealed envelope also precludes an auction in the absence of consent by the suppliers (articles 30 (5)(a) and (b)). The same rules apply to restricted tendering (article 47 (3)).

87. The grounds for using non-tender procedures for procuring goods and works will only rarely apply to procurements for which an auction is suitable, even if it is technically possible to accommodate an auction phase within the legal parameters of some of those procedures. The same observations can be made of the UNCITRAL Model Procurement Law’s procedures for procuring those services that cannot be viewed essentially as a commodity, sometimes known as intellectual services, whose non-price criteria are proportionately significant and commonly viewed as difficult to quantify.

### Policy options

88. As noted in paragraph 82 above, electronic reverse auctions are not universally considered as a suitable procurement tool for all types of procurement. Nevertheless, and given their increasing use, the Working Group may wish to consider the desirability of making provision for them in the UNCITRAL Model Procurement Law. Furthermore, the Working Group may also wish to consider how far other types of auctions, not currently regulated under the Model Law, should also be subject to its provisions.

89. The Working Group may therefore first wish to address the types of procurement that may be and may not be suitable for an electronic reverse auction procedure. For example, the Working Group may wish to recognize that the potential benefits of auctions will accrue only to the extent that an initial common specification against which tenders are submitted can be drafted, and for procurements for which non-price criteria can be effectively quantified. The Working Group may therefore wish to consider whether to provide guidance as to the types of services that would be suitable for auction procedures in the Guide to Enactment, perhaps in conjunction with optional provisions in the UNCITRAL Model Procurement Law itself.

90. If the Working Group considers that provision should be made for electronic reverse auctions in the UNCITRAL Model Procurement Law itself, the issue arises as to whether those provisions should be presented as a version of traditional procurement methods or as a distinct method. It has been suggested that treating such auctions as a version of traditional tendering would require the introduction of additional rules to address auctions' special features. Those features include the publication of prices during the tender process (otherwise prohibited) and a two-phase evaluation of tenders. However, to do so may be viewed as more appropriate than treating electronic auctions as a separate tendering method requiring new and specific provisions.

91. If so, the Working Group may wish to ensure procedural and substantive consistency between the auction procedures and those applied by the UNCITRAL Model Procurement Law to non-auction procurements, such as tendering—the general procurement method for goods and construction. If so, the Working Group may wish to provide, for example, an auction procedure should follow the pattern of the “tendering” or “restricted tendering” methods of procurement, adapted to include an auction phase (in relevant cases, it may also be modelled on the pattern of a two-stage tendering procedure).

92. Separately, the Working Group may then wish to include provisions regarding the conduct of the auction phase either in the UNCITRAL Model Procurement Law or to provide guidance in the Guide to Enactment as to the content of regulations to be issued pursuant to the Model Law. The Working Group may also wish to consider the issue in the context of whether the Law is to remain “technologically neutral”, as is explained in the discussion on electronic publication in paragraph 13 above.

## III. Recommendations

93. In this first note for the sixth session of the Working Group, considering issues arising from electronic procurement, the Working Group is presented with a description of the main such issues identified to date. It is recommended that the Working Group identify those issues that it wishes to address in this regard, and provide guidance as to the policy

objectives that should be reflected in draft provisions that the Working Group might wish to request the Secretariat to prepare for future consideration by the Working Group.

**C. Note by the Secretariat on recent developments in the area  
of public procurement – Issues arising from recent experience with  
the UNCITRAL Model Law on Procurement of Goods, Construction  
and Services, submitted to the Working Group on  
Procurement at its sixth session  
(A/CN.9/WG.I/WP.32) [Original: English]**

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## I. Introduction

1. This note is the second of two notes prepared by the Secretariat in anticipation of future work by the Commission on the question of public procurement. The notes address issues as regards the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the UNCITRAL Model Procurement Law or the Model Law), and this note considers recent activities and experience of international organizations and lending institutions, some of which are currently in the process of reviewing their rules and regulations in the field of public procurement. The first of the two papers is entitled "Recent developments in the area of public procurement—issues arising from the increased use of electronic commerce for public procurement" (A/CN.9/WG.I/WP.31), and sets out the background to the proposed inclusion of procurement law in the work programme of the Commission. The Secretariat has focused on policy issues rather than on how relevant provisions may be drafted at this stage and, accordingly, this note does not seek to provide drafting suggestions.

2. The above-mentioned institutions' activities and experience in the application of the UNCITRAL Model Procurement Law highlight the need for coordination of efforts by international bodies active in the field of procurement. In this regard, the Commission has

indicated that the Model Law may benefit from some revision (A/58/17, para. 229). Consistency with other international and regional public procurement regimes in use should, while respecting the basic policies and principles underlying the Model Law, tend to increase the use of the Model Law, and thereby further the aim of harmonization.

3. The Secretariat's work has been carried out in close cooperation with organizations having experience and expertise in the area, such as the World Bank, and has received the benefit of consultations with experts in the field. The Secretariat has considered the experience of and relating to such international bodies and agreements as the Asia-Pacific Economic Cooperation (APEC), the European Union (EU), the draft Free Trade Area of the Americas Agreement (FTAAA), the North American Free Trade Agreement (NAFTA), the Organization of American States (OAS) and the World Trade Organization's (WTO's) Agreement on Government Procurement (GPA). The main domestic provisions that have been considered are those of Brazil, France, Singapore, the United Kingdom of Great Britain and Northern Ireland and the United States of America, and (to a more limited extent) Canada and Hong Kong, selected so as to be representative of different regulatory traditions and also because they have significant experience with electronic procurement practice and regulation.

## **II. Possible areas for review in the UNCITRAL Model Procurement Law**

4. The Working Group is referred to the Secretariat's note A/CN.9/553 and also to two notes to the thirty-sixth session of the Commission, documents A/CN.9/539, and A/CN.9/539/Add.1, which set out further background information regarding the possible areas for review. This note will consider the following issues, foreshadowed in the earlier notes:

- (a) The use of suppliers' lists;
- (b) Framework agreements;
- (c) Procurement of services;
- (d) Evaluation and comparison of tenders;
- (e) Remedies and enforcement; and
- (f) Other matters (legalization of documents, alternative methods of procurement, community participation in procurement, and the simplification and standardization of the Model Law).

### **A. The use of suppliers' lists**

#### **Background**

5. Suppliers' lists (also known as qualification lists, qualification systems or approved lists) identify selected suppliers for future procurements and can operate as either mandatory or optional lists. Mandatory lists require registration of the supplier on the list as a condition of participation in the procurement. A supplier may choose to register on an optional list but not doing so does not prejudice eligibility for a particular contract. Admission of a supplier to a list may involve a full assessment of the supplier's suitability

for certain contracts, some assessment or no assessment at all. However, there will normally be an initial assessment of some qualifications, leaving others to be assessed when the supplier is considered for specific contracts.

#### **Position under the UNCITRAL Model Procurement Law**

6. The UNCITRAL Model Procurement Law does not address the subject of suppliers' lists, though it does not prevent procuring entities from using optional lists to choose suppliers in procurement that does not require advertising, such as restricted tendering, competitive negotiations, requests for proposals or quotations and single-source procurement. Article 6(3) of the Model Law prohibits entities from imposing any "criterion, requirement or procedure" other than those in article 6, and article 6 does not refer to registration on a list. However, the use of optional lists may in practice result in the exclusion of non-registered suppliers, for example in the use of the relatively informal request for quotations procedure, and operate effectively as a mandatory list.

7. The Model Law does not allow advertisement of a list to serve as a substitute for advertising a specific contract. As regards (open) tendering and two-stage tendering, for example, article 24 requires entities to advertise to "solicit tenders" or "applications to pre-qualify", indicating that an advertisement is necessary for each procurement (although it could be divided into lots).

8. At the time of the adoption of the Model Law, the use of suppliers' lists was considered to be both undesirable and diminishing in frequency. However, with the spread of electronic communications, the use (and value) of lists has increased and their costs diminished. Further, it has been commented that increasing use of electronic catalogues – that is, product catalogues with single or multiple suppliers, which are compiled following a traditional tender. Under the tender, the suppliers are selected to provide an electronic catalogue from which the procuring entity can choose and order goods and services, and this procedure may also lead to more procurement being conducted in a way that involves de facto reliance on suppliers' lists.

#### **Potential benefits and possible difficulties**

9. In those countries that use suppliers' lists, it has been found that the lists assist in streamlining the procurement process, leading to cost savings, wider competition, and more efficient information management, which benefit both purchasers (as regards administration of earlier contracts, for example) and suppliers. There may also be advantages arising from consistency in policies regarding the qualification of suppliers. However, the costs of registration on the lists must be taken into account (including the costs of assessment of qualifications, some of which may be unnecessary if suppliers that will not qualify seek to register). The cost-benefit analysis is likely to vary from enacting State to State.

10. Lists can also save time by eliminating or reducing the period for advertising, awaiting expressions of interest, and assessing qualifications, of particular importance in the case of procurement that is not subject to advertisement and competition, such as urgent procurement, often carried out in an ad hoc way that favours suppliers known to the procuring entity. The particular advantages of optional lists include cost reductions from eliminating the need to provide and evaluate separate qualification information for each contract, access to information if emergency procurements are required, reduced costs for suppliers in finding contract information (which can be given automatically to registered

suppliers), and potentially wider competition if lower supplier costs lead to increased numbers of interested suppliers.

11. Mandatory lists can increase the above advantages. For example, more time may be saved with mandatory lists, as an entity can avoid considering any new suppliers within the time scales of a specific procurement. Mandatory lists can also facilitate close relationships – for example, providing a means for working with the few best suppliers to improve quality – and can allow entities to assess qualifications more fully than is possible within the time frame of a specific procurement. However, they also pose significant risks in potentially restricting competition by excluding suppliers from forthcoming contracts. New suppliers or foreign suppliers who do not frequently sell to that particular government, for example, may not be registered. Mandatory lists may compromise confidence in public procurement, as they may reduce transparency and the close relationships between suppliers and procuring entities may be negatively perceived. Their operation may also involve significant administrative costs.

12. Advertising a list rather than specific contract opportunities can also be one way of giving publicity to an entity's requirements so that suppliers can respond, reducing advertising costs and time scales. However, dispensation from normal advertising requirements for each future procurement would normally be required.

#### **Extent of current use and relevant provisions in international and domestic regimes**

13. Suppliers' lists are used in many States and in international procurement regimes, and in the cases of larger contracts are sometimes mandatory. However, under these regimes their use is regulated: first, by limiting in some cases the entities that may use them and, secondly, by controlling their use to ensure they operate in a reasonable and transparent way. Examples include the GPA, which allows the use of mandatory and optional lists (with controls governing such use other than in the case of small, limited tendering or non-competitive urgent procurement). NAFTA allows for the use of lists, including mandatory lists, under rules and controls very similar to those of the GPA. (See, in particular, NAFTA Article 1011(2) allowing use of lists to select suppliers in restricted procedures, and Article 1009(2) containing controls). The EU procurement directives normally prohibit mandatory lists for competitive procurements (other than in the utility sectors, which (including publicly-owned procuring entities) may use mandatory lists with controls similar to those of the GPA). There are no controls over the use of optional lists in the directives. (For a detailed analysis, see "Framework Purchasing and Qualification Lists under the European Procurement Directives" (1999) 8 Public Procurement Law Review 115-146 and 168-186.)

14. The controls in these regimes generally include the following points: that registration should be permanently open, that the time taken to register suppliers should be reasonable, and that registration through mail and (where feasible) the Internet should be permitted.

15. The World Bank and other multilateral lending institutions do not allow the use of mandatory lists in international competitive bidding procedures, but the possibility of mandatory lists for national suppliers in some cases may be accepted (with controls similar to those of the GPA). The APEC non-binding principles on government procurement assume that APEC members may maintain such lists subject to the application of APEC's general principles of effective competition. (See, further, APEC Government Procurement Experts Group Non-binding Principles on Government Procurement, available at



[http://www.apecsec.org.sg/content/apec/apec\\_groups/committees/committee\\_on\\_trade/government\\_procurement.](http://www.apecsec.org.sg/content/apec/apec_groups/committees/committee_on_trade/government_procurement.))

16. The EU, GPA and NAFTA rules all permit advertisement of lists as a substitute for advertising specific contracts to some extent, but the development banks do not.

### **Policy options**

17. The fact that the Model Law does not specifically address suppliers' lists indicates that, at the time the Model Law was drafted, the Commission was not in favour of promoting the wide use of suppliers' lists, noting that they may operate in practice as mandatory lists even where they are stated to be optional. This approach was in line with the policy of many international lending institutions, which do not regard the use of mandatory lists as good practice so far as open tender procedures are concerned. At the same time, however, the Commission did not wish to go as far as to express a recommendation against their use. Experience has shown, however, that many States continue to use mandatory lists for various reasons. The Working Group may therefore wish to consider whether it would be desirable to formulate specific provisions on them in the UNCITRAL Model Law or guidance on their operation in the Guide to Enactment that accompanies it, with a view to contributing to enhanced transparency in the use of suppliers' lists.

18. Furthermore, the Working Group may wish to consider whether suppliers' lists could provide a more transparent and non-discriminatory way of selecting suppliers for those restricted procurement methods in respect of which there is no control over the selection of suppliers in the UNCITRAL Model Procurement Law. The aim would be to ensure that fairer and more transparent access to the lists for suppliers is put into place and could, for example, consist of an obligation to publicize the existence of any list in accordance with any publication requirements governing future opportunities.

19. The Working Group may also wish to recognize that informal records of potentially suitable suppliers may be maintained by procuring entities. If the definition of a list is not sufficiently broadly defined, then entities may escape the controls by keeping an informal list, and the controls may not therefore be of universal application, a matter that may affect public confidence in the procurement process.

20. If the Working Group were to consider that the use of mandatory lists should also be permitted (with the aim of improving efficiency), it may decide that new articles should include controls to secure competition and transparency. For example, the Working Group may wish to provide for the use of mandatory lists for procurements not subject to tendering procedures, to provide that suppliers not yet registered must be considered if there is sufficient time to complete the registration process and to provide that the existence of the lists must be advertised with reasonable frequency in the place in which a county's procurement contracts are normally advertised. Further, it may consider that an explicit provision to the effect that all suppliers are given an opportunity to become aware of the lists and so to register, to apply for qualification at any time, to be included within a reasonably short period (so as to ensure that unjustified delays in registration do not effectively reduce competition), and to be notified of any decisions to terminate a list or remove them from it should be included. Finally, the Working Group may consider it desirable to provide that registration must not be used with the intention of keeping suppliers of third parties off a suppliers' list.

21. Noting the divergent level of use of suppliers' lists, the Working Group may wish to address the extent to which the provisions should be included in the Model Law itself, or (perhaps with appropriate model provisions accompanied by comments in the Guide to Enactment) they should be left to implementing regulations in individual States. Further, the Working Group may wish to consider whether and, if so, in what circumstances, advertising the existence of a list, rather than future contracts, should be permitted under the Model Law.

22. The Working Group may also wish to provide guidance in the Guide to Enactment as to the policy considerations affecting and practical operation of the use of all types of lists, so as to stress the need to ensure that their operation is not used as a barrier to full and open competition as the norm in procurement.

## **B. Framework agreements**

### **Background**

23. Framework agreements (also known as supply arrangements and indefinite-delivery/indefinite-quantity contracts) can be defined as agreements for securing the repeat supply of a product or service over a period of time, and which involve a call for initial tenders against set terms and conditions, the selection of one or more suppliers on the basis of the tenders, and the subsequent placing of periodic orders with the supplier(s) chosen as particular requirements arise. Their main use therefore arises in circumstances in which procuring entities require particular products or services over a period of time but do not know the exact quantities, nature or timing of their requirements.

24. Framework agreements are widely used and in some cases are regulated by national law. They are also regulated by some regional bodies or international lending institutions.

25. Framework agreements may be concluded with a single supplier or multiple suppliers. Single-supplier agreements may bind the procuring entity to purchase, may bind the supplier to supply, or both, or may bind neither party but set the terms for contracts to be awarded in the future, with a legal commitment arising only when an order is agreed. A non-binding arrangement is common if arrangements are made for the benefit of several procuring entities—for example, by a central purchasing agency—such that the procuring entities can reserve the right to make their own arrangements.

26. Multi-supplier arrangements involve an initial process to select several potential suppliers that can supply the products or services on the terms and conditions of the procuring entity (the first stage). When a requirement subsequently arises for the product or service, the procuring entity then chooses from these suppliers a supplier for that particular order (the second stage). The methods used for the selection of the supplier(s) in the second award phase vary widely among the entities that use them, notably in that the degree of further competition varies significantly. So, for example, the second phase may involve a further round of tenders, or the selection of the supplier whose initial tender offers the best value for the particular requirement, or the rotation of suppliers. A second round of tenders may be restricted to the submission of a price against pre-existing specifications, and the qualifications of the suppliers will have been assessed in advance, and so may be referred to as a “mini-tender”. Alternatively, suppliers may be permitted to revise their prices at any time, and the procuring entity may then select the supplier that offers the best value at the time of each requirement, a process often described as “ongoing

alteration of tenders”. These variations reflect the aim of achieving a balance between the aims of competition (so as to promote value for money), openness and transparency in the approaches chosen as against the reduction in procedural costs of the methods themselves is reflected in these variations.

#### **Position under the UNCITRAL Model Procurement Law**

27. The UNCITRAL Model Law contains no specific provisions on framework agreements. Nevertheless, single-supplier and some multi-supplier agreements (that is, those by which suppliers that offer the best value for each requirement are selected at the second stage) could arguably be operated under existing procedures, for instance, if they were treated as tendered procurements divided into lots. However, under the Model Law the tender solicitation documents are required to state the quantity of goods required though accompanying regulations may permit an estimate alone, and under a framework the quantity is normally unknown.

28. The Model Law’s tendering procedure also does not contemplate arrangements that involve entering into a binding contract only when orders are placed. In particular, article 36 (4) provides that a contract arises when a tender is accepted, and does not provide for contracts that will arise only when the procuring entity later decides to make specific purchases.

29. It would also appear that the requirement for publishing a public notice of a “contract award” under article 14, which applies to all procedures, is not suited for providing publicity for frameworks. There is, on the other hand, no requirement to publish the results of a competition to choose framework suppliers (as it does not involve a contract award), nor, arguably, to publish details of contracts awarded to the various suppliers. Indeed, many orders may escape publicity altogether because they would fall below relevant thresholds.

#### **Potential benefits and possible difficulties**

30. The potential benefits of using frameworks, rather than commencing a new procurement procedure for every requirement, include the saving of procedural costs and time in procurement. In particular, the arrangements avoid the need to advertise individual contracts and to assess suppliers’ qualifications for every order placed, as this phase of the process is carried out once only at the conclusion of the framework agreement.

31. The potential benefits of using multi-supplier rather than single-supplier agreements include flexibility in the selection of a supplier for a specific order, avoiding the costs of a new procedure for each requirement, the security of supply, the advantages of centralized purchasing, and enhanced access to government work for smaller suppliers. They can also enhance value for money and other procurement objectives by providing a more transparent procedure than would otherwise exist for small purchases. In particular, aggregation of contract amounts under a framework agreement may justify the costs of advertising, and framework suppliers have an interest in monitoring the operation of purchases under the arrangement (by contrast with a supplier under a single-supplier framework).

**Extent of current use and relevant provisions in international and domestic regimes**

32. One of the main concerns as regards the regulation of framework agreements is to limit the duration of such agreements, so that the price obtained remains current and competitive.

33. The methods of procurement available for operating framework agreements may depend on the general rules on financial thresholds (that is, thresholds below which procedures other than tendering, such as the informal request for quotations, may be used) and on how, if at all, the rules on thresholds are adapted for framework agreements. Those thresholds may depend simply on the value of each contract or may involve some degree of aggregation (for example, procuring entities may be required to aggregate their purchases over a given period of time, whether they are made under one framework agreement or not).

34. The EU, GPA and NAFTA current rules do not make express provision for frameworks, but it is considered possible to fit most types of framework arrangements within the rules, other than, for example, those that involve alteration of tender prices after the first stage or simple rotation of suppliers. The recently adopted EU directives address frameworks specifically and apply controls, notably limiting them to four years' duration, apart from exceptional and duly justified cases. The EU also has strict rules requiring the aggregation of similar purchases made over a period of time, such that many purchases of standardized items are subject to the directives' formal tendering procedures, and it is not possible to make repeat purchases under informal request for quotation-type procedures.

35. The non-binding form of single-supplier framework is also often used in practice in many domestic systems to ensure that the procuring entity can change suppliers if the market price changes. For example, in Canada, Hong Kong, Singapore and the United Kingdom, the use of frameworks is not specifically regulated, and it is common to select only a limited number of suppliers at the first stage, based on the initial tenders. There are several types of frameworks in use in the United States, whose notable features include the fact that negotiations can form part of a mini-tender exercise in the second phase, that the ordering process is largely immune from bid protest review, and awards need not be published. In France, frameworks are regulated expressly: in essence, frameworks are permitted when the timetable or scope of work cannot be fully regulated in the contract. In Brazil, there is a strong preference for single supplier arrangements, the use of multi-suppliers arrangements is limited and frameworks are limited to one year for goods and one year, but with a possible extension of up to one further year, for services.

36. In various systems there are also provisions regulating the point at which the number of suppliers may be limited if there is to be a mini-tender at the second stage (ranging from unlimited number of suppliers at both stages, limiting the number admitted to the framework but then including all at the second stage, admitting many to the framework but including only some at the second stage, and limiting numbers at both stages).

**Policy options**

37. Given the increasing use of frameworks, and noting that other international bodies do or are to deal with them expressly, the Working Group may wish to consider whether it would be desirable to make specific provision for them in the Model Law.

38. Matters that the Working Group may wish to consider in this context include whether it is desirable to address the issues of when a binding contract may come into

force in a framework arrangement, thresholds and aggregation of purchases (noting that thresholds under the Model Law are currently left to the implementing regulations in the individual enacting States), the duration of frameworks, estimating and exceeding estimated quantities, and changes of price. The issue of advertising either or both stages of a framework may also be a matter to be addressed in article 14 of the Model Law. Further, the Working Group may wish to include model provisions and guidance in the Guide to Enactment, such as model implementing provisions addressing some or all of these matters.

39. As regards multi-supplier frameworks in particular, further provision would be required if the Working Group were to wish to provide for the second stage of the procurement to involve mini-tenders, the ongoing alteration of tenders or proposals, or the award of contracts other than on a competitive basis at the second stage (such as a rotation basis, which may be appropriate if the security of supply is a major constraint). Addressing how to limit the number of suppliers at either stage, if at all, may also be an issue that the Working Group may wish to consider.

40. The Working Group may also wish to consider whether any of such matters would be more appropriately addressed in enacting States' regulations, for which guidance could be provided as models provisions in the Guide to Enactment. For example, the Guide could provide a brief outline of the circumstances in which multi-supplier frameworks are useful, including in the context of centralized purchasing, the key issues that a procuring entity (which may be acting as a central purchasing agency for government departments or on its own behalf) needs to consider for both single and multi-supplier arrangements, and may wish to include in its regulations (such as the relationship between a centralized procurement agency and user entities, the procedure for placing orders, the steps needed for a procurement contract to become binding, and the points at which decisions as to the procurement should be publicized).

## C. Procurement of services

### **Background—the provisions in the UNCITRAL Model Procurement Law governing the “principal method for procurement of services”**

41. The premise of the UNCITRAL Model Procurement Law for the procurement of services is that the procurement will be undertaken using different methods from the procurement of goods and construction. The main features of the principal method for procurement of services provide for tendering when it is feasible to formulate detailed specifications and tendering is considered “appropriate”, and for other methods used in procuring goods and construction if to do so would be more appropriate, and if conditions for their use are satisfied (article 18 (3) of the Model Law).

42. The selection procedure if tendering is used may involve subjecting all tenders that receive a technical rating above a set quality or non-price threshold to a straightforward price competition (article 42), may involve the procuring entity's negotiating with suppliers, after which suppliers submit their best and final offers (article 43), or may involve the procuring entity's holding negotiations solely on price with the supplier that obtained the highest technical rating (article 44). Under this latter procedure, the procuring entity may negotiate thereafter with the other suppliers in sequential fashion on the basis of their rating, but only after terminating negotiations with the previous, higher-ranked supplier.

43. This approach may have been influenced by the fact that a Model Law on Procurement of Goods and Construction was adopted in 1993, which covered only goods and construction. The Model Law on Procurement of Goods, Construction and Services, which was adopted a year later in 1994, includes additional provisions on procurement of services other than construction, which were then formulated as a separate procurement method.

44. Article 42 of the UNCITRAL Model Procurement Law provides for the selection of suppliers for the provision of services based on a threshold for quality and other non-price criteria, and thus forms the basis for a quality-based method of selection, useful in the provision of intellectual services. It has been noted that this approach to evaluation, which has the advantage of flexibility and employs qualitative and negotiated methods, has in practice worked satisfactorily for certain types of procurement, notably intellectual services (that is, services that do not lead to measurable physical outputs, such as consulting and other professional services). However, questions have been raised about the appropriateness of this method for services where quality and quantity specifications may be provided by the procuring entity in advance of the procurement concerned. It has been argued that considering services separately led to a focus on the special characteristics of some services procurement, rather than on the common features of many procurements of goods and construction and those of services.

#### **Extent of current use and relevant provisions in international and domestic regimes**

45. The EU directives provide for more flexible procedures for the procurement of services than for goods and construction, in that they allow the use of a flexible form of competitive procedures (referred to as the “negotiated procedure”) in exceptional cases, and the exceptions arise more frequently for services than for goods and construction—for example, when it is not possible to draw up specifications with precision. This situation applies in particular to intellectual services and financial services, but its use is not limited to those cases. The GPA and NAFTA provisions give entities a free choice of the forms of competitive procedure available, without regard to the nature of the procurement.

46. National regimes take widely divergent approaches to this issue. For the purposes of considering the Model Law, one of the most notable features is that even the most flexible systems do not allow for free use of all the evaluation methods provided for in the Model Law’s principal method for the procurement of all types of services. Rather, entities are required to use the ordinary methods for procurement of goods when purchasing services, unless specific exceptions apply.

#### **Policy options**

47. The risks to transparency and of potential abuse arising from flexibility of the principal method for the procurement of services have led to suggestions that the use of the method should be restricted. The Working Group may therefore wish to consider whether the procurement of services that are measurable on the basis of physical outputs (that is, services other than intellectual services) should be conducted using tendering as the normal procurement method. The other goods and construction methods would also be available when the grounds for using them are established. One possible consequence of such an approach may be that the principal method for the procurement of services would need to be renamed to reflect its use within the context of the UNCITRAL Model Procurement Law, and that a definition of intellectual services may then be required in the Model Law or in the Guide to Enactment.

48. The Working Group may also wish to consider whether the Model Law itself additionally could specify when the principal method should be available, either by reference to general circumstances (as is done for the other procurement methods) or by reference to particular types of services (such as intellectual services). Alternatively, the Model Law may require enacting States to specify the services or circumstances for which this procedure should be available, either in the relevant law or in regulations. The Working Group may consider that the former approach may be preferable in that there can be significant scope for abuse in leaving the choice of procurement method essentially unregulated.

49. As to the method for the provision of intellectual services, the Working Group may consider that the flexibility afforded by the possibility of simultaneous and consecutive negotiations in the selection of proposals should be retained. That flexibility is conferred by articles 43 and 44 of the Model Law, and address in the case of services in cases in which procurement needs are not well defined or in which the quality and technical expertise are paramount. Although some observers have commented that the restriction of the provisions would be beneficial to transparency, the Working Group may consider the flexibility afforded by those provisions is consistent with the Model Law's aims of economy and efficiency, and that transparency may be improved by the publication and dissemination of relevant information during the negotiations concerned, matters which may be addressed either in the Model Law itself or the Guide to Enactment, in the form of guidance or model provisions.

50. The Working Group may also wish to consider whether 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, the aim of which is to provide limited flexibility in non-complex services provision (that is, for the procurement of services for which quality and technical expertise are relevant, but are not paramount).

51. The Working Group may wish to note, however, the extensive consideration given to these issues during the preparation of the UNCITRAL Model Procurement Law, and to take that consideration into account in making any decision to reopen the debate.

#### **D. Evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies**

52. Evaluation criteria as regards tenders are set out in article 34, paragraph 4, of the UNCITRAL Model Procurement Law, and it is provided that the criteria for determining the lowest evaluated tender may allow for the use of procurement to promote industrial, social or environmental objectives. Such objectives may include the promotion of national industrial development (through the exclusion of foreign suppliers, the granting of preferences and the use of single source procurement in limited circumstances). The award criteria may also allow for foreign exchange impacts to be taken into account. There are express control mechanisms to ensure that the award criteria remain objective, quantifiable, and disclosed in advance to suppliers.

53. The view has been expressed by some observers that such policies may affect negatively both efficiency and economy in procurement, but that they play a significant part in enacting States' domestic policies. Further, it has been noted that the notion of regional as well as national objectives is being considered. Accordingly, suggestions have been made that the Model Law should be refined in order to maintain or achieve a better

balance between the aims of maximizing economy and efficiency in procurement, and other policy goals.

54. In view of the fact that the efficiency of preferences and their impact on transparency have been questioned, the Working Group may wish to consider whether there would be reasons that may justify addressing the issue of preferences in general, and in particular whether a maximum preference should be included in the Model Law (expressed in monetary terms, pass or fail requirements or otherwise), or relevant guidance given in the Guide to Enactment. If the Working Group decides to undertake such a review of the role of social and economic objectives in public procurement, it may wish to consider whether it would be appropriate, in the interest of enhanced transparency, to introduce limitations on the use of evaluation criteria such as shadow-pricing of foreign exchange and counter trade considerations (both permitted under article 34 (4) (d) of the Model Law). The Working Group may further wish to consider whether the provisions of article 34 of the Model Law permitting the use of preferences in favour of local (domestic) suppliers should be extended to regional suppliers. Additionally, the Working Group may wish to consider in this context whether the Guide to Enactment, which discusses criteria that permit the evaluation and comparison of tenders in the light of other policy objectives, and notes that enacting States may also be restricted in their ability to accord preferential treatment by their membership of international or regional organizations, should be updated, and should provide more detailed guidance on additional criteria regarding preferences for which enacting States may wish to provide.

## **E. Remedies and enforcement**

### **Extent of current use and relevant provisions in international and domestic regimes**

55. An effective system for monitoring and enforcing procurement rules is considered to be an important element of a transparent procurement system, to which review triggered by a supplier can contribute. Provisions are found in the EU regime, GPA, NAFTA and in the draft FTAAA proposals, which all have a common feature requiring an independent review. APEC's non-binding principles on government procurement also include provision for a supplier complaints mechanism, although it is flexible as well as non-binding. Common guidelines agreed by the multilateral development banks for assessing the adequacy of borrowers' procurement systems also contemplate a review system before an independent entity, and the World Bank has recommended this system to those using the UNCITRAL Model Law.

56. However, States differ significantly in their approach to enforcement and, in particular, in the extent to which they offer review at the instance of the supplier. For example, the United States has a long established system of review before specialist authorities and courts. However, in the United Kingdom and in countries that follow the British model, there is no general legislative provision for such review (except to the extent required by international obligations and subject to judicial review procedures). In France, there are administrative sanctions for breaches of procurement law by organs of the State, and proceedings are brought before an administrative tribunal. In other civil law countries, such as Brazil, there is a combination of administrative review, including possible suspension of procurement proceedings, and judicial review of procurement decisions through the ordinary courts and special criminal proceedings for violations of procurement laws by procuring entities.



### **Position under the UNCITRAL Model Procurement Law and possible scope of review**

57. The current review provisions are found in articles 52-57 of the Model Law. They are limited, and a note to the text suggests that enacting States might not incorporate all or some of the articles. These solutions in the Model Law are limited to general guidance and leave considerable scope to the enacting State in implementing the Model Law. For example, the Model Law does not address the question of the independence of the administrative review body, does not address the form of the relief to be given (which may include orders or recommendations), and there are no provisions for a judicial or quasi-judicial proceeding. There is no provision creating a right to judicial review, though article 57 allows enacting States that operate judicial review to include procurement review within the relevant courts' jurisdiction.

### **Policy options**

58. Suggestions have been made regarding the expansion of the review provisions, for example, as follows:

(a) Should there be a more articulate recommendation as to the inclusion and operation of review provisions in the national law and further guidance, including draft model provisions, in the Guide to Enactment?

(b) Should the administrative review provisions be strengthened, for example, by making provision for an independent review process? and

(c) Should there be more detailed advice and guidance as to the judicial review process, including as to the powers of the courts and time frame for the review, the possible reversal of incorrect procurement decisions and remedies that are available?

59. Further to these questions, the Working Group may wish to consider whether the scope of provisions relating to exceptions to review (article 52 (2)) should be revisited.

## **F. Other matters**

### **Alternative methods of procurement**

60. Suggestions have been made that it may be useful to review the need and conditions of use of some "[a]lternative methods of procurement" set out in Chapter V of the UNCITRAL Model Procurement Law, so as to address concerns expressed by certain multilateral lending institutions and other bodies that the number of such alternative methods is excessive. Although it is noted in the Model Law that an enacting State need not and perhaps should not enact all such methods, the Working Group may wish to consider whether the provisions relating to certain of the alternative methods should be reviewed.

61. The following suggestions have been made in respect of specific methods: "two-stage tendering" (article 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 tendering process in order to achieve a transparent selection in the second stage. Secondly, it has been observed that methods other than open tendering procedures may have been used in practice more widely than had been anticipated, and accordingly that the grounds for using those methods could be restricted, or justifications for their use

could be required or narrowed in scope. So, for example, the grounds for “restricted tendering” (articles 20 and 47) could be narrowed from “disproportionate cost of other procedures” and “limited number of suppliers” to the former only, and the justifications for using “single-source procurement” could be restricted so as not to include extrinsic considerations such as transfer of technology, shadow-pricing or counter trade (as is currently the case under article 22 (2) of the UNCITRAL Model Procurement Law). Further, the Model Law could include a requirement that the use of the “requests for proposals” and “competitive negotiations” procedures (articles 48 and 49) be justified.

### **Community participation in procurement**

#### **Background—community participation and the provisions of the UNCITRAL Model Procurement Law**

62. The UNCITRAL Model Procurement Law does not address the contract implementation phase of a procurement project. It has been suggested that the most efficient way to implement a project may sometimes be through the participation of users (known as community participation). Those users have an incentive to ensure good quality in the performance of work affecting them directly. So, for example, community participation may lead to a sustainable delivery of services in sectors unattractive to larger companies such as health, agricultural extension services and informal education. It may offer benefits including the improvement of the quality of the end product, as local people have a motivation to see that adequate standards are achieved and that work is completed on time, the potential for on-site disputes can be reduced, and bureaucracy may also be reduced through the use of less formal procedures. There are also other potential benefits, including the provision of local employment using labour-intensive technologies, the utilization of local know-how and materials, the encouragement of local businesses and the improvement of municipal accountability, which may form part of enacting States’ social goals.

63. Community participation has been observed to work successfully in local small-scale construction projects (such as the installation of septic tanks in rural communities), in the distribution of basic foodstuffs, and the provision of health services (e.g. to mothers and infants).

64. However, there are also potential difficulties in the use of community participation (and it has been observed that allowing for community participation involves an unacceptable degree of subjectivity, which can be abused). First, community participation may be most effective if projects are handled by entities that may not have contracting capacities in the State concerned. Secondly, there are risks that the scale of the projects may exceed the capacity of the community concerned, research is required to ensure that methods and materials are appropriate for local use, cash-flow issues may arise, and record-keeping and ensuring accountability and avoiding abuse may be problematic. It may therefore be appropriate to provide technical assistance, and to use a project manager to address such risks, but the costs of doing so can be significant.

#### **Extent of current use and relevant provisions in international and domestic regimes**

65. It has been observed that there are variations in the way community participation in procurement takes place in procurement systems.

66. Requiring community participation, such as by the involvement of the local community, may be one of the criteria for the selection of the method of procurement, or

for the award of the contract. Alternatively, tenderers may offer their best solutions including community participation if they so choose, and those solutions may then be compared, or the conditions of implementation may be set to include the employment of local labour or materials, or part of the budget for the project may be set aside for community participation. Finally, grants may be made available to communities, for example, to assist them in seeking procurement contracts. However, it has also been observed that the communities that enacting States may most desire to benefit from such projects may be unable (legally or financially) or unwilling to undertake contracts or to submit bids.

67. As the use of community participation may involve additional cost, it has also been observed that single-source procurement may be the only way to achieve the goals sought.

### **Policy options**

68. The UNCITRAL Model Procurement Law does not specifically address the issue of community participation, but its provisions are sufficiently flexible to allow some of the arrangements described above to be put in place. However, the Working Group may wish to consider whether the Model Law, and its accompanying Guide to Enactment should address the issues set out above directly. The Working Group may wish to consider whether model provisions or regulations, rather than the text of the law itself, should address such matters as the proportion of funds that may be set aside, margins of preference, the extent to which the use of local, unemployed or minority group labour may be required, and legislation that may be necessary so as to allow unincorporated associations or groups to contract.

### **Simplification and standardization of the UNCITRAL Model Procurement Law**

69. It has been noted that some enacting States have chosen not to enact some of the more detailed parts of the Model Law, finding that they have not proved necessary for legislation in the States concerned. It has also been suggested that some restructuring of the presentation of the Model Law may also prove useful, as a tool to assist enacting States in formulating domestic legislation.

70. The Working Group may wish to consider, therefore, and in the light of the amendments to the issues identified earlier in this note and in document A/CN.9/WG.1/WP.31, whether there is some room for improving the Model Law's structure and for simplifying its contents, for example, by some reordering or by eliminating unnecessarily detailed provisions. It has been suggested, for example, that certain provisions currently found in the text of the Model Law may be removed to an annex to the Model Law, or to model provisions that the Guide to Enactment could provide. Examples include article 7 (3), listing the contents of pre-qualification documents, article 25, listing the contents of invitations to tender and pre-qualify in tendering procedures, article 27, listing the contents of the solicitation documents, article 38, concerning the contents of a request for proposals for services under the principal method for the procurement of services, and article 48 (4), concerning the content of a request for proposals under the Request for Proposals procedure.

## **Legalization of documents**

### **Background**

71. Procuring entities sometimes require the legalization of documents by all those who need to demonstrate their qualifications to participate in a procurement procedure (for example, when pre-qualification is used in tendering), which can be time-consuming and expensive for suppliers. In addition to the deterrent effect, all or part of the increased overheads for suppliers may be passed on to procuring entities.

### **Position under the UNCITRAL Model Procurement Law**

72. Article 10 of the Model Law provides that if the procuring entity requires the legalization of documents, it shall not impose any requirements other than those provided by the general law for the type of documents in question. However, it imposes no restrictions on the power of procuring entities to call for legalization of documents.

### **Policy options**

73. The Working Group may wish to consider whether article 10 of the Model Law should be amended to limit the power of procuring entities to require legalization of documentation from the successful supplier alone. If so, the Working Group may wish to consider consequential changes such as to the rules on entry into force of the contract, to accommodate the possibility that a contract may not enter into force because the supplier fails to comply with the requirement.

**D. Report of the Working Group on Procurement on the work of its  
seventh session (New York, 4-8 April 2005)**

**(A/CN.9/575) [Original: English]**

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## I. Introduction

1. At its thirty-seventh session, in 2004, the Commission entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “UNCITRAL Model Procurement Law” or “Model Law”, A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82). The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004, A/CN.9/568). At that session, it decided to entrust the Secretariat with the preparation of drafting materials and studies reflecting the deliberations of the Working Group for consideration at its future session. It further decided that at its next session it would proceed with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (A/CN.9/568, para. 10).

## II. Organization of the session

2. The Working Group, which was composed of all States members of the Commission, held its seventh session in New York from 4 to 8 April 2005. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Belarus, Canada, Chile, China, Colombia, Czech Republic, France, Germany, Guatemala, Iran (Islamic Republic of), Jordan, Kenya, Madagascar, Mexico, Nigeria, Pakistan, Qatar, Republic of Korea, Russian Federation, Serbia and Montenegro, Singapore, Spain, Sri Lanka, Sweden, Thailand, Tunisia, Turkey, Uganda, United States of America and Venezuela (Bolivarian Republic of).

3. The session was attended by observers from the following States: Brunei Darussalam, Cuba, Dominican Republic, Finland, Indonesia, Kuwait, Myanmar and the Philippines.

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

(a) *United Nations system*: Food and Agriculture Organization of the United Nations (FAO), International Monetary Fund (IMF), United Nations Secretariat and United Nations Programme;

(b) *Intergovernmental organizations*: African Development Bank, European Commission, European Space Agency, International Development Law Organization (IDLO), Organization for Economic Cooperation and Development (OECD) and World Trade Organization (WTO);

(c) *International non-governmental organizations invited by the Commission*: European Law Students' Association (ELSA), International Bar Association (IBA) and International Studies Institute (ISI).

5. The Working Group elected the following officers:

*Chairman*: Mr. Stephen R. Karangizi (Uganda)

*Rapporteur*: Mr. Phua Wee Chuan (Singapore).

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

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.33);

(b) A note by the Secretariat setting out issues arising from the use of electronic communications in public procurement (A/CN.9/WG.I/WP.34 and Add.1 and 2);

(c) A note by the Secretariat presenting a comparative study of practical experience with the use of electronic (reverse) auctions in public procurement (A/CN.9/WG.I/WP.35 and Add.1);

(d) A note by the Secretariat presenting a comparative study of abnormally low tenders in public procurement (A/CN.9/WG.I/WP.36).

7. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.
5. Other business.
6. Adoption of the report of the Working Group.

### III. Deliberations and decisions

8. At its seventh session, the Working Group continued its work on the elaboration of proposals for the revision of the UNCITRAL Model Procurement Law. The Working Group used the notes by the Secretariat referred to in paragraph 6 above (A/CN.9/WG.I/WP.34 and 35 and their addenda and A/CN.9/WG.I/WP.36) as a basis for its deliberations.

9. The Working Group requested the Secretariat to prepare drafting suggestions for its eighth session, reflecting the deliberations of the Working Group at the current session, on electronic publication and communication of procurement-related information, other aspects arising from the use of electronic means of communication in the procurement process, such as controls over their use, electronic reverse auctions, and abnormally low tenders. The understanding of the Working Group was that the consideration of those topics should be completed at its next session. The Working Group further decided, time permitting, to take up the topic of framework agreements at its next session. In this regard, it recalled its consideration of the subject at its sixth session at which the Secretariat was entrusted with the preparation of a note on this question (A/CN.9/568, para. 78). The Working Group also heard suggestions that the following topics should thereafter be given priority: suppliers' lists; remedies and enforcement; evaluation and comparison of tenders (including the promotion of industrial, social and environmental policies in procurement); organization of procurement; and the procurement of services.

#### **IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services**

##### **A. Electronic publication and communication of procurement-related information**

###### **1. General remarks**

10. The Working Group had before it a note by the Secretariat (A/CN.9/WG.I/WP.34 and Add.1 and 2). It was recalled that in adapting the Model Law to recent developments in public procurement, notably in the use of electronic means of communication, the focus should be on those amendments that were necessary to eliminate obstacles to the use of electronic communications. In this regard, support was reiterated for the approach taken by the Working Group at its sixth session that the Model Law should encourage the use of electronic communications and technologies in public procurement (A/CN.9/568, para. 18). The goals of achieving simplification and precision in the text were also emphasized. The Working Group also recalled effects that changes in the provisions of the Model Law would have on those countries that based their procurement legislation on the Model Law.

11. As regards the general legislative principles and policy approaches for dealing with electronic communications and technologies in the procurement process, the Working Group decided to include provisions based on the electronic commerce texts prepared by UNCITRAL where necessary (see also A/CN.9/WG.I/WP.34, para. 13), but should amend them in the revised Model Law so as to take account of the specific circumstances of public procurement. The Working Group also recalled the decision taken at its sixth session that appropriate statements of the governing principles should be found in the Model Law, but that appropriate further guidance might usefully be provided in the Guide to Enactment (A/CN.9/568, para. 24).

12. It was agreed that the Secretariat should include a provision in an early section of the Model Law, as a new article 4 bis, promulgating the general principles of functional equivalence and technological neutrality to be observed in various actions taken in the course of the procurement process, such as publication of opportunities and procurement-



related information, communication between, for example, procuring entities and suppliers, opening of tenders and holding pre-tender conferences. Such a general provision, it was observed, should eliminate obstacles to and ambiguities in the use of electronic means of communication in public procurement under the Model Law and encourage such use by amending all phrases implying a solely paper-based environment, such as “writing”, “sealed envelope”, “signature” or “record-keeping”, without being overly prescriptive or rendering the Model Law more complex.

13. The Working Group agreed to continue its deliberations at a future session taking into account the following two variants alternatives for a new article 4 bis in the Model Law:

#### **Variant A**

“Article 4 bis. Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents

Any [provision] [requirement] under this Law for:

- (a) a document to be in writing;
- (b) a document to be signed;
- (c) a document to be in a sealed envelope;
- (d) a document to be published or provided or made accessible;
- (e) a record to be created or maintained;
- (f) meeting of persons to take place; and
- (g) the opening of tenders

or any other requirement implying physical presence or a paper-based environment

may be met by the use of electronic, optical or comparable means [, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy], [provided that the enacting State or procuring entity is satisfied that such use:

- (a) [does not represent an obstacle to the procurement process] [uses means of communication generally available];
- (b) promotes economy and efficiency in the procurement process; and
- (c) will not result in discrimination among or against potential suppliers or contractors or otherwise substantially limit competition.]”

#### **Variant B**

“Any provision of this Law related to writing, to a record or to a meeting shall be interpreted to include electronic, optical or comparable means, [including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy] [provided that the enacting State or procuring entity is satisfied that such use:

- (a) [does not represent an obstacle to the procurement process] [uses means of communication generally available];
- (b) promotes economy and efficiency in the procurement process; and

(c) will not result in discrimination among or against potential suppliers or contractors or otherwise substantially limit competition]”

(with the inclusion of the list found in Variant A in the Guide to Enactment).

14. The Working Group requested the Secretariat to make adjustments to both variants so as to ensure that the “accessibility standards” would apply to any means of publication and communication chosen.

**2. Notion of “electronic” and other terms (A/CN.9/WG.I/WP.34, paras. 17-22, and A/CN.9/WG.I/WP.34/Add.2, article 2 Definitions)**

15. With reference to paragraph 22 of A/CN.9/WG.I/WP.34, the Working Group considered possible additions to the definitions section of the Model Law, found in the proposed amendments to article 2 of the Model Law as contained in A/CN.9/WG.I/WP.34/Add.2.

16. The first possible addition considered was a definition of the term “electronic”, in the following terms: “‘electronic’ relates to technology having electronic, optical, magnetic, or similar capabilities that may be used to send, receive or store information, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy”, (drawing on the definition of a “data message” in article 2 of the UNCITRAL Model Law on Electronic Commerce, A/51/17, annex I). Some delegations and observers questioned whether the proposed definition was appropriate, considering whether a definition of the term “electronic communications” would be more useful for legislators than one of the adjective “electronic” alone.

17. As to the text of the second proposed definition, it was suggested, in light of continuing technological developments, that the word “comparable” should be substituted for the word “similar” and to explain the reasons therefor in the Guide to Enactment.

18. The second possible addition considered was a definition of a “publicly accessible electronic information system”, in the following terms (drawing on the definition of an “information system” in article 2 of the UNCITRAL Model Law on Electronic Commerce, A/51/17, annex I): “‘publicly accessible electronic information system’ means a system for generating, sending, receiving, storing or otherwise processing electronic communications which is generally accessible to persons making use of electronic devices.” Some delegations and observers questioned whether the proposed definition was in fact necessary, particularly if the definition of “electronic” or “electronic communications” were sufficiently wide, with corresponding changes to the proposed amendments to other articles of the Model Law.

19. As to the text of the proposed definition, it was suggested that the words “and data” after the word “communications” and the word “any” before the word “persons” should be added.

20. The Working Group heard suggestions by delegates and observers that other definitions should be included in the revised Model Law including definitions of the terms “writing” and “electronic means”, perhaps based on the definitions of these notions in the European Union procurement directives of 31 March 2004 (Directive 2004/17/EC and Directive 2004/18/EC). It was also suggested that the Guide to Enactment should encourage consistency in the use of terminology by enacting States, so as to avoid conflict with other legislative acts.

21. The view was also expressed that provisions of the Model Law aimed at ensuring the publication and accessibility of relevant information should be formulated in technologically neutral terms and any provisions specific to electronic means of communication should be avoided. At the same time, it was stated that such specific provisions could be useful in certain cases and for certain countries. It was suggested that in the revision of the Model Law, the Working Group should strive to achieve a balance between formulating provisions in technologically neutral terms and ensuring the functional equivalence among various means of communication, on the one hand, and the promotion of electronic means of communication, highlighting possible problems arising from their use and suggesting ways of dealing with such problems, on the other.

22. The Working Group held informal consultations on drafting suggestions with respect to proposed definitions for inclusion in article 2 of the Model Law, and agreed that further deliberations regarding the proposed definitions should be held at a future session, taking the following alternative proposals into account:

#### **Variant A**

“‘Electronic means’ of communicating, publishing, exchanging or storing information or documents means the generation, exchange, sending, receipt or storage of information or documents by electronic, optical or comparable means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

‘Electronic means’ of assembly of persons for any purpose under this Law means any method of assembly whereby those assembled can follow and participate in the proceedings by electronic means of communication.”

#### **Variant B**

“‘Electronic means’ of communicating, publishing, exchanging or storing information or documents, and of holding meetings, means the generation, exchange, sending, receipt or storage of information or documents by electronic, optical or comparable means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.”

#### **Variant C**

Not to include any definitions of “electronic means” on the basis that they would be superfluous in the light of the proposed article 4 bis (see paras. 10-14 above).

23. The Secretariat was requested to take these proposals into consideration when preparing documentation for continuation of the Working Group’s discussion at a future session.

### **3. Electronic publication of legal texts and other information (A/CN.9/WG.I/WP.34, paras. 24-30, and 42-47, A/CN.9/WG.I/WP.34/Add.1, paras. 8-17, and A/CN.9/WG.I/WP.34/Add.2, article 5 *Public accessibility of legal texts*, article 14 *Public notice of procurement contract awards*, article 24 *Procedures for soliciting tenders or applications to prequalify*, article 37 *Notice of solicitation of proposals*, article 47 *Restricted tendering*, and article 48 *Request for proposals*)**

24. It was agreed that the scope of article 5 should be expanded to cover the public accessibility of all procurement-related information subject to mandatory publication,

including legal texts. The Working Group noted that the Secretariat was currently reviewing the relevant practice under domestic procurement regimes to identify additional information relevant to potential suppliers that the Model Law did not currently require to be published and that could be brought within the scope of article 5 (A/CN.9/WG.I/WP.34, paras. 29-30). The Working Group agreed to revert to this matter once the results of the study were made available to it.

25. It was agreed that the Model Law should include a provision promulgating the general principle that a procuring entity should have the right to choose the means of publication under article 5. That is, the procuring entity could choose either paper or electronic publication, or both, without being required to justify the choice made, provided that the means of publication chosen complied with certain “accessibility standards”. The Working Group requested the Secretariat to provide draft accessibility standards for its consideration at a future session, which standards could be based on proposed paragraph 3 of article 24 contained in document A/CN.9/WG.I/WP.34/Add.2. The principles of that paragraph would provide that the method of publication chosen:

- (a) Should not represent an obstacle to access to the procurement process;
- (b) Would be justified to promote economy and efficiency in the procurement process;
- (c) Would not result in discrimination among potential suppliers or contractors or otherwise substantially limit competition.

26. It was agreed that general principles to be included in the revised article 5 would apply to the publication of other information currently dealt with in other articles of the Model Law, such as invitations to participate in specific procurement (articles 24, 37, 46, 47 and 48 of the Model Law, as discussed in paragraphs 42-45 of A/CN.9/WG.I/WP.34 and paragraphs 8-17 of A/CN.9/WG.I/WP.34/Add.1) and contract awards (article 14 of the Model Law, as discussed in paragraphs 46-47 of A/CN.9/WG.I/WP.34), or other information, the publication of which may be envisaged in the revised Model Law, such as publication of forthcoming contract opportunities (see below, section 4).

27. The Working Group requested the Secretariat to provide drafting suggestions for its consideration reflecting the above matters and to report to the Working Group on the outcome of the study it was requested to undertake as noted in paragraph 24 above.

28. The Working Group agreed that, in the continuation of its deliberations regarding draft article 5 at a future session, the following text would be considered:

“Article 5. Public accessibility of procurement-related information

“(1) The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereto, as well as any other documents and information required to be published [or being published under this Law] shall be promptly made accessible to the public and systematically maintained.

“[(2) Any further information, such as regarding forthcoming opportunities, internal controls or guidance, that an enacting State or procuring entity chooses to publish shall be promptly made accessible to the public and systematically maintained.]”

**4. Publication of forthcoming procurement opportunities (A/CN.9/WG.I/WP.34, paras. 31-41, and A/CN.9/WG.I/WP.34/Add.2, article 5 bis Notice of procurement opportunities)**

29. Although some doubt was raised as to whether publication of information on forthcoming opportunities constituted the best practice that the Model Law should promote, the prevailing view in the Working Group was that the publication of forthcoming procurement opportunities contributed to the transparency of procurement processes, efficiency in procurement planning and opening up procurement markets, especially in international bidding and, therefore, should be encouraged. However, it was also agreed that such publication should be optional, not mandatory. The Working Group noted concerns expressed with respect to the possible negative impact that mandatory publication could have, for instance pre-empting flexibility in the State budgeting process, traditionally a prerogative of legislators. The Working Group therefore expressed a preference for Variant B of the proposed article 5 bis Notice of procurement opportunities, as contained in A/CN.9/WG.I/WP.34/Add.2, which provided as follows:

“Within [the enacting State specifies a time-limit] after the begin of a fiscal year, procuring entities may publish notice of their expected procurement requirements for the following [the enacting State specifies a period].”

30. The views differed, however, as to the necessity of having a provision on the optional publication of forthcoming procurement opportunities in the Model Law at all, as opposed to elaborating advantages of such publications in the Guide to Enactment. In support of including the provision in the Model Law, it was stated that this subject, new in the Model Law, could be overlooked if put only in the Guide, which would be unfortunate in light of its importance and positive effects on the procurement process.

31. It was suggested that proposed amendments should make it clearer that information on forthcoming opportunities was not binding on procuring entities. The Working Group agreed to revert to this matter once the results of the study referred to in paragraph 12 above were made available to it.

**5. Form of communication (A/CN.9/WG.I/WP.34/Add.1, paras. 18-43, and A/CN.9/WG.I/WP.34/Add.2, article 7 Prequalification proceedings, article 9 Form of communications, article 10 Rules concerning documentary evidence provided by suppliers or contractors, article 25 Contents of invitation to tender and invitation to prequalify, article 26 Provision of solicitation documents, article 28 Clarification and modification of solicitation documents, article 30 Submission of tenders, article 37 Notice of solicitation of proposals, and article 40 Clarification and modification of requests for proposals)**

32. The Working Group agreed to revise the Model Law so that article 9 would incorporate a general principle as to the form of communication applicable to all types of communications dealt with in the Model Law, including provision, clarification and modification of solicitation documents, and submission of tenders. It was agreed that the principle should be drafted in a manner similar to that proposed as regards article 5 (see section 3 above), giving the option to the procuring entity to choose any form of communication, without being required to justify its choice, provided that the chosen form met the accessibility standards, as described in paragraph 25 above.

33. The Working Group agreed that suppliers should not be given the right to choose a form of communication with the procuring entity and therefore amendments should be

made as necessary to the provisions of the Model Law and the Guide to Enactment that provided for or could be construed to imply such a right, specifically with regard to articles 9.3 and 30.5 (b). It was also agreed that, in so doing, the Secretariat should exercise caution so as not inadvertently to remove the safeguards contained in those provisions against discriminatory or otherwise exclusionary practices by the procuring entities. It was suggested that in defining the accessibility standards referred to in paragraphs 25 and 32 above and revising the Guide to Enactment, such concerns should be duly borne in mind. Also as regards the accessibility standards, the Working Group agreed to consider where in the Model Law the definition(s) of those standards should be placed at a future session.

## **B. Other aspects arising from the use of electronic means of communication in procurement**

### **1. Conditions for functional equivalence between electronic and written tenders (A/CN.9/WG.I/WP.34/Add.1, para. 33, and A/CN.9/WG.I/WP.34/Add.2, article 30 *Submission of tenders*)**

#### **(a) Security measures in communications and in the treatment of tenders**

34. The Working Group considered the issue of security measures in communications and in the treatment of tenders, and the text of the proposed article 30 bis of the UNCITRAL Model Procurement Law as contained in document A/CN.9/WG.I/WP.34/Add.2. The Working Group noted that the proposed text addressed (inter alia) issues of authenticity of communications, integrity of data, date and time of electronic communications and confidentiality of such communications. In accordance with its earlier decision that such matters fall to be addressed in the law of electronic commerce and not procurement law per se, the Working Group decided that such text should not be introduced into the revised Model Law. Nonetheless, the Working Group noted that appropriate guidance (including the desirability of such regulation in an enacting State) should be provided in the Guide to Enactment.

#### **(b) The opening of tenders**

35. The Working Group then considered the issue of opening of tenders. Recalling its earlier decision that a procuring entity should be given the option to stipulate that tenders must be submitted electronically under article 30 of the UNCITRAL Model Procurement Law (see section 5 above), the Working Group addressed the provisions regarding the opening of tenders under article 33 of the Model Law. It was recalled that article 33 (1) of the Model Law provided that tenders “shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders [...], at the place and in accordance with the procedures specified in the solicitation documents”, and that article 33 (2) provided that “all suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders”.

36. The Working Group noted that while article 33 (1) seemed to be sufficiently broad to accommodate any system for opening tenders, article 33 (2) suggested the physical presence of suppliers and contractors at a given place and time. The Working Group noted that some countries had introduced enabling provisions that permitted opening of tenders through an electronic information system that automatically released and opened the

tenders at the date and time provided in the solicitation documents, and automatically transmitted the information that would usually be publicly announced at the opening of tenders. The Working Group considered whether the Model Law should make provision for such electronic bid-opening.

37. In this regard, the Working Group considered the following proposed addition to article 33 of the Model Law, as contained in document A/CN.9/WG.I/WP.34/Add.2, aimed at enabling procuring entities to use electronic communications as a substitute for tender opening in the presence of suppliers and contractors:

“(4) Where the procurement proceedings were conducted solely electronically in accordance with articles 9 (1) ter, 25 (1)(k), 25 (2)(f) or [insert provisions dealing with reverse auctions and other fully automated procedures, if any], suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they are allowed to follow the opening of the tenders through electronic means of communication [, such as on-line exchange of electronic messages, videoconferencing or similar technology,] used by the procuring entity provided that all suppliers or contractors that have submitted tenders have access to the required technical and other means of communication used by the procuring entity and that those means do not present an unreasonable barrier to participation in the session.”

38. It was noted that this provision addressed only a situation in which procurement proceedings were conducted electronically and not one in which a combination of paper and electronic tenders were submitted. Accordingly, the Working Group decided that the word “solely” should be deleted from the proposed text.

39. Further, and in the light of the general accessibility standards that the Working Group had decided should be included in the Model Law, and the general provisions that the Working Group had requested the Secretariat to draft in this regard (see paras. 25 and 32 above), the Working Group decided that the proviso contained at the end of the proposed text (“provided that all suppliers or contractors that have submitted tenders have access to the required technical and other means of communication used by the procuring entity and that those means do not present an unreasonable barrier to participation in the session”) was redundant and should not be included.

40. The Working Group also decided that the text in square brackets ([“such as on-line exchange of electronic messages, videoconferencing or similar technology”]) might be redundant once its consideration of the definitions section of the Model Law was complete. Accordingly, the Working Group did not wish to include that text in the draft provision at this stage.

41. Finally, it was observed that the draft provision should expressly state that the provision would be deemed to satisfy the requirements of article 33 (2) (the physical presence of suppliers).

42. The Working Group requested the Secretariat to provide drafting suggestions to reflect the above issues for its consideration at a future session.

**2. Legal value of electronic documents used in or resulting from procurement proceedings (A/CN.9/WG.I/WP.34, paras. 44-58, and A/CN.9/WG.I/WP.34/Add.2, articles 11 *Record of procurement proceedings* and 36 *Acceptance of tender and entry into force of procurement contract*)**

**(a) Record of procurement proceedings**

43. The Working Group recalled that article 11 of the UNCITRAL Model Procurement Law required the procuring entity to maintain a record of the procurement proceedings containing certain minimum information, and provided for that information to be made accessible. However, it was also noted that the Model Law itself did not prescribe the form of the record, and consequently did not prevent a procuring entity from maintaining the record in electronic form.

44. The Working Group then considered whether article 11 should be amended so as to address the form in which the record should be maintained, and whether provision regarding procedures for maintaining and accessing electronic records, including measures to ensure the integrity, accessibility and confidentiality of information should be made.

45. In accordance with its earlier decisions that information might be communicated or, in this case, stored, electronically (A/CN.9/568, paras. 23 and 37), the Working Group considered whether a paragraph addressing the conditions to be in place for a record to be maintained electronically should be included in the Model Law. In this regard, the Working Group considered the proposed additional article 11 (5), as contained in document A/CN.9/WG.I/WP.34/Add.2. The Working Group concluded that general provisions regarding electronic communications and dissemination of information should address such issues, and that including the form of the record in this article might be counterproductive and might dilute the force of the regulation of the content of the record. Nonetheless, the Working Group recognized that article 11 addressed the storage but not the dissemination of information, and therefore requested the Secretariat to consider how to include this broader concept in the accessibility standards that it had requested the Secretariat to draft (see paras. 25 and 32 above).

46. In addition, it was observed that measures to ensure the integrity, accessibility and confidentiality of information would apply to any method of maintaining the procurement record, and therefore the proposed paragraph 6 contained in document A/CN.9/WG.I/WP.34/Add.2, should be added to the text of article 11, amended so as to refer to any method of storage of information. The proposed text for paragraph 6 was as follows:

“The procurement regulations may establish procedures for maintaining and accessing electronic records, including measures to ensure the integrity, accessibility and, where appropriate, confidentiality of information.”

47. The Working Group therefore requested the Secretariat to redraft the provision in terms that would apply to all storage methods.

**(b) Acceptance of tender and entry into force of procurement contract**

48. As regards the acceptance of tenders and entry into force of a procurement contract, the Working Group noted that article 36 (2)(a) and (b) of the UNCITRAL Model Procurement Law provided that the solicitation documents could require the supplier or contractor whose tender had been accepted to “sign a written procurement contract” conforming to the tender. The Working Group therefore considered whether:



(a) The UNCITRAL Model Procurement Law should expressly allow for the execution of a procurement contract by electronic means and, if so, whether it should also refer to the possibility for the enacting State to prescribe procedures for signing or authenticating a procurement contract concluded electronically; or

(b) The matter should be left for other legislation of the enacting States, in which case the Guide to Enactment might briefly set out the relevant issues.

49. In this regard, the Working Group considered proposed additions to the current article 36, as contained in document A/CN.9/WG.I/WP.34/Add.2, to be a new paragraph 7 to that article:

“(7) Where a written procurement contract is required to be signed pursuant to this article, that requirement is met by the use of electronic communications or documents that are signed with an electronic signature that complies with any requirements established by the procuring entity.”

50. The Working Group observed that this proposed provision might duplicate or even contradict laws governing electronic commerce, and it might not be necessary in any event given the accessibility standards that it had requested the Secretariat to draft (see paras. 25 and 32 above). In this regard, it was also observed that the Working Group had decided not to make further provisions regarding electronic communications that might be regulated in other laws unless the procurement context strictly required such provision. Accordingly, the Working Group decided that there was no need to include the proposed text, though it noted that the Guide to Enactment might usefully address the issues raised, as set out in para. 34 above.

### **C. Electronic (reverse) auctions (A/CN.9/WG.I/WP.35 and Add.1)**

51. The Working Group based its consideration of the subject on a note by the Secretariat (A/CN.9/WG.I/WP.35 and Add.1). The Working Group was informed that an electronic reverse auction (ERA) could be defined as an online, real-time dynamic auction between a buying organization and a number of suppliers who competed against each other to win the contract by submitting successively lower priced bids during a scheduled time period.

52. The Working Group acknowledged that ERAs were increasingly used as a method of procurement in those countries where e-commerce had become a norm, but it also noted that the extent of regulation of ERAs as well as their use varied widely from jurisdiction to jurisdiction. The Working Group also heard that other international organizations, including the World Trade Organization and multilateral development banks, were considering possible measures bearing on ERAs, and that the recent European Union procurement directives made provision for ERAs. The need for harmonization between the regulations of these various organizations was highlighted.

53. The Working Group heard the recent experience of several delegations and observers in the practice of ERAs, and that improved value for money, efficient allocation of resources, and transparency in the process of awarding contracts through the use of ERAs had been observed. One observer also elucidated costs savings that had been achieved, such as transactional costs to the procuring entity and to suppliers, and costs internal to procuring entities (for example, personnel costs).

54. However, it was noted that the use of ERAs had also raised a number of concerns, in particular that such use: (a) did not guarantee the lowest responsible and responsive price and continued savings in subsequent ERAs; (b) could have hidden costs that might negate any savings realized from the auction process itself, notably opportunity costs from potential suppliers not competing in the market and additional running costs in the case of construction and services; (c) might encourage imprudent bidding and thus create a higher risk of abnormally low bids; (d) might not adequately handle non-price factors, such as quality of performance and buyer-supplier relationships; (e) might create conflicts of interest in market players, such as software firms and “market makers” or “e-market operators”, and fee-charging centralized purchasing agencies; (f) were more vulnerable than traditional bidding processes to collusive behaviour, often undetectable by procuring entities, especially in projects characterized by a small number of bidders, or in repeated bidding in which the same group of bidders participated; and (g) might have negative effects on the market, including an anti-competitive impact and a negative impact on technical innovations and innovative practices.

55. It was also noted that some commentators had observed that the cost savings identified did not persist in the medium to long term. Additionally, the Working Group was informed that the use of ERAs might operate so as to discourage or exclude the participation of small- and medium-sized enterprises in the procurement process, and therefore might come into conflict with other government economic policy objectives and further undermine long-term efficiency gains and costs savings through the negative effects on competition in the marketplace.

56. In addition, it was observed that certain general procurement principles set out in the Model Law, including those forbidding the disclosure of information on other bids, pre-closing negotiations or bid-shopping, may be contradictory with some inherent features of ERAs, and the Working Group was consequently invited to formulate its general position in this regard.

57. It was acknowledged that some of the above concerns, even where they were inherent features of ERAs, could be addressed through regulation aimed at promoting transparency, such as by applying conditions to the use of ERAs. It was stressed that the risks of collusive behaviour should be a focus of the Working Group in its deliberations, taking into account current considerations of other international organizations in this area.

58. It was observed that there were two systems of ERAs in current use: those that treated ERAs as a procurement method itself, and those that treated ERAs as an optional phase in other procurement methods. Further, there were two main types of ERAs: those based on the lowest price alone and those that permitted additional criteria to be auctioned. In some systems, the additional criteria were quantified using a mathematical formula that allowed each bidder to be ranked before and throughout the conduct of the ERA itself. It was commented that although the use of such formulas was beneficial and removed the risks of subjective assessments during the conduct of an ERA, over-reliance could be placed on such quantification methods.

59. The Working Group noted that many commentators had observed that ERAs were most successful for goods and services that could clearly be specified and whose non-price criteria could be quantified, and there was a general tendency in international practice to confine the use of ERAs to standardized goods and some simple types of services. Commodities, such as fuel, standard information technology equipment, office supplies and primary building products were quoted as examples of items appropriately procured by

ERAs. Although it was noted that the procurement of works was usually excluded from ERAs, the Working Group did not consider that such types of procurement should be excluded *per se*, in that the main issues were whether or not the specifications could be drafted with precision and the criteria to be subject to auction easily and objectively quantified.

60. The Working Group recalled its previous consideration that, with appropriate safeguards in place, ERAs could be used without compromising the principles of the Model Law and be beneficial to both procuring entities and suppliers (A/CN.9/568, para. 54). Views differed, however, as to whether provisions governing the use of ERAs should be included in the Model Law. Some delegations considered that it would be premature to take a decision on that issue in light of the noted limited experience with and regulation of ERAs. The prevailing view, however, taking account of the increasing use of ERAs and twin aims of harmonization and promotion of best practice, was that the revised Model Law should indeed contain provisions on ERAs.

61. It was suggested that, while the Model Law could contain a general enabling provision setting up key principles for the use of ERAs, the Guide to Enactment should address the use of ERAs in detail, in particular advantages and disadvantages, problems commonly arising and ways of dealing with them. Some delegates and observers noted the importance of guidelines from UNCITRAL to ensure consistency in regulations of that subject in various jurisdictions. Concern was expressed that practices could otherwise be developed that would be divergent and inconsistent with the principles of the Model Law.

62. As to the contents of the general enabling provisions, it was noted that a key principle would be the conditions for use (and limitations to the use) of ERAs, such as those described in para. 59 above and as more fully set out in A/CN.9/WG.I/WP.35, paras. 20-25. As regards some such conditions, the Working Group agreed to confine ERAs under the Model Law to the procurement of clearly specified goods, works and services whose non-price criteria could be quantified. It was noted that paragraphs 8 and 20 of A/CN.9/WG.I/WP.35 could serve as a basis for defining the scope of application of ERAs.

63. Some delegations were of the view that, in conformity with the principle of technological neutrality aimed at ensuring the equality of suppliers (see para. 12 above), the Working Group should not limit itself to regulating ERAs but also should make provision for reverse auctions in their conventional, non-electronic form. It was observed that such auctions (as well as ERAs) could provide a platform for a dynamic procurement method. The Working Group acknowledged that reverse auctions in this form were used in public procurement in certain countries in one region. However, strong reservations were expressed as to whether the use of conventional reverse auctions constituted best practice that the Model Law should promote.

64. It was further observed that the aim of technological neutrality was subordinate to the main principles of the Model Law and, in this regard, that reverse auctions in their conventional form raised the risk of a number of improprieties in the procurement process, such as collusion between bidders, price-signalling and corruption, and that bids might not be prepared independently because reverse auctions in their conventional form did not preserve the anonymity of bidders. Furthermore, it was observed that the requirement of physical presence of bidders found in conventional reverse auctions effectively favoured bidders located in the vicinity of the place where the auctions were held and heightened the risks of collusion. Although it was acknowledged that the preservation of anonymity was

only part of ensuring the integrity of the procurement process and was not a guarantee against collusion, it was generally considered that the risk of such collusion was likely to be lower in ERAs than other forms of reverse auctions.

65. It was recalled that at its sixth session, the Working Group had taken note of both the context in which the question of electronic reverse auctions had arisen (that is, the technological developments that had given rise to this procurement method) and the general policy objections that had led to the original decision by UNCITRAL not to address reverse auctions in the Model Law. At that session, the Working Group had therefore decided that only electronic reverse auctions should be acknowledged in a revised version of the Model Law (A/CN.9/568, para. 48). Although reluctance was expressed as regards the inclusion of any provisions on reverse auctions other than in electronic format in the Model Law, the Working Group agreed to take a final decision on the matter once it had before it draft provisions governing the use of ERAs.

66. As regards the ways of using ERAs in procurement proceedings (A/CN.9/WG.I/WP.35, paras. 26-27), that is, treating ERAs as a procurement method itself or treating ERAs as an optional phase in other procurement methods, the general agreement was that it would be preferable to base the draft provisions on the use of ERAs as a procurement method itself.

67. The Working Group deferred its consideration of paragraphs 28-34 of A/CN.9/WG.I/WP.35 and A/CN.9/WG.I/WP.35/Add.1, and entrusted the Secretariat with drafting a general provision for inclusion in the Model Law enabling the use of ERAs as an optional procurement method. The point was made that the Working Group would need to consider the more detailed aspects of ERAs, such as conditions for their use and their modalities, so as to permit it to complete its consideration of the enabling provision and general principles for the use of ERAs. The view was also expressed that the approach to drafting of any provisions in the Model Law regulating ERAs should take account of the approach on the same subject taken by the parties currently revising the plurilateral Government Procurement Agreement of the World Trade Organization (GPA) as regards the use of ERAs.

#### **D. Abnormally low tenders (A/CN.9/WG.I/WP.36)**

68. The Working Group based its consideration of the subject on a note by the Secretariat (A/CN.9/WG.I/WP.36). The Working Group recalled that in 1989, the then Procurement Working Group had been informed that an “abnormally low tender” (“ALT”) involved a risk that “the tenderer would be unlikely to be able to perform the contract at [the tender price] ... or could do so using only substandard workmanship or materials by suffering a loss ... it could also indicate collusion between the tenderers” (A/CN.9/WG.V/WP.22). The Working Group at the current session underscored that the root of the issue was this performance risk and in addition noted that ALTs might compromise the aims of the Model Law, including economy and efficiency in procurement, the promotion of competition among suppliers and contractors, and the fair and equitable treatment of all suppliers and contractors.

69. In this regard, the Working Group noted that the Model Law operated on the basis of a price-based and not a cost-based system, and it was noted that the price-based system was in any event the only practicable one. Accordingly, a procuring entity would be required to assess a potential performance risk using prices as a guide to costs, and the

resultant analysis would of necessity be an estimate. It was also recalled that a low price per se would not necessarily indicate a performance risk.

70. The Working Group noted that there was a variety of reasons why ALTs might be submitted, including imprecise or ambiguous specifications, errors in evaluating tender documentation, inadequate time given to suppliers to prepare tenders, suppliers' errors in assessing their own costs and inadvertent below-cost pricing during the auction process, and that these reasons might lead to the unintentional submission of ALTs. On the other hand, it was also acknowledged that anti-competitive behaviour in the marketplace, such as predatory pricing as described in paragraph 12 of A/CN.9/WG.1/WP.36, might also lead to the intentional submission of an ALT (though such anti-competitive behaviour was normally controlled and regulated in competition or criminal law). The Working Group was also advised that the General Assembly of the United Nations had adopted a "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Practices" (A/RES/35/63, 5 December 1980). It was further observed that intentional ALTs might also arise if suppliers sought a contract at any price, for example, if they were seeking to secure credit and avoid insolvency.

71. The Working Group noted that the performance risks arising from the acceptance of an ALT could have highly undesirable consequences during the contract phase, and that solutions available at that stage, which included termination of the contract or seeking additional guarantees, might only be invoked in extreme cases (see also A/CN.9/WG.1/WP.36, para. 15). Thus, the Working Group concluded, the focus of the Model Law should be on the identification of possible ALTs so that their submission could be avoided.

72. The Working Group took note of the results of the comparative study on current legislative provisions in national and international systems on the topic of ALTs, details of which were found in paragraphs 26 to 61 of A/CN.9/WG.1/WP.36. In summary, the Working Group noted that there was little legislation prohibiting the submission of ALTs per se, but that various analytical techniques (focusing on prices and risks) were more commonly employed to identify and address them. In this regard, it was stressed that the aim of such analyses was to establish whether prices were "realistic" in the light of market conditions regarding prices and, where such information might be available, costs. Further, it was noted that many systems enabled procuring entities to take steps to investigate suspected ALTs and, indeed, required such steps to be taken before any ALT could be rejected as such, a procedure known as a price justification procedure. For example, in the European Union, article 55 of Directive 2004/18/EC stated that a procuring entity, before it could reject a possible ALT, must request details in writing of the relevant constituent elements of the tender concerned.

73. The Working Group was also informed that, in some jurisdictions, the risks of ALTs were also addressed by legislation that provided for suppliers to be held accountable for their tenders or other bids. In other words, suppliers could be required to complete the contract for the price stipulated in the initial bid, and unjustified requests for variations to that amount would be rejected. Thus the supplier would bear the risk of the submission of an ALT.

74. The Working Group recalled that the Model Law did not expressly address ALTs, and therefore a procuring entity would not be able to reject an ALT even where identified, though a procuring entity could reject a supplier or tender that was considered unqualified or unresponsive under the current provisions of articles 6 and 34, respectively. In this

regard, it was noted that article 6 of the Model Law provided that the qualifications of suppliers were to be assessed on the basis of (inter alia) their professional, managerial and technical qualifications and competence, their resources and solvency, and that their directors were not subject to criminal investigation or prosecution. Under article 34 (3) of the Model Law, the procuring entity was required to reject any tenders that were non-responsive or if the supplier concerned was not qualified.

75. Although it was acknowledged that these provisions might enable possible ALTs to be addressed, it was noted that there was no opportunity afforded to the procuring entity to investigate a possible ALT using a price justification procedure. In this regard, the Working Group noted that article 34 (1)(a) of the Model Law permitted the procuring entity to seek clarification of a tender, but according to the Guide to Enactment the provision “[was] not intended to refer to abnormally low tender prices that are suspected to result from misunderstandings or from other errors not apparent on the face of the tender” (A/CN.9/WG.1/WP.36, para. 23, citing A/CN.9/375).

76. Accordingly, the Working Group decided that the Model Law should be amended so as to allow procuring entities to investigate possible ALTs through a price justification procedure. The Working Group also expressed the view that appropriate further guidance should be provided in the Guide to Enactment.

77. In this regard, it was stated that the Model Law should address ALTs, regardless of whether they were intentional or unintentional, but that intentional ALTs were more appropriately regulated by competition and, perhaps, criminal law. The Working Group also heard the view that it was important not to introduce subjectivity into the assessment of possible ALTs, and therefore the objective structure of the current text of article 34 of the Model Law should not be compromised in the revisions to be made.

78. The Working Group expressed the view that providing a definition of an ALT in the text of the Model Law might be unnecessary and noted that the new European Union Directives did not provide such a definition.

79. The Working Group requested the Secretariat to formulate draft provisions for its consideration at a future session, taking into account a proposal from the Working Group that a new provision could be added as article 34 (3)(e) of the Model Law or elsewhere in the text to the effect that if a tender price were abnormally low and raised justified concerns as to the ability of the tenderer to perform the contract, the procuring entity should be authorized to reject the tender. It was noted that any rejection in such cases would be subject to two qualifications: first, that the tenderer had been given an opportunity to explain its prices through a price justification procedure and, second, that justification for the rejection should be included in the record of the procurement proceedings, such that any challenge to the rejection could be considered in the light of that justification. The Working Group further requested the Secretariat to review article XIII.4 of the GPA (which recognized the right of the procuring entity to ensure via enquiry of suppliers that they could comply with the conditions of participation and were capable of fulfilling the terms of the contract) and any proposed revised text, in order to take account of the approach set out in those provisions.

80. The Working Group also took note of the suggestion contained in paragraph 80 of A/CN.9/WG.1/WP.36 that article 34 (4)(b) of the Model Law could be amended to provide that the successful tender would be that submitted by a supplier that had been determined to be fully qualified to undertake the contract, and whose tender was the lowest responsive

tender. The Working Group did not consider that this provision alone would be sufficient to address the issues of ALTs.

81. The Working Group also requested the Secretariat to draft text that would enable the procuring entity to conduct a price justification procedure, in addition to removing the commentary in the Guide regarding article 34 (1)(a) of the Model Law that prevented that provision from being used to seek price justification in the submission of suspected ALTs. The Working Group did not come to a firm conclusion as to where that provision should be located, but agreed to revisit the issue once revised draft provisions were before it for consideration.

82. The Working Group generally agreed that the items set out in paragraph 76 of A/CN.9/WG.1/WP.36 might form the basis of further guidance to be provided in the Guide to Enactment, and that the Model Law's current provisions concerning the evaluation of tenders and qualification criteria should be amplified in the Guide to Enactment so as to aid the identification of ALTs, the assessment of performance risk and subsequent action to address these issues.

## A/CN.9/WG.I/WP.34

**E. Note by the Secretariat on possible revisions to the  
UNCITRAL Model Law on Procurement of Goods, Construction  
and Services – Issues arising from the use of electronic communications  
in public procurement, submitted to the Working Group  
on Procurement at its seventh session  
(A/CN.9/WG.I/WP.34 and Add.1 and 2) [Original: English]**

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**I. Introduction**

1. The UNCITRAL Model Law on Procurement of Goods, Construction and Services (hereafter “the UNCITRAL Model Procurement Law” or “the Model Law”),<sup>1</sup> which the Commission adopted in 1994, is intended to serve as a model for States wishing to modernize their procurement legislation and to promote procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process. The Model Law has influenced legislation in a large number of jurisdictions, and its use has contributed to increasing harmonization of procurement rules and procedures.

2. At its thirty-sixth session, in 2003, the Commission expressed strong support for the inclusion of procurement law in its current work programme, inter alia, so as to allow novel issues and practices that have arisen since the adoption of the UNCITRAL Model

<sup>1</sup> For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I (also published in: United Nations Commission on International Trade Law, *Yearbook* (hereafter “*UNCITRAL Yearbook*”), vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/procure/ml-procure.htm>).



Procurement Law to be considered.<sup>2</sup> At its thirty-seventh session, in 2004, the Commission indicated that the Working Group entrusted with the consideration of that topic should focus on two main areas in respect of which the Model Law might benefit from some revision: first, issues arising from the use of electronic communications in public procurement, and, secondly, issues that have arisen during the application of the Model Law itself.<sup>3</sup>

3. Working Group I (Procurement) began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004) on the basis of two studies prepared by the Secretariat. The first study discussed issues that had arisen from the increasing use of electronic communications and technologies in public procurement, including the use of procurement methods based on the Internet (A/CN.9/WG.I/WP.31). The second study presented issues arising from recent experience in the application of the UNCITRAL Procurement Model Law (A/CN.9/WG.I/WP.32).

4. At that session, the Working Group noted that the use of electronic procurement offered many potential benefits, including improved value for money and enhanced transparency in the procurement process. The Working Group noted that those potential benefits were consistent with the main aims and objectives of the Model Law. The Working Group proceeded to consider the extent to which the Model Law might need to be reviewed so as to enable full advantage of electronic procurement to be taken by enacting States. The Working Group identified three key principles that should form the basis for accommodating in the Model Law the use of electronic communications and technologies in public procurement: (a) the Model Law should, to the extent possible, encourage the use of those communications and technologies in procurement; (b) it should make appropriate provisions for that purpose in a technologically neutral manner; and (c) further and more detailed guidance might be provided in the Guide to Enactment,<sup>4</sup> as appropriate. The Working Group agreed that any advice to be provided should cover all means of communication and offer guidance on the controls that are needed for their use (A/CN.9/568, paras. 12-18).

5. It was observed that the main policy issues concerning the use of electronic procurement arose in the following areas: advertisement of procurement-related information, including invitations to participate in procurement and contract awards, the use of electronic communications in the procurement process, and the use of electronic reverse auctions (A/CN.9/568, para. 19). This note and the addenda thereto consider the scope of future work in respect of the first two of those areas and propose draft amendments to relevant articles of the Model Law. Issues related to the use of electronic reverse auctions are discussed in a separate document (A/CN.9/WG.I/WP. 35).

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<sup>2</sup> *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 229.

<sup>3</sup> *Ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 81-82.

<sup>4</sup> For the text of the Guide to Enactment of the UNCITRAL Model Procurement Law, see document A/CN.9/403, reproduced in: United Nations Commission on International Trade Law, *Yearbook*, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex II.

## II. General legislative principles and policy approaches for dealing with electronic communications and technologies in the procurement process

6. The UNCITRAL Model Procurement Law was adopted at a time when it could be anticipated that information technology and electronic communications, even if not very widely used then, would eventually become widespread. Accordingly, some provisions of the Model Law show the concern to accommodate electronic or similar types of communications, such as the reference, in article 9(1) to a form of communication that “provides a record” of the content of communication (rather than an obvious reference to “written communication”). Nevertheless, the Model Law is not primarily concerned with legal issues related to the use of new technologies, and the wording of a number of provisions indicates that they were conceived against the background of communications, record-keeping and evidentiary systems that were largely based on information recorded on tangible media (essentially, written on paper). Examples include references to “documentary evidence” and similar concepts (see articles 6(2), 7(3)(a)(iii), 10, 27(c), 36, 38(f)), or the rules on preparation, modification, withdrawal, submission and opening of tenders, particularly in view of the requirements that tenders be submitted in a “sealed envelope” (see articles 27(h), (q), (r), and (z); 30, 31(2) and 33).

7. At the Working Group’s sixth session, it was suggested that the Working Group’s work should as much as possible draw on the provisions of the UNCITRAL Model Law on Electronic Commerce<sup>5</sup> (A/CN.9/568, para. 43). Indeed, a number of principles of the UNCITRAL Model Law on Electronic Commerce may be helpful to modernize the UNCITRAL Model Procurement Law. In some instances, however, the differences in purpose between those model laws may call for solutions tailored to the particular context of public procurement.

8. The purpose of the UNCITRAL Model Law on Electronic Commerce is to offer national legislators a set of internationally acceptable rules for removal of a number of legal obstacles to the use of modern means of communication which may result from uncertainty as to their legal effect or validity. For that purpose, the Model Law relies on what has been called a “functional equivalent approach”, which is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques. The UNCITRAL Model Law on Electronic Commerce does not attempt to define a computer-based equivalent to any kind of paper document. Instead, it singles out basic functions of paper-based form requirements, with a view to providing criteria which, once they are met by data messages, enable such data messages to enjoy the same level of legal recognition as corresponding paper documents performing the same function. Consistent with that approach and the aim of ensuring technological neutrality, the Model Law does not attach legal consequences to any particular format or technique used to create a data message. In the system of the Model Law, questions as to whether a

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<sup>5</sup> For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), annex I (also published in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I). The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.99.V.4, and are available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm>).

particular data message is indeed “accessible so as to be usable for subsequent reference” would need to be answered on a case-by-case basis.

9. Another important aspect that the Working Group may wish to bear in mind is the prominent role of party autonomy in the system of the UNCITRAL Model Law on Electronic Commerce. That Model Law is based on the recognition that, in practice, solutions to the legal difficulties raised by the use of modern means of communication can to some extent be established by contract. Thus, the parties may exclude or modify the provisions of chapter III of the Model Law (dealing with formation and validity of contracts, recognition by parties of data messages, attribution of data messages, acknowledgement of receipt and time and place of dispatch and receipt of data messages).

10. In summary, the UNCITRAL Model Law on Electronic Commerce could be described as containing a set of principles that (a) provide general criteria for functional equivalence in flexible manner so as to accommodate evolving and varying technologies or (b) offer default rules to be applied when the parties have not provided otherwise.

11. While the principle of functional equivalence may be used to offer solutions in the procurement area, it should be recognized that procuring entities may have an interest in establishing conditions for the use of electronic communications taking into account their respective levels of sophistication, security concerns and other relevant factors. The high degree of flexibility, which is inherent in the UNCITRAL Model Law on Electronic Commerce—and arguably essential in the area of private law—may not be entirely suitable to achieve the high level of certainty required for public procurement.

12. In practice, countries that have adopted legislation on electronic transactions dealing with the types of issues covered by the UNCITRAL Model Law on Electronic Commerce do not seem to rely exclusively on this general legal framework to introduce the use of electronic communications in the procurement process or, more generally, on the use of electronic communications in government functions. In some countries, general rules on electronic communications may be excluded in connection with procurement activities of public bodies,<sup>6</sup> or have been incorporated into the existing framework for private law in such a way that they do not seem to apply automatically to government functions.<sup>7</sup> Other countries and regions have enacted both rules governing the use of electronic communications in Government (including procurement), and general legislation on electronic commerce, some of which is declared to apply to the public sector, while other aspects do not seem to have been conceived for Government use.<sup>8</sup> In a number of other

<sup>6</sup> United States (Electronic Signatures in Global and National Commerce Act, Public Law 106-229, June 30, 2000, sect. 102(b)).

<sup>7</sup> This is the case, for example, in France (see Loi n° 2000-230, of 13 March 2000, *Journal officiel*, 14 March 2000) and Mexico (see *Decreto por el que se reforman y adicionan diversas disposiciones del Código Civil para el Distrito Federal* of 26 April 2000).

<sup>8</sup> Within the European Union, electronic commerce, including electronic signatures, and public procurement are subject to a harmonized regime under Directives issued by the European Parliament and the Council. Rules on electronic commerce and electronic signatures are contained in two different directives (Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“the E-Commerce Directive”), *Official Journal of the European Communities*, No. L 178, 17 July 2000, p. 1; and Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures (the “E-Signatures Directive”), *Official Journal of the European Communities*, No. L 13, 19 January 2000, p. 12). While the latter directive expressly refers to the use of electronic signatures by public bodies, subject to “possible additional

countries, however, general legislation on electronic commerce and electronic transactions is expressly intended to bind Government, except for a number of specifically excluded areas,<sup>9</sup> but even in countries that follow this approach electronic commerce legislation often contains specific rules for the use of electronic communications in governmental functions,<sup>10</sup> or contemplate the enactment of specific regulations for that purpose.<sup>11</sup> Where specific provisions exist, they typically empower Government agencies to specify matters such as the manner and format in which the electronic records shall be filed, created, kept or issued; whether the electronic records have to be signed and what signature creation methods may be used; control processes and procedures appropriate to ensure adequate integrity, security and confidentiality of electronic records or payments. Lastly, some countries—not all of which have adopted a general framework for electronic commerce and electronic transactions<sup>12</sup>—have enacted detailed provisions on electronic communications in the procurement process.<sup>13</sup>

13. The Working Group may therefore wish to consider that an appropriate treatment of issues raised by electronic communication under the UNCITRAL Model Procurement Law may require more than simply cross-referencing to the relevant provisions of the UNCITRAL Model Law on Electronic Commerce or the UNCITRAL Model Law on Electronic Signatures.<sup>14</sup> Accordingly, it is proposed that the Working Group should

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requirements” (see article 3, paragraph 7), the extent to which the provisions of the first directive may be used in Government functions is unclear. The newly adopted harmonized procurement regime, in turn, expressly contains provisions on electronic procurement (see Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (*Official Journal of the European Union*, No. L 134, 30 April 2004, p. 114), articles 33, 36(3), 42, 54).

<sup>9</sup> Australia (Electronic Transactions Act 1999); Ireland (Electronic Commerce Act, 2000); and New Zealand (Electronic Transactions Act 2002).

<sup>10</sup> India (Information Technology Act, 2000, sect. 4-10); Ireland (Electronic Commerce Act, 2000, sect. 12); Mauritius (Electronic Transactions Act 2000, sect. 40); Philippines (Electronic Commerce Act 2000, sect. 27-29); and Singapore (Electronic Transactions Act 1998, sect. 47).

<sup>11</sup> Republic of Korea (Framework Law on Electronic Commerce 1999, art. 27); Thailand (Electronic Transactions Act 2001, sect. 35); and Venezuela (*Decreto n° 1024 de 10 de febrero de 2001—Ley sobre mensajes de datos y firmas electrónicas*, art. 3).

<sup>12</sup> E.g. Brazil does not have general legislation on electronic commerce or the legal value of electronic communications, but has enacted specific legislation on certain procurement application of information technologies, such as electronic reverse auctions and on electronic catalogues under *Lei n° 10.520*, of 17 July 2002 (available at [https://www.planalto.gov.br/ccivil\\_03/Leis/2002/L10520.htm](https://www.planalto.gov.br/ccivil_03/Leis/2002/L10520.htm)) and *Decreto n° 3.697*, of 21 December 2000 (available at [https://www.planalto.gov.br/ccivil\\_03/decreto/D3697.htm](https://www.planalto.gov.br/ccivil_03/decreto/D3697.htm)).

<sup>13</sup> In the Philippines, in addition to general legislation on electronic commerce (Electronic Commerce Act 2000), there are specific rules concerning the use of electronic communications in the procurement process under Republic Act No. 9184 (known as “The Government Procurement Reform Act”, available at <http://www.procurement-service.net/English/AboutEPS/RepublicAct9184-GPRA.pdf>) and its Implementing Rules and Regulations (available at [http://www.neda.gov.ph/references/RAs/Approved%20IRR-A%20of%20R.A.%209184\(July%2011,%202003\).pdf](http://www.neda.gov.ph/references/RAs/Approved%20IRR-A%20of%20R.A.%209184(July%2011,%202003).pdf)).

<sup>14</sup> For the text of the Model Law, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*, annex II. The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.02.V.8, and are available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/electcom/ml-elecsig-e.pdf>).

include provisions based on the electronic commerce texts prepared by UNCITRAL but amend them so as to be appropriate to public procurement in the revised Model Law.

### III. Electronic publication of procurement-related information

14. At its sixth session, the Working Group was informed that electronic publication of procurement-related information may provide wider dissemination of such information than would be achieved through traditional paper means by making it more accessible to a potentially larger group of suppliers. The Working Group expressed the view that the Model Law should encourage the electronic publication of information that the Model Law currently requires States to publish. (A/CN.9/568, para. 21).

15. Given the aim of promoting the use and implementation of the Model Law, it was agreed that flexibility should be retained, and that the Working Group in its work should achieve a balance between the provisions in the Model Law, which would address the issues from the standpoint of the policies and principles, and the Guide to Enactment, which would address them in more detail, where appropriate. Consequently, the Working Group considered that there should be limited regulation beyond appropriate statements of the governing principles in the Model Law itself, but that appropriate further guidance might usefully be provided in the Guide to Enactment. (A/CN.9/568, para. 24).

16. The Working Group noted that a significant issue was the extent to which electronic publication should be mandatory or optional, that is, in a particular case effected by electronic means alone, or by electronic means as an addition to traditional paper-based means. Strong support was expressed for the view that electronic publication should be permitted, but on an optional basis, notably so as to preserve the principle of flexibility and reflecting differing situations prevailing in enacting States. (A/CN.9/568, paras. 25-26). In conclusion, the Working Group took the view that the use of electronic publication under the Model Law should remain optional. Nonetheless, the Working Group agreed that the Guide to Enactment might set out considerations to assist legislators in establishing thresholds of technological maturity and market access after which they might wish to consider the mandatory electronic publication of information (A/CN.9/568, para. 27).

#### A. Notion of “electronic” and related terms

17. In view of its procedural nature, several provisions of the UNCITRAL Model Procurement Law refer to various types of communications between procuring entities and suppliers or actions taken by them in connection with procurement proceedings and the form in which they should be made.<sup>15</sup> Although in most cases the expressions used are not in and of themselves linked to any particular medium, the Working Group may wish to consider that it would be appropriate to include, where appropriate, references intended to enable the use of communications by “electronic means”.

<sup>15</sup> For instance, “accept”, “address to”, “ask”, “approve”, “notify”, “require”, “communicate”, “solicit”, “extend opportunity”, “declare”, “give”, “decide”, “reject”, “record”, “obtain”, “modify”, “issue addendum/decision”, “invite”, “inform”, “institute proceedings”, “dispatch”, “provide”, “return” (late tenders), “receive”, “confirm”, “procure”, “withdraw”, “terminate”, “transmit”, “seek”, “permit”, “grant”, “recommend”, “dismiss”, “annul”, “revise”, “order”, “participate”, “furnish”, “make available”, “disclose”, “commencing ... action”, “certify”, “promptly”. Additional terms are concepts such as “document”, “documentary evidence”.

18. For that purpose, it may be necessary to indicate in the Model Law what is meant by the word “electronic” in connection with the form of communications. Such a definition is important because the word “electronic”, which is commonly used to refer to any information that is not contained in a tangible medium, strictly speaking relates to one particular technology (i.e. using electrical impulses). For example, digital imaging, which in common usage is understood as an “electronic” technique, relies on optical storage, which is technically not “electronic”.

19. The UNCITRAL Model Law on Electronic Commerce does not contain a definition of “electronic”. In the context of that Model Law, which focuses on the legal value of “information” such a definition was not necessary, as it was subsumed in the notion of “data message”. Indeed, article 2, subparagraph (a), of the Model Law defines the term “data message” as “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.” The notion of “data message” in the Model Law on Electronic Commerce, as explained in paragraph 30 of its Guide to Enactment, is not limited to communication but is also intended to encompass computer-generated records that are not intended for communication.

20. It is suggested that, although the notion of “data message”, as used in the general context of the UNCITRAL Model Law on Electronic Commerce, provides useful indication as to the techniques that should be covered by any enabling provision aimed at promoting the use of electronic communications in public procurement, that notion may not be immediately suitable for use in the context of the UNCITRAL Model Procurement Law. Rather, it might be preferable to insert a general definition of “electronic”, which could be used to qualify either the medium used to store the information (for instance “electronic document”) and the means for transmitting the information (“publication by electronic means”).

21. Another important element to take into account is the notion of “writing” or “record”. The UNCITRAL Model Law on Electronic Commerce does not define those terms, since it relies on the existing understanding given to them under other laws. A definition of “writing” or “record” in the UNCITRAL Model Law on Electronic Commerce was further not necessary since that Model Law does not establish any requirements as to form.<sup>16</sup> In some countries, the law contemplates authorizing the use of electronic communications whenever a written document is required.<sup>17</sup> To the extent, however, that several provisions of the UNCITRAL Model Procurement Law, in turn, establish a number of form requirements and that procuring entities may not always be in a position to accept electronic forms as a substitute for all of them or some of them, it may be important to preserve in the UNCITRAL Model Procurement Law a distinction

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<sup>16</sup> The Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce recognizes, however, that a definition of “record” in line with the characteristic elements of “writing” in article 6 may be added in jurisdictions where that would appear to be necessary (*Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce* (United Nations publication, Sales No. E.99.V.4), para. 30).

<sup>17</sup> In Lithuania, article 2, paragraph 16, of the Law on Public Procurement, No. IX-1217, of 3 December 2002, which authorizes the use of electronic communications in public procurement, has introduced a definition of “writing” which is intended to accommodate information that is stored and transmitted by electronic means. A similar provision can be found in article 3 of the Public Procurement Law of the Republic of Montenegro (*Official Gazette of Montenegro*, No. 40/2001). An English translation of both laws is available from the Secretariat.

between “paper documents” or “paper-based communications” and their electronic equivalents.

22. Subject to any additional definitions or clarifications that may become necessary in view of the deliberations of the Working Group, the Working Group may wish to consider inserting in article 2 of the UNCITRAL Model Procurement Law the additional definitions. The proposed text is set out in the addendum to this note contained in document A/CN.9/WG.I/WP.34/Add.2.

## **B. Publication of the laws, rules and regulations governing procurement**

23. At its sixth session, the Working Group considered: (a) electronic publication of legal texts referred to in article 5 of the Model Law; and (b) whether any additional information not covered by article 5, such as internal policies or guidance, should be brought within the scope of the Model Law.

### **1. Electronic publication of legal texts referred to in article 5 of the Model Law**

24. Article 5 of the Model Law envisages a general principle of accessible publication for the law itself as well as “procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law”, such that the information should be “promptly made accessible to the public and systematically maintained”. At its sixth session, the Working Group noted that this provision appears to be sufficiently broad in scope as to encompass publication in any manner—electronic or by paper means—as it addresses the issue from the standpoint of accessibility (A/CN.9/568, para. 22).

25. Nevertheless, it may be useful to clearly state in the Model Law that the dissemination of such information may be made by electronic means. In keeping with the general wish of the Working Group that electronic communications should be permitted, but not mandated, and that they should not generally substitute for other means of publication, the Working Group may wish to consider whether article 5 of the UNCITRAL Model Procurement Law could be amended so as to include a reference to possible simultaneous dissemination of information through electronic means (proposed draft amendments are set out in the addendum to this note contained in document A/CN.9/WG.I/WP.34/Add.2).

26. A number of countries are in fact making increased use of electronic means to publish legislation, regulations and related materials of general interest.<sup>18</sup> Typically, laws, regulations, and sometimes court decisions and related information of general interest are posted on databases available through the Internet. However, the extent of dissemination of information, the quality and level of access and the amount of information provided varies greatly. In the majority of cases, all information is available free of charge, while in other countries access is granted only to subscribers to a services provider.<sup>19</sup> The supporting

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<sup>18</sup> A comprehensive set of links to online editions of official gazettes worldwide can be found in <http://www.lib.umich.edu/govdocs/gazettes/>. For links to European official sites, see <http://forum.europa.eu.int/irc/opoce/ojf/info/data/prod/html/gaz1.htm>.

<sup>19</sup> E.g. South Africa ([http://origin.sundayobserver.lk/2001/pix/gov\\_gazette.html](http://origin.sundayobserver.lk/2001/pix/gov_gazette.html)).

technology is also not uniform: while most are Internet-based solutions developed by public bodies, others rely on other types of network.<sup>20</sup>

27. In view of the above, the Working Group may wish to consider using a general term not specifically linked to any particular technology or device such as “publicly accessible electronic information system”, which could cover various means such as Intranet, Internet sites or internal electronic databases accessible to the public. The proposed expression would also have the advantage of drawing on terminology used in the UNCITRAL Model Law on Electronic Commerce and incorporated into legislation of several countries that have implemented that Model Law. “Information system” is defined in article 2 (f) of the UNCITRAL Model Law on Electronic Commerce, as “a system for generating, sending, receiving, storing or otherwise processing data messages.”<sup>21</sup> A proposed draft definition is set out in the addendum to this note contained in document A/CN.9/WG.I/WP.34/Add.2. Alternatively, the Working Group may wish to leave the term undefined and prefer to explain its meaning in the Guide to Enactment.

28. Another issue that the Working Group may also wish to consider is whether it would be desirable to provide guidance in the Guide to Enactment as to the value of electronic publication of laws and regulations. The current stage of electronic publications is such that universal access is not yet guaranteed. As noted above, a subscription fee may also hinder access to information. Furthermore, even in technologically advanced countries legislative databases are sometimes incomplete and only reach back to a certain number of years. Entities maintaining such databases often make disclaimers to the effect that texts of legislation and other texts provided in electronic form, in particular where the electronic file is not a facsimile reproduction of the original printed text, are not authoritative texts.<sup>22</sup> Electronic publication of laws and regulations is made in most cases for information purposes only, although some countries contemplate making the electronic and the paper publication legally equivalent.<sup>23</sup>

## 2. Additional information to be published

29. As regards the content of information to be published, the Working Group noted that it should further consider whether additional information relevant to potential suppliers that the Model Law does not currently require to be published, such as internal policies or guidance on the conduct of procurement proceedings (see A/CN.9/568, para. 28), might be brought within the scope of any new provision or guidance given.

30. In view of the fact that any such additional information is substantive in nature, rather than merely a consequence of the use of electronic communications, the Secretariat is currently reviewing the relevant practice under domestic procurement regimes and will

<sup>20</sup> E.g. Sri Lanka ([http://origin.sundayobserver.lk/2001/pix/gov\\_gazette.html](http://origin.sundayobserver.lk/2001/pix/gov_gazette.html)) and Thailand (<http://library2.tu.ac.th/gazette/index.html>).

<sup>21</sup> As explained in the Guide to Enactment, depending on the factual situation, an information system may indicate “a communications network, and in other instances could include an electronic mailbox or even a telecopier” (*Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce* (United Nations publication, Sales No. E.99.V.4), para. 40).

<sup>22</sup> The home page of the Portuguese gazette (*Diário da República-DRE*), for example, states that “reading of the DRE databases does not substitute for reading the original” (<http://dre.pt/>).

<sup>23</sup> In India, for instance, sect. 8 of the Information Technology Act, 2000, provides that “where any law provides that any rule, regulation, order, bye-law, notification or any other matter shall be published in the Official Gazette, then, such requirement shall be deemed to have been satisfied if such rule, regulation, order, bye-law, notification or any other matter is published in the Official Gazette or Electronic Gazette.”



include the results of its review in information to be provided to the Working Group in due course. It is anticipated, however, that no specific provision may be required for the electronic publication of such additional information (as distinct from other form of publication), which the Secretariat suggests could be addressed by adding appropriate references in the current article 5 of the UNCITRAL Model Procurement Law, once the Working Group has agreed on the nature of further information, if any, that would need to be published.

## **C. Publication of contract opportunities**

31. In view of the varying level of use of electronic means to disseminate procurement-related information, it may be useful for the Working Group to distinguish between two types of publications relating to contract opportunities, namely: (a) general information on forthcoming procurement opportunities, on the one hand, and (b) invitations to participate in specific procurement proceedings, on the other.

32. The reason for this distinction is that information under (a) above is typically of a non-binding nature and serves general purposes such as to promote better planning of Government procurement or to allow potential suppliers to make advance arrangements for participation in forthcoming procurement processes. The Model Law currently does not require the publication of such information. Invitations under (b), in turn, differ significantly from general information about forthcoming contract opportunities in that they form the basis for the conduct of procurement proceedings and give rise to enforceable rights and obligations, both to procuring entities and suppliers. It is recognized, however, that in practice, legislative provisions or recommendations from international organizations on the electronic publication of contract opportunities, which are often formulated in general terms, do not always distinguish between those two types of publications.

### **1. General information on forthcoming procurement opportunities**

33. At its sixth session, the Working Group noted that article 24 of the Model Law addresses the publication of invitations to participate in specific procurement proceedings by means of invitations to tender or to prequalify, but that there is no equivalent provision in the Model Law governing steps in the procurement process earlier in time, such as general information on forthcoming procurement opportunities (A/CN.9/568, para. 28).

34. Several countries frequently issue advance information about forthcoming projects or general information about contract opportunities with particular entities. Typically, procuring entities issue periodically (e.g. once every year) general information on their forecasted procurement needs for the relevant period, without any commitment on their part to actually procure the goods or services indicated. This information is being increasingly disseminated through electronic publication, and may appear on both procurement entities' individual websites, or in centralized electronic systems covering many entities.

35. The European Union operates a centralized publication and translation system for all member States that must be used for all regulated contracts, notice of which appears in the Official Journal of the European Union, available only in electronic form (Internet and on CD-ROM). However, entities may publish additional notices in other publications and usually do so (often in hard copy form and in additional electronic media). The European

Union regime currently<sup>24</sup> requires entities to publish general notices of opportunities when their purchases in certain product or service areas exceed a specified amount (that is, equal to or greater than EUR 750,000), plus advance notice of major works projects.<sup>25</sup>

36. The Agreement on Government Procurement negotiated under the auspices of the World Trade Organization (WTO) (hereinafter “GPA”)<sup>26</sup> and the North American Free Trade Agreement (“NAFTA”)<sup>27</sup> list for each State the publications in which States must advertise for their contracts, without any specific requirements or general principles concerning the medium of advertisement.

37. The Asia-Pacific Economic Cooperation (APEC) non-binding principles on government procurement suggest that information on opportunities should be available through a readily accessible medium at no or reasonable cost and gives the Internet as an example of such a medium.<sup>28</sup> It also suggests that publishing procurement information through the Internet is one way of ensuring compliance with the Group’s principle of non-discrimination, since it allows information to be available instantaneously to all interested suppliers.<sup>29</sup>

38. Publication of advance information regarding forthcoming projects, and general information about contract opportunities is not limited to procuring entities whose procurement activities are governed by a multilateral or regional regime. Nor is it limited to developed countries. Indeed, developing countries are making increased use of electronic publication of procurement-related information. In some cases, the information

<sup>24</sup> Under article 35 of the Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 (*Official Journal of the European Union*, No. L 134, 30 April 2004, p. 114), which member States of the European Union have to implement until 31 January 2006, advance notice of procurement opportunities which value is equal to or greater than a specified threshold may continue to be published through the *Official Journal of the European Union* but such publication will only be compulsory if the procuring entities have taken the option to shorten the time limit for receipt of tenders laid down in article 38(4) of the Directive.

<sup>25</sup> Such an advance notice does not represent a commitment to actually procure the estimated amount. In Germany, § 17a of the *Bekanntmachung der Neufassung der Verdingungsordnung für Leistungen* of 17 September 2002 clarifies the purpose of this requirement as follows: “Procuring entities shall publish as soon as possible after the begin of the relevant fiscal year, non-binding notices containing information on all intended contracts for the following twelve months, with an individual value of at least 750,000 Euro” (*Bundesanzeiger* No. 216a, 20 November 2002).

<sup>26</sup> Text available at [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf). At the time of writing (December 2004), the following were parties to GPA: Canada, the European Communities (including its 25 member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom), Hong Kong SAR of China, Iceland, Israel, Japan, Korea, Liechtenstein, Netherlands with respect to Aruba, Norway, Singapore, Switzerland and United States. According to information provided by WTO, there are countries negotiating accession to the GPA as well as a number of observer governments and intergovernmental organizations (see [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm)).

<sup>27</sup> Text available at [http://www.nafta-sec-alena.org/DefaultSite/index\\_e.aspx?DetailID=78](http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78). NAFTA is comprised of Canada, Mexico and the United States.

<sup>28</sup> APEC Government Procurement Experts Group, non-binding Principles on Government Procurement, paras. 3 and 7 (available at [http://www.apecsec.org.sg/content/apec/apec\\_groups/committees/committee\\_on\\_trade/government\\_procurement.downloadlinks.0001.LinkURL.Download.ver5.1.9](http://www.apecsec.org.sg/content/apec/apec_groups/committees/committee_on_trade/government_procurement.downloadlinks.0001.LinkURL.Download.ver5.1.9)).

<sup>29</sup> *Ibid.*, para 72.

appears on procurement entities' individual websites, and in others, on centralized electronic systems.<sup>30</sup>

39. The capabilities of electronic publication systems varies greatly. It ranges from countries that offer summaries only to countries that have developed information resources that include searchable websites with specific links to procurement opportunities.<sup>31</sup>

40. If the Working Group decides that the UNCITRAL Model Procurement Law should promote the publication of information on forthcoming contract opportunities, the following questions will need to be considered:

(a) Whether the Model Law should require the publication of such notices or treat it as optional;

(b) Whether there should be a threshold for the publication of information on forthcoming contract opportunities;

(c) Whether publication in electronic form should be mandated or only encouraged.

41. The addendum to this note (document A/CN.9/WG.I/WP.34/Add.2) contains a draft additional provision to the Model Law in which options have been included to address these questions.

## 2. Invitations to participate in specific procurement

42. In domestic practice, the extent to which procuring entities may use electronic means to give notice of their intention to procure certain goods or services to meet a particular need varies according to the stage of use of information technology in the procurement process (this topic is further developed in the addendum to this note as contained in document A/CN.9/WG.I/WP.34/Add.1 in the context of the consideration of the use of electronic communications in the procurement process).

43. In the Model Law, the following articles deal with the publication of invitations to participate in specific procurement: as regards tendering proceedings, article 24 (procedures for soliciting tenders or applications to prequalify); as regards the principal method for procurement of services, article 37.1 and 2 (notice of solicitation of proposals); and as regards the alternative methods of procurement, articles 46.1 (two-stage tendering), 47.2 (restricted tendering) and 48.2 (request for proposals).

44. At its sixth session, the Working Group noted that the provisions of article 24 of the Model Law implied that the publication of those invitations would be made in paper form. Bearing in mind the potential benefits of disseminating information on procurement

<sup>30</sup> In the Philippines, for instance, Section 8 of Republic Act No. 9184 provides that "there shall be a single portal that shall serve as the primary source of information on all government procurement" (available at <http://www.procurement-service.net/English/AboutEPS/RepublicAct9184-GPRA.pdf>). Section 8.2.1 of the Implementing Rules and Regulations of Republic Act No. 9184 (available at [http://www.neda.gov.ph/references/RAs/Approved%20IRR-A%20of%20R.A.%209184\(July%2011,%202003\).pdf](http://www.neda.gov.ph/references/RAs/Approved%20IRR-A%20of%20R.A.%209184(July%2011,%202003).pdf)) provide further that the Government Electronic Procurement System ("G-EPS") contemplated by the Act shall have "a centralized electronic bulletin board for posting procurement opportunities, notices, awards and reasons for award. All procuring entities are required to post all procurement opportunities, results of bidding and related information in the G-EPS bulletin board."

<sup>31</sup> For example, the United States (<http://www.gpoaccess.gov/about/services.html>).

opportunities through electronic means, the Working Group agreed that it should consider options for making appropriate revisions to that article to remove obstacles to electronic publication of the information referred to therein (A/CN.9/568, para. 23). The Secretariat understands that the Working Group's agreement with respect to article 24 applies *mutatis mutandis* to other relevant articles of the Model Law referred to in paragraph 43 above.

45. Given the close relationship between the form of invitations to participate in procurement and the conduct of the procurement proceedings, and the fact that the form of invitations, in particular as regards the intended addressees, is closely related to the method of procurement to be used, the Working Group may wish to consider this matter and possible amendments to article 24 and other relevant articles of the Model Law in connection with its consideration of the use of electronic communications in the procurement process (see A/CN.9/WG.I/WP.34/Add.1).

#### **D. Publication of contract awards and other information**

46. Article 14 of the Model Law requires procuring entities to publish notices of contract awards above a threshold specified by the enacting State, and further states that regulations may provide for the manner of publication. This article appears to be sufficiently broad in scope as to encompass publication in any manner—electronic or otherwise. Nevertheless, with a view to encouraging the use of electronic publication of contract awards, which has been found to contribute to enhanced transparency, the Working Group may find it useful to include express reference to electronic publication in article 14 of the Model Law, along the lines of what has been proposed for article 5 (see above, paras. 24-28). Proposed draft amendments to article 14 of the Model Law are set out in the addendum to this note as contained in document A/CN.9/WG.I/WP.34/Add.2.

47. The Working Group may wish to consider whether there should be some provision in the UNCITRAL Model Procurement Law for publishing in electronic form other information that the Model Law currently does not require States to publish (such as information on the status of ongoing procurement proceedings), or refer to the value of such publication in the Guide to Enactment.

## A/CN.9/WG.I/WP.34/Add.1

**Note by the Secretariat on possible revisions to the  
UNCITRAL Model Law on Procurement of Goods,  
Construction and Services – Issues arising from the use of  
electronic communications in public procurement, submitted  
to the Working Group on Procurement at its seventh session**

## ADDENDUM

*[Chapters I through III are published in document A/CN.9/WG.I/WP.34]*

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## IV. Use of electronic communications in the procurement process

1. At its sixth session (Vienna, 30 August-3 September 2004), the Working Group noted that the main policy issues with regard to the use of electronic methods of communication under the UNCITRAL Model Law on Procurement of Goods, Construction and Services (hereafter “the UNCITRAL Model Procurement Law” or “the Model Law”)<sup>1</sup> were the following:

(a) Whether the law should permit or require procuring entities to use electronic communications by consent with suppliers or authorize either party to require electronic communications; and

<sup>1</sup> For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I (also published in United Nations Commission on International Trade Law, *Yearbook* (hereafter “UNCITRAL Yearbook”) vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex I; available in electronic form from <http://www.uncitral.org/english/texts/procure/ml-procure.htm>).

(b) Whether those rules should attach conditions to the use of electronic means to safeguard the objectives of the procurement law, so as to prevent the electronic means chosen from operating as a barrier to access, to secure confidentiality, to ensure authenticity and security of transactions, and the integrity of data ( A/CN.9/568, para. 30).

2. As regards the extent to which electronic communications (including the electronic submission of tenders) could be required or made mandatory, the Working Group had been informed that in the practice of a number of countries procuring entities were authorized to require bidders to use electronic means of communication in procurement proceedings (A/CN.9/WG.I/WP.31, para. 55). At its sixth session, the Working Group generally agreed on the desirability of approaching the issue in a flexible manner. There was broad agreement within the Working Group to the effect that suppliers should not be enabled to impose a particular means of communications on the procuring entity. As regards, however, the procuring entity's right to require electronic communications, it was generally felt that it would be unwise to craft a rule that contemplated that possibility for all cases and circumstances (A/CN.9/568, para. 33). It was generally agreed that it would be useful to formulate provisions that expressly enabled and, in appropriate circumstances, promoted the use of electronic communications, possibly subject to a general requirement that the means of communication imposed by the procuring entity should not unreasonably restrict access to the procurement. Additional guidance and explanations on various options regarding the kind of means available and the controls that might be needed should be included in the Guide to Enactment (A/CN.9/568, para. 39).

#### **A. General remarks: stages of use of electronic means in the procurement process**

3. In considering the appropriate level of guidance that should be provided, the Working Group may wish to bear in mind the various stages of use of electronic communications in the procurement process in current practice. Recent studies on the use of electronic applications in the procurement process distinguish generally between two systems: electronic tendering and electronic purchasing systems.<sup>2</sup>

4. "Electronic tendering systems" are defined as systems developed to support "carefully regulated competitive bidding processes based on detailed bidding documents and technical specifications."<sup>3</sup> Electronic tendering systems are said to be particularly suitable for procurement "of large public works, of production capabilities such as a power plant, of performance capabilities such as large information systems, or of sophisticated services such as design and management of virtual private communication networks. All these are documentation-heavy procurement transactions that require careful evaluation of

<sup>2</sup> See Eduardo Talero, *Electronic Government Procurement: Concepts and Country Experiences*, World Bank Discussion Paper (September 2001), paras. 30-40 (available at [http://wbln0018.worldbank.org/OCS/egovforum.nsf/c3c9b2819079a45d852569bc007722a0/e5596442988cccfd85256af5006af56a/\\$FILE/ATTUQ5LL/egpdiscpaperdraft16.pdf](http://wbln0018.worldbank.org/OCS/egovforum.nsf/c3c9b2819079a45d852569bc007722a0/e5596442988cccfd85256af5006af56a/$FILE/ATTUQ5LL/egpdiscpaperdraft16.pdf)). See also Elaine Curran, Andrea Bernert, Anke Wiegand, *Electronic Procurement in the Public Sector: Factsheet on Latest Developments in E-procurement in the EU and its Member States* (available at [http://www.eic.ie/downloads/e\\_procurement.pdf](http://www.eic.ie/downloads/e_procurement.pdf)). The results of this survey are confirmed by the examples of current practice in various European countries (see <http://europa.eu.int/ida/en/chapter/197>).

<sup>3</sup> Talero, *ibid.*, para. 31.

quality aspects, customized contracts, and extensive services.”<sup>4</sup> Electronic tendering systems may provide various types of support functions for the conduct of procurement proceedings, including: tender document preparation assistance through document templates; electronic publication; access control and protection of original documents; market research capabilities; process automation of all tasks involved in the tendering process, from preparation and clearance of bidding documents, to operational acceptance of goods or services procured; support of off-line processes such as pre-qualification of bidders, and evaluation of bids.<sup>5</sup> Depending on the extent of use of information technology in a country, the systems may evolve through the following stages:

(a) *First stage*: In this stage, the use of electronic communications is essentially limited to making tender notices available through electronic means, such as Internet web sites. Such a system is not very complex technologically and requires minimum or no legislative change;

(b) *Second stage*: In this stage, invitations to prequalify and solicitation documents are made available electronically and may be either downloaded by suppliers from a designated website or are transmitted by e-mail upon request. In addition, a number of other actions may be carried out electronically, such as the online registration of suppliers and contractors and notices of impending business opportunities through electronic mail based on supplier profiles;

(c) *Third stage*: This stage involves conversion to full electronic processing and requires substantially more complex technology, operating capabilities and legal and regulatory infrastructure. In this stage, all pre-bidding steps are accomplished electronically—invitation to participate in the procurement, registration, supply of solicitation documents, clarifications, modifications to process or substance of the procurement. Furthermore, submission of bids, opening of bids, filing of minutes of the bidding session, recording of the award decision, reception and filing of complaints, and notice of disposition of complaints, may all be done electronically;

(d) *Fourth stage*: The last stage involves, in addition to the capabilities covered by the third stage, highly developed support and oversight functions, including functions such as settlement of transactions made through the procurement platform; advanced demand aggregation services (whereby the procurement platform operator identifies aggregation possibilities for public sector demand of particular goods or services and actively markets electronic auctions designed to capture associated economies of scale); or advanced buyer support services (whereby the procurement platform operator develops procurement profiles for individual government agencies, particularly for recurrent purchases, and custom tailors market research and transaction facilities that improve the efficiency and economy of those purchases).<sup>6</sup>

5. “Electronic purchasing systems”, which may include electronic catalogues, electronic reverse auctions and “dynamic purchasing”, in turn, are primarily oriented towards discrete item or lot purchasing of standard products or precisely defined services. Their distinguishing characteristics are:

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<sup>4</sup> Talero, *ibid.*

<sup>5</sup> Talero, *ibid.*, para. 33.

<sup>6</sup> Talero, *ibid.*, para. 106.

(a) They involve an electronic, legal equivalent of a physical marketplace where goods are figuratively displayed (electronic catalogue) and buyers and sellers meet under rules of procedure enforced by the marketplace operator;

(b) They provide comparison facilities and electronic pricing mechanisms, but not contract formation facilities, as terms and conditions of contracts are typically pre-established.<sup>7</sup>

6. It is suggested that the flexibility contemplated by the Working Group for its work (see above, para. 2) would be best promoted by bearing in mind not only that States might be at varying stages in the use of electronic communications, but also that even within the same States different procuring entities may not be at the same level of sophistication as regards the use of information technology in the procurement process. It may be further useful to bear in mind that in any case this situation may rapidly change as more experience is gained and technology becomes more widely used, which is one of the reasons underlying the Working Group's wish for a flexible approach to the use of electronic communications in the procurement process. At the same time, however, the Working Group may also wish to consider the appropriate balance between concerns for preserving flexibility and advice that may be needed by States to move forward in the modernization of their procurement processes. An overly cautious approach that would refrain from providing concrete advice on measures to remove possible legal obstacles to the use of electronic communications might itself run counter to the aim of flexibility, since it would not support the efforts of those States that desire to widen the use of electronic communications in the procurement process.

7. The following sections deal with issues related to the use of electronic communications that may arise in connection with any of the first three stages of "electronic tendering systems", as described above (see above, para. 4). Legal issues related to the fourth stage of an electronic tendering system (see above, para. 4(d)), fall for the most part outside the scope of the UNCITRAL Model Procurement Law, as they relate to procurement planning and contract management. Issues related to the use of electronic reverse auctions, as an example of "electronic purchasing systems", are considered in a separate note (A/CN.9/WG.I/WP.35).

## **B. Electronic publication of invitations to participate in specific procurement**

8. Many states and entities now use electronic means to publish invitations for suppliers to participate in specific procurements (including those required to be published by law).<sup>8</sup>

<sup>7</sup> Talero, *ibid.*, para. 35.

<sup>8</sup> Argentina (<http://onc.mecon.gov.ar>),  
Australia (Western) (<https://www.tenders.gov.au/federal/index.shtml>),  
Brazil (<http://www.comprasnet.gov.br/>),  
Canada ([http://www.merx.com/Services/AboutMERX/English/MK\\_SiteMap.asp?FLASH=Yes](http://www.merx.com/Services/AboutMERX/English/MK_SiteMap.asp?FLASH=Yes)),  
Chile ([http://www.chilecompra.cl/portal/centro\\_informaciones/fr\\_ley\\_compras.html](http://www.chilecompra.cl/portal/centro_informaciones/fr_ley_compras.html)),  
the European Union (<http://ted.publications.eu.int/official/Exec?Template=TED/home&DataFlow=XMLRead.dfl&Path=staticDefault.xml&Lang=EN>),  
France (<http://djo.journal-officiel.gouv.fr/MarchesPublics/>),  
Mexico (<http://web.compranet.gob.mx/>),  
the Philippines (<http://www.procurement-service.net/Default.asp>),  
Singapore (<http://www.gebiz.gov.sg/>),



At its sixth session, the Working Group recognized the value of electronic publications as a means to enhance transparency and competition and expressed the view that the Model Law should encourage the electronic publication of information that the Model Law currently required States to publish (A/CN.9/568, para. 21).

9. Article 24(1) of the UNCITRAL Model Procurement Law requires the publication of invitations to tender or invitations to prequalify in an official publication specified by the enacting State when implementing the Model Law (such as an official gazette). In addition, under article 24(2), an invitation shall also be advertised in a “newspaper” or “relevant trade publication or technical or professional journal” of wide international circulation. The provisions of article 24 are incorporated by cross-reference to chapter III of the Model Law in article 46(1) (two-stage tendering) of the Model Law. Similar provisions exist in articles 37(1 and 2) (procurement of services), 47(2) (restricted tendering) and 48(2) (request for proposals). Generally, those other provisions give rise to the same types of issues that are raised in connection with article 24, which are discussed in the following paragraphs and apply, *mutatis mutandis*, to the context of those provisions as well.

10. Article 24 of the UNCITRAL Model Procurement Law implies paper means of publication. Statements in the Guide to Enactment alone setting out the benefits, desirability and possible methods of electronic publication, rather than further provisions in the UNCITRAL Model Procurement Law itself, may not be sufficient to promote electronic publication.

11. An apparently simple solution to allow for the electronic publication of invitations to tender might be to include in article 24 additional clarification similar to the one proposed for inclusion in article 5 (see A/CN.9/WG.I/WP.34, paras. 24-28) that may read “which may include by publication through publicly accessible electronic information systems”, with appropriate explanations in the Guide to Enactment. However, given the impact that the choice of the means of publication inevitably has on the potential group of suppliers, this type of minimal amendment is not likely to address the view expressed by the Working Group that the means of communication chosen by the procuring entity should not unreasonably restrict access to procurement proceedings and should not discriminate against and among suppliers (A/CN.9/568, paras. 34, 41 and 42). Indeed, it would be important to clarify whether and to what extent electronic publication would substitute for paper publication and under what circumstances they may or may not be used by a procuring entity.

12. The Working Group may therefore wish to consider what kind of additional provisions may be desirable to both enable use of electronic publications and prevent discrimination among suppliers. At its sixth session, the Working Group generally agreed that it would be useful to formulate provisions that expressly enabled and, in appropriate circumstances, promoted the use of electronic communications, possibly subject to a general requirement that the means of communication imposed by the procuring entity should not unreasonably restrict access to the procurement. (A/CN.9/568, para. 39).

13. In the light of the above, the Working Group may wish to consider that an enabling clarification along the lines suggested above (see above, para. 11) should be accompanied by a requirement that the means of publication should not compromise the general

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United Kingdom (<http://www.supplyinggovernment.gov.uk/opportunities.asp>),  
United States (<http://www.fedbizopps.gov/>).

principle of accessibility, without, however, specifying the technical means to be used, with a view to preserving technological neutrality.<sup>9</sup>

14. The Working Group may therefore wish to consider the following amendments to articles 24, 37, 47, and 48 of the UNCITRAL Model Procurement Law:

(a) To clarify that the reference to “publication” may include optional or mandatory electronic publication. The Working Group may further wish to consider whether a parenthetical reference in the text could indicate that enacting States could, where possible, insert a reference to a (specified) electronic medium;

(b) To establish conditions for the use of electronic publications so as to ensure that they are made in accessible electronic media; and

(c) Possibly requiring procuring entities to justify the use of electronic publications in the record of the procurement proceedings.

15. Proposed draft amendments to articles 24, 37, 47, and 48 that reflect the considerations set out above are contained in document A/CN.9/WG.I/WP.34/Add.2. The Working Group may wish to consider whether those amendments would adequately reflect its deliberations to date, and whether those amendments would suffice to accommodate the use of electronic publications or whether additional clarification would be needed. The Working Group may further wish to consider in due course, in connection with its consideration of possible improvements to the structure of the Model Law (see A/CN.9/568, paras. 123-126) whether those provisions could be combined in a single article that would apply, as appropriate, to all the various procurement methods contemplated in the Model Law.

16. Additionally, the Working Group may wish to consider whether the provision of detailed guidance would be required, either in the UNCITRAL Model Procurement Law or the Guide to Enactment, to cover, inter alia, such issues as flexibility as to the use of a publication medium, who should decide on a publication medium, whether the use of electronic publication only or the non-use of electronic means should be justified, upon what grounds such decisions may be taken, whether such a decision is to be open to review and who should bear the responsibility of an omission.

<sup>9</sup> Domestic laws on electronic publications in procurement often provide such a requirement. In France, for example, invitations to tender may be published in an “information network” (“*raiseau informatique*”) from which “any interested person” should be able to download the invitation and related documents (see *Décret n° 2002-692* du 30 avril 2002, article 2, *Journal officiel*, No. 103, 3 May 2002, p. 8064). A similar requirement exists in Austria, where § 3(1) of the *Verordnung der Bundesregierung betreffend die Erstellung und Übermittlung von elektronischen Angeboten in Vergabeverfahren (E-Procurement-Verordnung)* requires the procuring entity to choose the means of communication for the transmission of electronic offers and the electronic address to which they shall be transmitted “in a non-discriminatory manner” (*Bundesgesetzblatt für die Republik Österreich*, 28 April 2004, part II). In Sweden, chapter 6, § 2a, of the Act on Public Procurement (SFS 1992:1528) provides that procuring entities may publish invitations to tender in “simplified procedures” in an “electronic database that is open to the public or some other form of notification that can ensure effective competition” (unofficial English translation available at <http://www.nou.se/loueng.html>). In the United States, procuring entities must ensure “that any notice of agency requirements or agency solicitation for contract opportunities is provided in a form that allows convenient and universal user access through a single, Government-wide point of entry” (United States Code Service, title 41, chapter 7, section 426(c)(4) (41 U.S.C.S., § 426 2004)).

17. In domestic practice, there seems to be an interest in replacing paper publications entirely with electronic publications of procurement notices,<sup>10</sup> although most countries seem to accept that paper-based and electronic publications may coexist during a certain transition period. In this connection, the Working Group may further wish to consider whether the Guide to Enactment should discuss possible factors to be taken into account by States in assessing when it is or becomes possible to migrate entirely to electronic publications, such as when a threshold of use of electronic communications has been reached.

### C. Electronic supply of solicitation or prequalification documents, and requests for proposals or quotations

18. Article 26 of the UNCITRAL Model Procurement Law does not expressly deal with the form in which solicitation documents should be provided to suppliers, and contractors, and requires only that they shall be provided “in accordance with the procedures and requirements specified in the invitations to tender”. However, the reference in the same article to the “cost of printing” implies a paper form of solicitation documents. These provisions are incorporated by cross-reference to chapter III of the Model Law in articles 46(1) (two-stage tendering) and 47(3) (restricted tendering) and similar provisions are found in articles 7(2) (prequalification proceedings) and 37(4) (procurement of services). Article 25 (1)(f) of the Model Law, in its turn, requires invitations to tender to indicate “the means of obtaining the solicitation documents and the place from which they may be obtained.” Arguably, these provisions are sufficiently neutral to accommodate provision of solicitation documents in electronic form. However, if words such as “document” and “place” are read in a narrow sense, those provisions might be construed to the effect that only solicitation documents printed on a tangible medium are covered by the Model Law.

19. Some countries expressly authorize procuring entities to transmit solicitation documents, including specifications, project description, draft contracts and other related information by electronic means, subject to a number of controls, such as that there must be a record of the date and time of transmission and receipt of the content of the transmission and that proper identification of originator and addressee be provided.<sup>11</sup> Another way of supplying solicitation documents that, depending on the technology supporting electronic procurement, may become widely used is the posting of documents

<sup>10</sup> “Permitting electronic notice of business opportunities [...] as a substitute for the currently required paper publication [...] is key to agencies’ ability to realize the efficiencies in electronic processes that justify agency investments in these processes” (United States, Interim Rule of 16 May 2001, *Federal Register*, vol. 66, No. 95 (66 FR 27407)). In Chile, article 24 of the *Reglamento de Ley n° 19.886 de Bases sobre Contratos Administrativos de Suministro y Prestación de Servicios (Decreto n° 250*, of 9 March 2004) already requires all procuring entities to publish invitations to participate in procurement through the electronic tendering system. Article 62 of the *Decreto* admits tendering in paper form only in exceptional circumstances (available at [http://www.chilecompra.cl/portal/centro\\_informaciones/](http://www.chilecompra.cl/portal/centro_informaciones/)). (The *Decreto* defines “Information System” as “an information system for public procurement and electronic contracting [...] which is composed as software, hardware and electronic communications and support infrastructure that allows to conduct procurement”).

<sup>11</sup> Spain, Real Decreto 1098/2001 (*Reglamento general de la Ley de Contratos de las Administraciones Públicas*), of 12 October 2001, article 80, paragraph 2 (*Boletín oficial del Estado*, No. 257, 26 October 2001, p. 39252, available at <http://www.boe.es/boe/dias/2001-10-26/pdfs/A39252-39371.pdf>).

on an accessible database or information system—such as a special web site—from which suppliers can download them. The invitation to tender may even incorporate those documents by reference, similarly to what commercial entities do in respect of general conditions of contract made available through the Internet.

20. For the avoidance of doubt, it may be useful to clearly state in article 26 of the Model Law that a procuring entity's duty to provide the solicitation documents may be met by making those documents available through a publicly accessible electronic information system from which they can be downloaded or printed by the suppliers, a possibility which the laws of some countries already recognize.<sup>12</sup>

21. Proposed draft amendments to articles 7, 26 and 37 that reflect the considerations set out above are contained in document A/CN.9/WG.I/WP.34/Add.2. The Working Group may wish to consider them, as well as adding provisions on this matter in articles 48 through 50 of the Model Law, taking into account the flexible nature of the procurement methods contemplated in those articles. The Working Group may further wish to consider in due course, as has been suggested in connection with the proposed amendments to article 24 (see above, para. 15), combining such additional provisions in a single article that would apply, as appropriate, to all the various procurement methods contemplated by the Model Law.

#### **D. Electronic submission of tenders, proposals and quotations**

22. Article 30(5)(a) of the UNCITRAL Model Procurement Law provides that tenders must be submitted “in writing, signed and in a sealed envelope”. Those provisions are incorporated by cross-reference to chapter III of the Model Law in articles 46(1) (two-stage tendering) and 47(3) (restricted tendering), and similar provisions are implied in articles 45 (procurement of services) and 48(6) (request for proposals).

23. Article 30(5)(a) and its corresponding provisions elsewhere in the Model Law do not contemplate the submission of tenders through electronic means. However, paragraph (5)(b) of the same article provides that without prejudice to the right of a supplier or contractor to submit a written, signed tender in a sealed envelope, a tender “may alternatively be submitted in any other form specified in the solicitation documents that

<sup>12</sup> For example, article 2 of *Décret 2002-692* of France, which governs the dematerialization of procurement procedures, provides that “interested persons” must be able to “consult and download to their computer the rules of the [procurement] proceedings.” It provides further that “interested persons, in a tendering proceeding and invited suppliers in a restricted tendering or negotiated procedure shall also have the right to consult and download to their computer the invitation to tender and the solicitation documents,” provided that they advise the procuring entity as to “name of the supplier, the name of the person downloading the document and an address allowing for electronic communication with acknowledgement of receipt” (see above, note 9). A similar provision—albeit less detailed—exists in Lithuania, where article 22(1) of the Law on Public Procurement (Law No. IX-1217, of 3 December 2002), stipulates that a procuring entity may provide the supplier with contract documents “upon supplier’s request”, “together with the invitation to tender” or “by placing on the Internet or using other electronic means” (English translation of the text is available with the Secretariat). In Mexico, article 31 of the *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público* provides that solicitation documents shall be made available at the address indicated by the procuring entity as well as by electronic means of publication established by the Government (available at <http://www.funcionpublica.gob.mx/unaopspf/doctos/adquisiciones/leyadq.doc>).

provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality”.

24. Thus, article 30(5)(b) can be read as offering procuring entities the option to allow the submission of tender by electronic means. Nevertheless, two questions need to be considered in connection with this provision:

(a) Whether the current wording is sufficient to ensure the functional equivalence between written, signed tenders in a sealed envelope and electronic tenders (see below, paras. 25-33); and

(b) Whether a procuring entity could contemplate the submission of tenders by electronic means only (see below, paras. 34-37).

# 1. Conditions for functional equivalence between electronic and written tenders

25. As regards question (a), it appears that the legislative intention of article 30(5)(b) is indeed to make it possible for a supplier to submit a tender electronically if the supplier so wishes and the procuring entity has admitted this possibility. However, the Working Group may find it nevertheless useful to elaborate on the conditions for functional equivalence. Arguably, the reference to a form that “provides a record of the content of the tender” would generally meet the criteria for functional equivalence between a data message and a writing under article 6 of the UNCITRAL Model Law on Electronic Commerce,<sup>13</sup> since the notion of “record” usually implies a medium that contains information which is “accessible” in a manner that makes it “usable for subsequent reference”.<sup>14</sup>

26. However, it appears that the words “a similar degree of authenticity, security and confidentiality” might be too general to offer sufficient guidance as to what conditions need to be met by electronic tenders in order to be recognized as having the same legal value as tenders submitted in writing, signed and in a sealed envelope. Already at the time of adoption of the Model Law, it was recognized that additional “rules and techniques” might be needed, for instance “to guard the confidentiality of tenders and prevent ‘opening’ of the tenders prior to the deadline for submission of tenders”.<sup>15</sup>

27. This question is closely related to the issue of controls over the use of electronic communications, in particular as regards security, confidentiality and authenticity of submissions, and integrity of data, which the Working Group considered at its sixth session. At that time, the Working Group recognized that efficient and reliable electronic procurement systems required appropriate controls as regards security, confidentiality and authenticity of submissions, and integrity of data, for which special rules and standards

<sup>13</sup> For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I (also published in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I). The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.99.V.4, and are available in electronic form at the UNCITRAL web site <http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm>.

<sup>14</sup> Article 6(1) of the UNCITRAL Model Law on Electronic Commerce reads as follows: “Where the law requires information to 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>15</sup> Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services, remarks to article 30, para. 3. For the text of the Guide to Enactment, see document A/CN.9/403, reproduced in the *UNCITRAL Yearbook*, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex II.

might need to be formulated. There was general agreement within the Working Group that the following principles provided a good basis for the formulation of specific rules, standards or guidance on the matter:

- (a) The means of communication imposed should not present an unreasonable barrier to participation in the procurement proceedings;
- (b) The means used should make it possible to establish the origin and authenticity of communications;
- (c) The means and mechanisms used should be such as to ensure that the integrity of data is preserved;
- (d) The means used should enable the time of receipt of documents to be established, when the time of receipt is significant in applying the rules of the procurement process;
- (e) The means and mechanisms used should ensure that tenders and other significant documents are not accessed by the procuring entity or other persons prior to any applicable deadline;
- (f) That the confidentiality of information submitted by, or relating to, other suppliers is maintained (A/CN.9/568, paras. 41 and 42).

28. A number of regional<sup>16</sup> or domestic<sup>17</sup> procurement systems that allow for the electronic submission of tenders contemplate security requirements that are largely similar to those tentatively endorsed by the Working Group, or at least some<sup>18</sup> of them.

<sup>16</sup> For instance, Annex XXIV of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (*Official Journal of the European Union*, No. L 134, 30 April 2004, p. 1), provides that devices for the electronic receipt of tenders, proposals or quotations must at least guarantee, through technical means and appropriate procedures, that: (a) electronic signatures relating to tenders, requests to participate and the forwarding of plans and projects comply with national provisions adopted pursuant to Directive 1999/93/EC [*N.B. this Directive established a community framework for electronic signatures*]; (b) the exact time and date of the receipt of tenders, requests to participate and the submission of plans and projects can be determined precisely; (c) it may be reasonably ensured that, before the time limits laid down, no one can have access to data transmitted under these requirements; (d) if that access prohibition is infringed, it may be reasonably ensured that the infringement is clearly detectable; (e) only authorized persons may set or change the dates for opening data received; (f) during the different stages of the contract award procedure access to all data submitted, or to part thereof, must be possible only through simultaneous action by authorized persons; (g) simultaneous action by authorized persons must give access to data transmitted only after the prescribed date; (h) data received and opened in accordance with these requirements must remain accessible only to persons authorized to acquaint themselves therewith.

<sup>17</sup> For instance, under the Austrian regulations on electronic procurement, electronic tenders are subject to a number of controls, including compliance with “encryption and decryption method or methods” specified by the procuring entity in the solicitation documents, which must “correspond to state-of-the-art strong encryption standards”. The procuring entity must also ensure that “the decryption of tenders cannot occur before the end of the deadline for submission of tenders”. Furthermore, the time of delivery of offers shall be “documented by a time-stamp and shall be immediately confirmed to the offeror”. Lastly, tenders submitted electronically must be filed in such a way that their authenticity, integrity and confidentiality is guaranteed; no unauthorized access can occur until they are opened; and any attempted access

29. It should be noted, however, that most of the above principles already apply—or should apply—to paper-based procurement procedures—for example, the principle that tenders should be authentic or should remain confidential during the tendering procedure. Therefore, at its sixth session, the Working Group was invited to carefully consider the need for any specific additional standards or rules, and to take into account the extent to which the relevant background law, such as general laws on electronic commerce and electronic signatures, already addressed the issues that the proposed principles were concerned with. Another view was that if the Working Group intended to formulate legislative guidance that enabled use of electronic communications in the procurement process without mandating it, it would be useful to spell out in the Model Law itself the conditions under which electronic communications should be used (A/CN.9/568, paras. 43 and 44).

30. It appears that the rationale for suggesting a cautious approach concerning controls over electronic communications is the concern that procurement legislation should avoid creating different standards depending on the means of communications used. It should be noted, however, that the novelty of electronic communications may prompt legislators to

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until opening can be traced (*E-Procurement-Verordnung 2004* (see above, note 9), §§ 4-7). In France, the procuring entity must “ensure the security of the transactions through an information network accessible to all candidates in a non-discriminatory manner.” The procuring entity must further “take the necessary measures to ensure the security of the information relating to the candidates and their offers” and “that the information remains confidential.” For this purpose, the procuring entity may “require the candidates to equip their files with a security system such that their applications and tenders cannot be opened without their agreement” (*Décret n° 2002-692 du 30 avril 2002* (see above, note 9), articles 7 and 8).

<sup>18</sup> In Sweden, a contracting entity may allow a tender to be submitted by “electronic transmission or in some other manner provided that it ensures that the contents of the tender shall not be disclosed before it is opened as prescribed in Article 7” (Act on Public Procurement (see above, note 9), chapter 6, § 5 and similar provisions may be found in chapter 1, § 19). The German procurement regulations (*Verdingungsordnung für Leistungen*) do not contain a discrete catalogue of security requirements for electronic tenders. However, amendments introduced in various provisions to accommodate electronic tenders expressly reflect most—if not all—of the principles of the EU Directives. Thus, when tenders are received electronically, the procuring entity must ensure “that the content of the tender will only be accessible after the expiration of the deadline for its submission” (§ 18). Electronic tenders must be “marked accordingly and kept safely” (“*unter Verschluss*”) (§ 22) (*Bundesanzeiger*, 20 November 2002, No. 216a). The German Decree on the Award of Public Contracts (*Verordnung über die Vergabe öffentlicher Aufträge*) provides in its § 15 that procuring entities must ensure the confidentiality of electronic tenders, which must be signed with a qualified electronic signature in accordance with the German Law on Electronic Signatures (*Signaturgesetz*) and remain encrypted until the end of the deadline for submission of tenders (*Bundesgesetzblatt*, I 2001, p. 110). In Lithuania (see above, note 12, article 23(7)), tenders may be submitted electronically provided that “the electronic means employed ensure that the contracting authority or other suppliers will access the contents of the tenders only after the expiry of the period fixed for receipt of tenders”, the tender “contains all information requested in the contract documents” and that “upon submission of the tender by electronic means, the supplier immediately forwards a confirmation of the submitted tender by non-electronic means, or provides the contracting authority, by non-electronic means, with a certified copy of the tender”. A similar requirement is provided in article 27 of *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público* of Mexico, which provides that tenders submitted electronically shall use technology that ensures the confidentiality and inviolability of the information and that an agency of the Government shall provide certification services to support the electronic identification methods used by suppliers and contractors (see above, note 12).

formulate specific rules for what is perceived as a particular problem caused by the use of new technologies in procurement. Indeed, a number of countries have already enacted legislation that specifies certain standards to be used in electronic communications aimed at ensuring that those communications provide the same level of reliability that is generally assumed to exist in the case of paper-based communications.<sup>19</sup> These general rules are in some cases supplemented by detailed regulations.<sup>20</sup>

31. The Working Group may wish to consider that the aim of avoiding double standards for electronic and paper-based communications may be best served by developing general rules that would spell out requirements that under the current text of the UNCITRAL Model Procurement Law are assumed to apply as a matter of course for paper communications (for example, requirements as to the authenticity of bids and other documents), but would make it clear for the avoidance of doubt that they also apply to electronic communications. The Guide to Enactment might then provide further guidance

<sup>19</sup> E.g. within the European Union, Austria (see note 9 above), France (*ibid.*), Germany (see note 18, above), Spain (see note 11, above). In the United States, sect. 4.502 of the Federal Acquisition Regulations requires the heads of procuring agencies before using electronic commerce to “ensure that the agency systems are capable of ensuring authentication and confidentiality commensurate with the risk and magnitude of the harm from loss, misuse, or unauthorized access to or modification of the information” (available at <http://www.arnet.gov/far/loadmainre.html>). In the Philippines, government electronic procurement systems (G-EPS) are subject to a number of general requirements set forth in sect. 8.1.2 of the Implementing Rules and Regulations of Republic Act No. 9184 (available at [http://www.neda.gov.ph/references/RAs/Approved%20IRR-A%20of%20R.A.%209184\(July%2011,%202003\).pdf](http://www.neda.gov.ph/references/RAs/Approved%20IRR-A%20of%20R.A.%209184(July%2011,%202003).pdf)), including that the Bid Awards Committee “shall have complete control of the bidding process” and “sole authority to open bids”, that the systems must be “virus-resilient and must provide sufficient security” such as “firewall and encryption devices”, that they must provide for the use of electronic signatures “and other current electronic authentication devices” and have “sufficient redundant back-up facilities.”

<sup>20</sup> For example, sect. 9 of the Implementing Rules and Regulations of Republic Act No. 9184 of the Philippines (see note 19, above), which provides as follows:

“9.1.1 *Security*—The G-EPS shall be protected from unauthorized access or interference through the incorporation of security features such as, but not limited to, firewalls. Period tests shall be conducted to ensure that the system cannot be breached.

“9.1.2 *Integrity*—The G-EPS shall ensure that no person, including the system administrator or chairperson and members of the [Bid Awards Committee], shall be able to alter the contents of bids submitted through the system or read the same ahead of the stipulated time for the decryption or opening of bids. For this purpose, bids submitted through the G-EPS shall be sealed through electronic keys. The authenticity of messages and documents submitted through the G-EPS shall also be ensured by the use of electronic signatures.

“9.1.3 *Confidentiality*—The G-EPS shall ensure the privacy of parties transacting with it. For this purpose, no electronic message or document sent through the system shall be divulged to third parties unless such electronic message or document was sent after the sender was informed that the same will be made publicly available. The G-EPS shall protect the intellectual property rights over documents, including technical designs, submitted in response to Invitations to Apply for Eligibility and to Bid.

“9.1.4 *Audit Trail*—The G-EPS shall include a feature that provides for an audit trail for on-line transactions, and allows the Commission on Audit (COA) to verify the security and integrity of the system at any time.

“9.1.5 *Performance Tracking*—The performance of manufacturers, suppliers, distributors and consultants shall be tracked to monitor compliance with delivery schedules and other performance indicators. Similarly, the performance of procuring entities shall be tracked to monitor the settlement of their obligations to manufacturers, suppliers, distributors, contractors and consultants.”



on best practices to ensure compliance with those requirements in the case of electronic communications, which might draw on existing domestic regulations and rules on the matter.

32. It is suggested that such an approach, which is reflected in a draft provision in document A/CN.9/WG.I/WP.34/Add.2 (draft article 30 *bis*), would be consistent with the general agreement, at the sixth session of the Working Group, that any guidance on this matter should be formulated in a manner that covered all means of communication, giving a general idea on the controls that were needed, and should not be overly prescriptive (A/CN.9/568, para. 45).

33. Another matter related to the conditions for functional equivalence between written tenders submitted in a sealed envelope and electronic tenders is the manner of opening tenders. Article 33(1) of the UNCITRAL Model Procurement Law provides that tenders “shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders [...], at the place and in accordance with the procedures specified in the solicitation documents.” Article 33(2) provides further that “all suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders.” While article 33(1) seems to be sufficiently broad to accommodate any system for opening tenders, article 33(2) suggests the physical presence of suppliers and contractors at a given place and time. Some countries have introduced enabling provisions that contemplate opening of tenders through an electronic information system that would automatically transmit the information that is usually announced at the opening of tenders.<sup>21</sup> The Working Group may wish to consider including a provision that would enable procuring entities to use electronic communications as a substitute for tender opening in the presence of suppliers and contractors. Proposed additions to article 33 are contained in document A/CN.9/WG.I/WP.34/Add.2.

## 2. Optional or mandatory nature of electronic tenders

34. Article 30(5)(b) of the UNCITRAL Model Procurement Law specifically provides for the right of a supplier to submit a tender by the “usual” method set out in article 30(5)(a), namely in writing, signed and in a sealed envelope. According to the Guide to Enactment of the Model Law, this is an “important safeguard against discrimination in view of the uneven availability of non-traditional means of communication such as [Electronic Data Interchange (EDI)]”.<sup>22</sup> Consequently, it appears that suppliers cannot be required to submit a tender electronically and may insist on using traditional means of communication for that purpose.

35. In some countries, it appears that procuring entities have the right to choose when tenders may be submitted electronically<sup>23</sup> and, if so, whether or not tenders may be

<sup>21</sup> In Chile, for example, article 33 of *Decreto n° 250*, of 9 March 2004 (see above, note 10) provides that the opening of tenders shall be effected through an “Information System”, which shall automatically release and open the tenders at the date and time provided in the solicitation documents.” It provides further that “the Information System shall ensure certainty as to the date and time of opening and shall allow the tenderers to know at least the following conditions of the remaining tenders: (a) identity of tenderer; (b) basic description of good or service tendered; (c) initial and global price of tender; (d) identification of tender security, if any”.

<sup>22</sup> Guide to Enactment, remarks to article 30, para. 3.

<sup>23</sup> In Germany, for example, § 15 of the *Verordnung über die Vergabe öffentlicher Aufträge* (see above, note 18) provides that procuring entities “may authorize the submission of tenders in

submitted in paper form as well, which in some countries is generally admitted unless the invitation to tender states otherwise.<sup>24</sup> However, in those countries suppliers are not allowed to switch from one medium to the other or to use both media to submit tenders or parts thereof.<sup>25</sup> A somewhat different approach is taken by countries in which procuring entities are allowed to accept the submission of tenders electronically but do not seem to have the power to prescribe electronic submission,<sup>26</sup> with the consequence that suppliers seem to retain the right to choose between submission of tenders in paper form, by electronic means, or in electronic form stored on a tangible medium.<sup>27</sup> Lastly, some countries require procuring entities to accept tenders and other documents submitted electronically, as long as they are authenticated with methods prescribed by the law.<sup>28</sup>

36. It would appear that the latter approach is more in line with the Working Group's general desire to treat the issue in a flexible manner (A/CN.9/568, para. 33). However, the Working Group may also wish to bear in mind that certain methods of procurement (such as electronic reverse auctions) are nearly always conducted by electronic means only.<sup>29</sup> It is indeed an essential element of those procurement methods that all suppliers are required to submit their bids by electronic means only. Accordingly, once the conditions for use of any such special procurement method are met, the procuring entity must have the right to

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other forms than in writing per post or in person”.

<sup>24</sup> In Austria, § 68 of the *Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz 2002—BvergG)* provides in paragraph 1 that tenders can be submitted electronically “as far as the procuring entity has at its disposal the technical and further conditions”. The procuring entity must give notice, at the latest with the invitation of tenders, as to whether electronic tenders are admitted and, if so, which are “the authorized method for encoding and decoding as well as the authorized formats for documents and communication.” If the procuring entity “has made no declaration on the possibility to deliver offers electronically, the delivery of offers by electronic means is not permitted.” Paragraph 2 provides further that if the submission of tenders by electronic means is admitted, “the invitation to tender must state whether tenders can be delivered only electronically or whether they can be submitted either electronically or in paper form.” If the procuring entity has made no declaration on this, the delivery of offers is allowed either by electronic means or in paper form (*Bundesgesetzblatt* Nr. 99/2002).

<sup>25</sup> Austria, *Bundesvergabegesetz 2002*, § 68, paragraph 3: “If the delivery of offers by electronic means is permitted, the bidders that have delivered an electronic offer may not make an offer or parts of an offer in paper form. The foregoing does not apply to parts of offers such as [documentary evidence require by the law] as far as these parts of the offer are not available electronically” (see above, note 24).

<sup>26</sup> According to article 3 of *Décret n° 2002-692* of France, the procuring entity “may accept the submission of applications to prequalify or tenders by electronic means”, and the decision to do so, along with “the modalities for the electronic submission of applications to prequalify or tenders must be indicated in the invitation to prequalify or invitation to tender or, for negotiated procedures, in the letter of invitation.” (see above, note 9).

<sup>27</sup> This is the case, for example, in France where article 5 of the *Décret n° 2002-692* provides that suppliers “shall choose between electronic submission of their applications and tenders, on the one hand, and their submission on paper form or on electronic form stored on a physical medium on the other hand” (see above, note 9).

<sup>28</sup> This is the case, for example, in Argentina (see *Decreto 1023/2001 con las modificaciones introducidas por los Decreto Nros. 666/2003 y 204/2004 y por la Ley 25.563. Régimen General. Contrataciones Públicas Electrónicas. Contrataciones de Bienes y Servicios. Obras Públicas. Disposiciones Finales y Transitorias* (available at [http://onc.mecon.gov.ar/paginas/inicio/Decreto\\_delegado\\_1023\\_2001.doc](http://onc.mecon.gov.ar/paginas/inicio/Decreto_delegado_1023_2001.doc)), article 21.

<sup>29</sup> Only a few countries admit auctions outside the context of electronic procurement. One of them is Brazil, where the matter is regulated in *Lei n° 10.520*, of 17 July 2002 (available at [https://www.planalto.gov.br/ccivil\\_03/Leis/2002/L10520.htm](https://www.planalto.gov.br/ccivil_03/Leis/2002/L10520.htm)).

refuse to accept bids submitted by other means. Another aspect which the Working Group may also wish to consider is that, even for procurement methods which do not by their nature require the use of electronic communications, the procuring entity might have a legitimate interest, for purposes of economy or efficiency, to take advantage of fully or partly automated devices for receiving and processing tenders, such as a specially designated portal or Internet web site. In some countries the law indeed encourages the use of fully automated systems for receiving and processing tenders to which otherwise the ordinary tendering rules apply.<sup>30</sup>

37. In view of the above, the Working Group may wish to consider adding a provision to the UNCITRAL Model Procurement Law, possibly as a new paragraph to the current article 30, whereby procuring entities would be given the right to indicate whether they will accept the submission of tenders by means other than “in writing, signed and in a sealed envelope” (that is, by electronic means) and, if so, whether or not tenders may be submitted in paper form as well. Such a provision may further state that tenders in paper form are deemed to be acceptable unless the invitation to tender states otherwise, in which case the suppliers would have to follow the instructions given by the procuring entity. The Working Group may further wish to consider whether a procuring entity should be required to justify the choice of electronic tenders only. Proposed amendments to article 30, reflecting some of the above considerations, are contained in document A/CN.9/WG.I/WP.34/Add.2.

## **E. Form of other communications during the procurement process**

38. Article 9(1) of the UNCITRAL Model Procurement Law provides that, subject to any requirement of form specified by the procuring entity when first soliciting participation, communications are to be in a form that “provides a record of the content of the communication.” Although this article might be interpreted as allowing the procuring entity to require the use of electronic communications, the deliberations of the Working Group at the time of the preparation of the Model Law indicate that the original intention was contrary to that.<sup>31</sup>

39. Article 9(3) states further that the procuring entity shall not discriminate against or among suppliers on the basis of the form in which they transmit or receive communications. At the sixth session of the Working Group, it was pointed out that, in certain circumstances, a requirement for use of electronic communications in a given case

<sup>30</sup> The Implementing Rules and Regulations of Republic Act No. 9184 of the Philippines (see above, note 19), for example, not only require all procuring entities to “post all procurement opportunities, results of bidding and related information” on a government electronic procurement system, or G-EPS (sect. 8.2.1), but mandates them to “fully use the G-EPS” (sect. 8.3.1). The Rules provide further that G-EPS “may support the implementation of e-Bid submission processes, which includes creation of electronic bid forms, creation of bid box, delivery of bids submissions, notification to supplier of receipt of bids, bid receiving and electronic bid evaluation. This facility shall cover all types of procurement for goods, infrastructure projects and consulting services” (sect. 8.2.4.3).

<sup>31</sup> See, for example, the views of Australia and Canada on article 9 of the draft Model Law that can be found in A/CN.9/376 and Add.1 and 2 (reproduced in the *UNCITRAL Yearbook*, vol. XXIV: 1993 (United Nations publication, Sales No. E.94.V.16), part two, I, D (available at <http://www.uncitral.org/english/yearbooks/yb-1993-e/yb-1993-index-e.htm>); see also A/CN.9/371 (published in the same volume of the *UNCITRAL Yearbook*, part two, I, A), paras. 82-90.

might effectively result in discrimination against or among suppliers if the means used to engage in electronic communications were not reasonably accessible to potential suppliers (A/CN.9/568, para. 34). There was also broad agreement that the rule in article 9(3) did not necessarily require all suppliers to use the same methods for communication with the procuring entity (A/CN.9/568, para. 35).

40. It would appear, therefore, that the Working Group would envisage a general rule in article 9 that would authorize procuring entities to communicate with suppliers and contractors by electronic means, but would give contractors the right to choose between electronic communications and paper-based communications, where such alternative existed. Nevertheless, the Working Group may wish to consider how such a provision would relate to the conduct of those procurement methods that, by their very nature, require fully automated processes, or cases where the procuring entity might have a legitimate interest, for purposes of economy or efficiency, to use only fully or partly automated devices for communicating with suppliers and contractors (see above, para. 36).

41. Apart from communications sent individually to suppliers and contractors, the Working Group may wish to consider the form of notices and other communications that the procuring entity may be required to send to all bidders, such as, for example, an addendum to the solicitation documents under article 28(2) (similar provisions may be found in articles 40(2), 48(5) and 49(2)), invitations to meetings convened under articles 28(3) and 40(3), and notices of the extension of deadlines for submission of tenders under article 30(4). Those communications may be sent to the electronic addresses provided by the suppliers and contractors. Depending on the technology used by the procuring entity, it may however appear more expeditious to post those notices and documents on an accessible database or information system—such as a special website—from which suppliers can download them (see above, para. 19). Some countries already recognize that possibility.<sup>32</sup> The Working Group may wish to consider the desirability of including a provision in article 9 of the Model Law to the effect that a procuring entity's duty to provide certain notifications to suppliers and contractors may be met by publishing the notice in a publicly accessible electronic information system from which they can be downloaded or printed by the suppliers. Proposed draft amendments to article 9 are contained in document A/CN.9/WG.I/WP.34/Add.2.

42. Another issue for the Working Group's consideration relates to the conduct of meetings with suppliers or contractors and the manner of handling requests for clarifications of solicitation documents and responses thereto. Article 28(1 and 2) of the Model Law deals with requests for clarification of the solicitation documents, the manner in which the procuring entity shall respond to any such request and modifications to the solicitation documents. It requires the procuring entity to communicate the clarification and modifications "to all suppliers or contractors to which the procuring entity has provided the solicitation documents." Those provisions are incorporated by cross-reference

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<sup>32</sup> For example, sect. 8.4 of the Implementing Rules and Regulations of Republic Act No. 9184 of the Philippines (see above, note 19), which provides as follows:

"8.4.2 Requests for clarification from bidders may be sent electronically [...]. To be binding on bidders, clarifications and amendments to the Invitation to Apply for Eligibility and to Bid and to the bidding documents shall be in the form of Supplemental/Bid Bulletins which shall be posted in the G-EPS bulletin board.

"8.4.3 The Supplemental /Bid Bulletins mentioned [above] as well as all other notices to be made [...] to the bidders or prospective bidders shall be posted in the G-EPS bulletin board and sent electronically to the e-mail address indicated in the bidder's registration."

to chapter III of the Model Law in articles 46(1) and 47(3) and similar provisions are found in articles 40(1 and 2), 48(5) and 49(2). It appears that those provisions are drafted in a technologically neutral manner and do not prescribe any particular form of communication. The Working Group may therefore wish to consider that the possible use of electronic communications for the purposes of those articles might be covered by the general provisions on the form of communications under amended article 9.

43. The situation may be more complex in connection with paragraph 3 of articles 28 and 40, which address meetings with suppliers or contractors, insofar as the word “meeting” usually suggests the physical presence of persons at the same place and time. Some countries have introduced enabling provisions that authorize procuring entities to dispense with the requirement of an actual meeting, as long as it is possible for the procuring entity and the suppliers to establish some other form of simultaneous communication, such as by using teleconferencing facilities.<sup>33</sup> The Working Group may wish to consider including a provision that would enable procuring entities to use electronic communications as a substitute for face-to-face meetings with suppliers and contractors. Proposed draft amendments to articles 28 and 40 reflecting the above considerations are contained in document A/CN.9/WG.I/WP.34/Add.2.

## **F. Legal value of electronic documents used in or resulting from procurement proceedings**

44. In addition to the legal issues set out in paragraphs 8-43 above, enacting States may be interested in ensuring that procurement contracts concluded electronically within their domestic systems are fully enforceable, and that electronic communications and documents exchanged during the procurement process will not be devoid of legal value, including evidentiary value in administrative review or court proceedings.

45. As discussed below, some of these issues may be suitable for regulation by specific provisions in government procurement law. However, a number of issues will require appropriate treatment in other legislation.

### **1. Procurement contracts and electronic signatures**

46. Articles 27(y) and 38(u) refer to a “written” procurement contract. Article 36(2)(a) and (b) provides that the solicitation documents may require the supplier or contractor whose tender has been accepted to “sign a written procurement contract” conforming to the tender, in which case the contract must be signed within a reasonable period of time after the notice of acceptance of the tender is dispatched to the supplier or contractor.

47. In domestic practice, some countries authorize the notice of acceptance of a tender to be sent electronically.<sup>34</sup> In principle, it should be possible for a procuring entity in a

<sup>33</sup> For example, sect. 8.4 of the Implementing Rules and Regulations of Republic Act No. 9184 of the Philippines (see above, note 19), which provides as follows:

“8.4.1 Pre-bid conferences shall be conducted in accordance with Section 22 [hereof]:  
*Provided, however,* that the requirement for face-to-face bidding conferences may be replaced once videoconferencing or similar technology becomes the norm in business transactions in the country. Procuring entities with videoconferencing capabilities that have manufacturers, suppliers, distributors, contractors and/or consultants that also have videoconferencing capabilities may conduct their pre-bidding conferences electronically.”

<sup>34</sup> United States Code Service, title 41, section 253 b (c) (41 U.S.C.S. § 253b (2004)): “The award

country where the law does not create obstacles to the legal recognition of contacts negotiated through electronic means to accept electronically executed procurement contracts. However, countries may also wish to prescribe the manner in which the parties will sign or otherwise authenticate a procurement contract concluded electronically.<sup>35</sup>

48. The options available to the Working Group seem to be essentially the following:

(a) Whether the UNCITRAL Model Procurement Law should expressly allow for the execution of a procurement contract by electronic means and, if so, whether it should also refer to the possibility for the enacting State to prescribe procedures for signing or authenticating a procurement contract concluded electronically; or

(b) Whether the matter should be left for other legislation of the enacting States, in which case the Guide to Enactment might briefly set out the relevant issues.

49. In accordance with article 6 of the UNCITRAL Model Law on Electronic Commerce, “where the law requires information to 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.” Article 11 of that Model Law provides further that “where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.” As regards signature requirements, article 7 of the UNCITRAL Model Law on Electronic Commerce provides that, where the law requires a signature of a person, that requirement is met in relation to a data message if: “(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 was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.” The reliability requirement set forth in this provision is further elaborated in article 6(3) of the UNCITRAL Model Law on Electronic Signatures,<sup>36</sup> which provides that an electronic signature is considered to be reliable if:

“(a) The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

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of a contract shall be made by transmitting, in writing or by electronic means, notice of the award to the successful bidder. Within 3 days after the date of contract award, the executive agency shall notify, in writing or by electronic means, each bidder not awarded the contract that the contract has been awarded.”

<sup>35</sup> In Austria, § 100 of the *Bundesvergabegesetz 2002* (see above, note 24) provides in paragraph 1 that notice of award can be sent to suppliers and contractors electronically. However, § 102, paragraphs 1 and 2, contemplate the execution of the procurement contract through the exchange of paper documents by registered mail tenders, while paragraph 3 of that provision only authorizes the Federal Government to issue regulations on “contract execution” (“*Vertragsabschluss*”) by electronic means, including regulations to guarantee the confidentiality, authenticity and integrity of data transmitted electronically by means of secure electronic signatures, as well as their confidentiality.” Rules on the authenticity and integrity of electronic tenders are contained in regulations issued recently (*E-Procurement-Verordnung 2004*, see above, note 9). Although the regulations do not expressly refer to the execution of the procurement contract, the same requirements would arguably apply.

<sup>36</sup> For the text of the Model Law, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*, annex II. The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.02.V.8, and are available in electronic form at the UNCITRAL web site (<http://www.uncitral.org/english/texts/electcom/ml-elecsig-e.pdf>).

“(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 a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.”

50. An apparently simple solution to the issue of electronic signatures might be to incorporate in the UNCITRAL Model Procurement Law provisions along the lines of article 7 of the UNCITRAL Model Law on Electronic Commerce or article 6(3) of the UNCITRAL Model Law on Electronic Signatures. However, as noted earlier, the nature and purpose of those other texts differ from those of the UNCITRAL Model Procurement Law and the solutions they contain may not be immediately transposable to the latter's context (A/CN.9/WG.I/WP.34, paras. 7-13). Furthermore, the type of authentication methods that a procuring entity is capable of accepting may be limited for various reasons, including concerns over the appropriate level of reliability and availability of supporting technology. Lastly, issues related to the interoperability of information systems, both among public bodies in the enacting State, as well as within a given region, suggest that enacting States should have broad latitude in determining which methods of authentication they would accept in the procurement process.<sup>37</sup>

51. Another matter that the Working Group may wish to consider is the entry into force of a procurement contract. Article 36(4) of the UNCITRAL Model Procurement Law provides that a procurement contract enters into force when the notice of acceptance of the tender “is dispatched to the supplier or contractor that submitted the tender, provided that it is dispatched while the tender is in force.” The notice is dispatched when “it is properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by a mode authorized by article 9.” Article 15 of the UNCITRAL Model Law on Electronic Commerce, which deals with time and place of dispatch and receipt of data messages, provides that 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.” Although this provision does not expressly require the data message to be “properly addressed”, this requirement is implicit in article 15.

52. It appears therefore that article 36(4) of the UNCITRAL Model Procurement Law is drafted in a technologically neutral manner and could in its current form satisfactorily accommodate electronic transmissions of notices of acceptance, in particular in conjunction with any general requirement that the Working Group may wish to make that a system for the exchange of electronic communications in the procurement process should provide adequate means for determining the date and time of dispatch and receipt of communications, documents and tenders (see above, para. 27).

53. A draft proposal for general enabling provisions in article 36 along the lines suggested in paragraph 48, option (a) above, is contained in document A/CN.9/WG.I/WP.34/Add.2.

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<sup>37</sup> See Christine Kirchberger and Jon Ramón y Olano, *Issues of Security and Interoperability in Electronic Public Procurement* (manuscript available with the Secretariat).

## 2. Record of procurement proceedings

54. Article 11 of the UNCITRAL Model Procurement Law requires the procuring entity to maintain a record of the procurement proceedings containing, at a minimum, certain information, and makes provisions on the extent to which that information shall be accessible to interested persons. The Model Law itself does not prescribe the form of the record and does not seem to prevent a procuring entity from maintaining the record in electronic form.

55. Article 10 of the UNCITRAL Model Law on Electronic Commerce provides that, where the law requires that certain documents, records or information be retained, that requirement is met by retaining data messages, provided that the following conditions are satisfied: (a) the information contained therein is accessible so as to be usable for subsequent reference; (b) the data message is retained in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and (c) such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time when it was sent or received.

56. To the extent that this provision only establishes general criteria, without specifying the means that may be used to satisfy its requirements, it seems that article 10 of the UNCITRAL Model Law on Electronic Commerce could provide a useful basis to enable electronic records of procurement proceedings, if the Working Group wishes to include a provision on the matter.

57. In the event the Working Group may find it desirable to include such a provision in the UNCITRAL Model Procurement Law, it may also find it useful to provide that regulations to be issued under article 4 of the UNCITRAL Model Procurement Law may establish procedures for maintaining and accessing electronic records, including measures to ensure the integrity, accessibility and, where appropriate, confidentiality of information. Clarification to that effect may be necessary in view of the relationship between the “integrity” of electronic information and the means used to “authenticate” that information (e.g. electronic signatures), and the close link between retention of records on procurement proceedings and the overall policy in the enacting State for retention of records of public bodies. This may include consideration of complex issues such as interoperability of record retention systems, period of retention (also in view of technology changes), privacy protection and security of electronic records.<sup>38</sup>

58. Draft amendments to article 11 of the UNCITRAL Model Procurement Law are contained in document A/CN.9/WG.I/WP.34/Add.2.

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<sup>38</sup> For a discussion of the wide range of issues related to electronic records, see John T. Ramsay, *IT Governance, SOX and Other Acronyms*, June 2004 (available at <http://www.gowlings.com/resources/publications.asp?pubid=1005>).



## A/CN.9/WG.I/WP.34/Add.2

### Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – Issues arising from the use of electronic communications in public procurement, submitted to the Working Group on Procurement at its seventh session

#### ADDENDUM

The annex to the present note contains proposals for draft amendments to the UNCITRAL Model Law on Procurement of Goods, Construction and Services, which reflect the considerations set forth in documents A/CN.9/WG.I/WP.34 and addendum 1.

#### ANNEX

### UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES

#### PROPOSED AMENDMENTS TO DEAL WITH ELECTRONIC PUBLICATION OF PROCUREMENT-RELATED INFORMATION AND THE USE OF ELECTRONIC COMMUNICATIONS IN THE PROCUREMENT PROCESS<sup>39</sup>

##### *Article 2. Definitions*

...

“Electronic” relates to technology having electronic, optical, magnetic, or similar capabilities that may be used to send, receive or store information, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;<sup>40</sup>

“Publicly accessible electronic information system” means a system for generating, sending, receiving, storing or otherwise processing electronic communications which is generally accessible to persons making use of electronic devices.<sup>41</sup>

...

##### *Article 5. Public accessibility of legal texts*

<sup>39</sup> The underlined portions of the text are proposed additions to the present text of the Model Law.

<sup>40</sup> This definition draws on elements used in the notion of “data messages” in article 2 of the UNCITRAL Model Law on Electronic Commerce (see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I; also published in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I), and the definition of “electronic” in section 2(5) of the United States Uniform Electronic Transactions Act (UETA), drafted by the National Conference of Commissioners on Uniform State Laws and approved at its 108th annual conference meeting (Denver, Colorado, 23-30 July 1999) and section 1(a) of the Uniform Electronic Commerce Act of Canada.

<sup>41</sup> This definition draws on elements used in the notion of “information system” in article 2 of the UNCITRAL Model Law on Electronic Commerce.

The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained, which may include simultaneous dissemination through publicly accessible electronic information systems.

...

*Article 5 bis. Notice of procurement opportunities*

**Variant A**

(1) [If so provided in regulations issued under article 4] [T]he procuring entity shall not later than [the enacting State specifies a time-limit] after the begin of a fiscal year publish notice of its expected procurement requirements for the following [the enacting State specifies a period].

**Variant B**

(1) Within *[the enacting State specifies a time-limit]* after the begin of a fiscal year, procuring entities may publish notice of its expected procurement requirements for the following *[the enacting State specifies a period]*.

(2) The procurement regulations may provide for the manner of publication of the notice required by paragraph (1), which [may include publication in publicly accessible electronic information systems] [shall be done [primarily] by publication in publicly accessible electronic information systems].

(3) Paragraph (1) is not applicable where the anticipated value of procurement is less than [...].

...

*Article 7. Prequalification proceedings*

...

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

(2) bis [Without prejudice to the right of a supplier or contractor to request and to receive a set of prequalification documents in paper form][T]he obligation to provide the prequalification documents may be met by transmitting them to suppliers or contractors in electronic form or by making the documents available to suppliers or contractors through publicly accessible electronic information systems, from which the documents may be downloaded or printed by interested parties.

...

*Article 9. Form of communications*

(1) Subject to other provisions of this Law and any requirement of form specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, documents, notifications, decisions and other communications referred to in this Law to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication, including by means of electronic communications and documents, where the solicitation documents so provide.

(1) bis [Without prejudice to the right of a supplier or contractor to request and to receive notices and documents in paper form] [W]here this law requires the procuring entity to provide notices or issue documents to suppliers or contractors, that requirement may be met by posting the notice or document in a publicly accessible electronic information system from which the notice or document can be downloaded or printed by the suppliers or contractors.

(1) ter Where the solicitation documents requires tenders to be submitted in electronic form, the procuring entity may provide that all communications with suppliers or contractors shall be conducted only in electronic form in accordance with the provisions in the solicitation documents.

...

(3) The procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications. The means of communication chosen by the procuring entity shall not present an unreasonable barrier to participation in the procurement proceedings.

*Article 10. Rules concerning documentary evidence provided by suppliers or contractors*

(1) The prequalification or solicitation documents may provide that documentary evidence intended to demonstrate the suppliers' or contractors' qualifications may be submitted in the form of electronic documents that meet the technical requirements as to authenticity and integrity established [by the procuring entity] [in the prequalification or solicitation documents] provided that such technical requirement may not discriminate against or among suppliers or contractors or against categories thereof.

*Article 11. Record of procurement proceedings*

...

(5) The procuring entity may [be authorized to] maintain the record referred to in paragraph 1 of this article in electronic form provided that the following conditions are satisfied:

(a) The information contained therein is accessible so as to be usable for subsequent reference;

(b) Electronic information is retained in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and

(c) Such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time when it was sent or received.

(6) The procurement regulations may establish procedures for maintaining and accessing electronic records, including measures to ensure the integrity, accessibility and, where appropriate, confidentiality of information.

...

*Article 14. Public notice of procurement contract awards*

- (1) The procuring entity shall promptly publish notice of procurement contract awards.
- (2) The procurement regulations may provide for the manner of publication of the notice required by paragraph (1), which may include publication in publicly accessible electronic information systems.
- (3) Paragraph (1) is not applicable to awards where the contract price is less than [...].

...

*Article 24. Procedures for soliciting tenders or applications to prequalify*

- (1) A procuring entity shall solicit tenders or, where applicable, applications to prequalify by causing an invitation to tender or an invitation to prequalify, as the case may be, *to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to tender or to prequalify is to be published).*
- (2) Invitations to tender or invitations to prequalify may also be published in publicly accessible electronic information systems [commonly used by procuring entities in the enacting State].
- (3) A procuring entity may choose to publish invitations to tender or invitations to prequalify only in electronic form when it is satisfied that the method of publication chosen:
  - (a) does not represent an obstacle to access to the procurement process;
  - (b) is justified to promote economy and efficiency in the procurement process; and
  - (c) will not result in discrimination among potential suppliers or contractors or otherwise substantially limit competition.
- [(4) The record of the procurement proceedings shall contain a written declaration by the procuring entity that the conditions of paragraph (3) of this article are met.]

...

*Article 25. Contents of invitation to tender and invitation to prequalify*

- (1) The invitation to tender shall contain, at a minimum, the following information:

...

(k) A statement by the procuring entity as to whether tenders [shall][may] be submitted in electronic form and, if so, the procedures and format for their submission and the electronic address to which they shall be transmitted. Unless otherwise stated in the invitation, suppliers or contractors have the right to submit written tenders in sealed envelopes in accordance with article ....

(2) An invitation to prequalify shall contain, at a minimum, the information referred to in paragraph (1) (a) to (e), (g), (h) and, if it is already known, (j), as well as the following information:

...

(f) A statement by the procuring entity as to whether applications to prequalify [shall][may] be submitted in electronic form and, if so, the procedures and format for their submission and the electronic address to which they shall be transmitted. Unless otherwise stated in the invitation, suppliers or contractors have the right to submit applications [in writing][in paper form].

*Article 26. Provision of solicitation documents*

...

(2) [Without prejudice to the right of a supplier or contractor to receive a set of solicitation documents in paper form][T]he obligation to provide the solicitation documents may be met by transmitting the documents to suppliers or contractors in electronic form or making the documents available to suppliers or contractors through publicly accessible electronic information systems, from which the documents may be downloaded or printed by interested parties.

...

*Article 28. Clarifications and modifications of solicitation documents*

...

(3) bis The procuring entity may convene a meeting of suppliers or contractors by electronic means of communication [, such as on-line exchange of electronic messages, videoconferencing or similar technology,] when it is satisfied that all suppliers or contractors whom the procuring entity should invite for a meeting pursuant to paragraph 1 of this article have access to the required technical and other means and that the means of communication chosen by the procuring entity do not present an unreasonable barrier to participation in the meeting.

...

*Article 30. Submission of tenders*

...

(5) (a) A tender shall be submitted in writing, signed and in a sealed envelope or in any other form specified in the solicitation documents that comply with article 30 bis;

~~(b) Without prejudice to the right of a supplier or contractor to submit a tender in the form referred to in subparagraph (a), 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;~~

(b) The procuring entity shall, on request, provide to the supplier or contractor a receipt showing the date and time when its tender was received.

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

*Article 30 bis. Security measures in communications and in the treatment of tenders*

(1) The procuring entity shall take the necessary measures and establish appropriate procedures to ensure that:

(a) The origin and authenticity of communications, documents and tenders received from suppliers or contractors can be established;

(b) The integrity of communications, documents and tenders received from suppliers or contractors can be preserved;

(c) The date and time of dispatch and receipt of communications, documents and tenders can be determined;

(d) Communications, documents and tenders are not accessed by the procuring entity or other persons prior to any deadline;

(e) Any unauthorized access or attempt to access communications, documents and tenders prior to the deadline referred to in paragraph 1(d) is detectable;

(f) The confidentiality of communications, documents and tenders received from or relating to other suppliers or contractors is maintained.

(2) The ... (the enacting State designates an organ or authority) may provide in regulations for specific provisions to comply with this article, in particular as regards electronic communications of tenders, proposals or quotations submitted by electronic means.

...

*Article 33. Opening of tenders*

...

(4) Where the procurement proceedings were conducted solely electronically in accordance with articles 9(1) ter, 25(1)(k), 25(2)(f) or [insert provisions dealing with reverse auctions and other fully automated procedures, if any], suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they are allowed to follow the opening of the tenders through electronic means of communication [, such as on-line exchange of electronic messages, videoconferencing or similar technology,] used by the procuring entity provided that all suppliers or contractors that have submitted tenders have access to the required technical and other means of communication used by the procuring entity and that those means do not present an unreasonable barrier to participation in the session.

...

*Article 36. Acceptance of tender and entry into force of procurement contract*

...

(7) Where a written procurement contract is required to be signed pursuant to this article, that requirement is met by the use of electronic communications or documents that are signed with an electronic signature that complies with any requirements established by the procuring entity.

...

*Article 37. Notice of solicitation of proposals*

...

(2) bis The notice may also be published in publicly accessible electronic information systems [commonly used by procuring entities in the enacting State]. A procuring entity may choose to publish the notice in electronic form only when it is satisfied that the method of publication chosen:

- (a) does not represent an obstacle to access to the procurement process;
- (b) is justified to promote economy and efficiency in the procurement process;
- and
- (c) will not result in discrimination among potential suppliers or contractors or otherwise substantially limit competition.

[(2) ter The record of the procurement proceeding shall contain a written declaration by the procuring entity that the conditions of paragraph (2) bis of this article are met.]

...

...

(4) bis [Without prejudice to the right of a supplier or contractor to receive the request for proposals, or prequalification documents, in paper form][T]he obligation to provide the request for proposals, or prequalification documents, may be met by transmitting the documents to suppliers or contractors in electronic form or making the documents available to suppliers or contractors through publicly accessible electronic information systems, from which the documents may be downloaded or printed by interested parties.

...

*Article 40. Clarification and modification of requests for proposals*

...

(3) bis The procuring entity may convene a meeting of suppliers or contractors by electronic means, such as on-line exchange of electronic messages, videoconferencing or similar technology, when it is satisfied that all suppliers or contractors whom the procuring entity should invite for a meeting pursuant to paragraph 1 of this article have access to the required technical and other means and that the means of communication chosen by the procuring entity do not present an unreasonable barrier to participation in the meeting.

...

*Article 47. Restricted tendering*

...

(2) When the procuring entity engages in restricted tendering, it shall cause a notice of the restricted-tendering proceeding to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published).

(2) bis The notice may also be published in publicly accessible electronic information systems [commonly used by procuring entities in the enacting State]. A procuring entity may choose to publish the notice in electronic form only when it is satisfied that the method of publication chosen:

- (a) does not represent an obstacle to access to the procurement process;
- (b) is justified to promote economy and efficiency in the procurement process; and
- (c) will not result in discrimination among potential suppliers or contractors or otherwise substantially limit competition.

[(2) ter The record of the procurement proceedings shall contain a written declaration by the procuring entity that the conditions of paragraph (2) bis of this article are met.]

...

*Article 48. Request for proposals*

(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation a notice seeking expressions of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.

(2) bis The notice may also be published in publicly accessible electronic information systems [commonly used by procuring entities in the enacting State]. A procuring entity may choose to publish the notice in electronic form only when it is satisfied that the method of publication chosen:

- (a) does not represent an obstacle to access to the procurement process;
- (b) is justified to promote economy and efficiency in the procurement process; and
- (c) will not result in discrimination among potential suppliers or contractors or otherwise substantially limit competition.

[(2) ter The record of the procurement proceeding shall contain a written declaration by the procuring entity that the conditions of paragraph (2) bis of this article are met.]

...



## A/CN.9/WG.I/WP.35

**F. Note by the Secretariat on possible revisions to the  
UNCITRAL Model Law on Procurement of Goods, Construction  
and Services – Issues arising from the use of electronic communications  
in public procurement: comparative study of practical experience with the  
use of electronic (reverse) auctions in public procurement, submitted  
to the Working Group on Procurement at its seventh session  
(A/CN.9/WG.I/WP.35 and Add.1) [Original: English]**

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**I. Introduction**

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and

Services (hereafter “the UNCITRAL Model Procurement Law” or “the Model Law”)<sup>1</sup> is set out in paragraphs 1 to 5 of document A/CN.9/WG.I/WP.34, submitted to the Working Group for its consideration at its seventh session.

2. At its sixth session, the Working Group considered inter alia the use of electronic reverse auctions in public procurement. It recognized the reality of electronic reverse auctions and confirmed its willingness to consider the appropriateness of enabling provisions for the optional use of electronic reverse auctions in the Model Law. However, before making a final decision on the matter, the Working Group agreed that it would be useful to have more information on the practical use of electronic reverse auctions in the countries that had introduced them. The Secretariat was requested to provide that information in the form of a comparative study of practical experience (A/CN.9/568, para. 54).

3. The present note has been prepared pursuant to that request. It compares existing regulations of electronic reverse auctions in the surveyed countries from various regions of the world. The present note deals only with public procurement legislation that specifically addresses electronic reverse auctions. It does not cover other areas of law relevant to electronic reverse auctions, such as competition law or rules on electronic commerce. For the analysis of electronic commerce aspects of public procurement, see notes by the Secretariat (A/CN.9/WG.I/WP.34 and Add.1 and 2).

## II. General Remarks

### A. Definition of an “electronic reverse auction”

4. An electronic reverse auction (ERA) can be defined as an online, real-time dynamic auction between a buying organization and a number of suppliers who compete against each other to win the contract by submitting successively lower priced bids during a scheduled time period.<sup>2</sup> ERAs are used in both the private and public sectors. The way government does its procurement affects the format of electronic auctions in public procurement.

5. Unlike a traditional selling auction which involves a single seller and many buyers, the latter bidding for the right to purchase and the former using market forces to drive buyers to raise the price of purchase, in a reverse auction, there is a single buyer and many suppliers: the buyer indicates its requirement, and suppliers progressively bid downwards to win the right to supply. In this instance, the buyer uses market forces to drive suppliers to lower prices. According to economic analysis, there is no difference in results between traditional and reverse auction formats.<sup>3</sup> Both have been used for government purposes,

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<sup>1</sup> For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I (also published in the Yearbook of the United Nations Commission on International Trade Law, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL web site (<http://www.uncitral.org/english/texts/procurem/ml-procure.htm>).

<sup>2</sup> See the Focus Study of the Center for Advanced Purchasing Studies (CAPS Research), “Role of reverse auctions in strategic sourcing”, 2003, available at <http://www.capsresearch.org/publications/pdfs-public/beall2003es.pdf>.

<sup>3</sup> See Soudry O., “Promoting economy: electronic reverse auctions under the EC directives on

for instance, auctions in the traditional format are utilized in Colombia for the sale of government assets<sup>4</sup> and in the reverse format in Argentina,<sup>5</sup> Brazil<sup>6</sup> and Costa Rica<sup>7</sup> for the purchase of products for government needs. In the latter case, public procurement proper, it is only a reverse auction format that can be used as several suppliers or contractors compete among themselves for the public contract award.

## B. The extent of use of ERAs

6. The extent of the use is determined to a large degree by the extent of e-business activity in the overall economy. In countries where e-commerce has become a norm, the trend towards the use of ERAs in public procurement is strong. Countries in which application of ERAs to public procurement has been pioneered include in particular Australia,<sup>8</sup> Brazil,<sup>9</sup> Canada, France, Singapore, Thailand, the United Kingdom<sup>10</sup> and the

public procurement”, 2004, Journal of Public Procurement, vol. 4, No. 3, p. 345.

<sup>4</sup> Law 80 of 1993 (available at [http://www.secretariassenado.gov.co/leyes/L0080\\_93.HTM](http://www.secretariassenado.gov.co/leyes/L0080_93.HTM)), article 24, subsection 3. Colombia also has the system of dynamic conformation of offers which resembles auction mechanism. It was established under article 5 of Presidential Decree 2170 of 30 September 2002 (executive guidelines for Law 80, available at the documents section of <http://www.contratos.gov.co>).

<sup>5</sup> *Decreto delegado* 1023/2001 of 13 August 2001 (available at <http://infoleg.mecon.gov.ar/txtnorma/68396.htm>), article 25, Selection Procedures, paragraph b) provides for the use of public auctions for the procurement of goods.

<sup>6</sup> Federal Law No. 8.666 of 21 June 1993 as amended (the full text in Portuguese is available at <https://www.planalto.gov.br/> and <http://www.COMPRASNET.gov.br/legislacao/leis/lei8666.pdf>.) added “procurement auction” (*pregao*) to other methods of procurement. Decrees 3.555 and 3.693 of 8 August and 20 December 2000, respectively, established the list of goods and services eligible for procurement through reverse auctions limiting them to “commodity items”, i.e. off-the-shelf products, with quality standards established by the market, and in which price is the only differential.

<sup>7</sup> *Decreto* No. 25038-H, *Reglamento General de Contratación Administrativa*, of 6 March 1996 (available at <http://www1.hacienda.go.cr/proveeduria-financiera/reg%20gral%20de%20contratacion%20adva.html>), article 64.1, under which auctions can be used for the purchase of generic products, defined in article 64.2 as those produced subject to general manufacturing patterns and that are distributed by at least four vendors, with the satisfaction of requirements being indifferent as to contractual mechanisms, make or supplier. Under article 64.6, quotations are formulated verbally in person in front of all other accredited bidders.

<sup>8</sup> Australia has had an integrated national electronic procurement framework since May 1999 (see the “Framework for national cooperation on electronic commerce in government procurement”, available at <http://www.apcc.gov.au/docs/NationalECFramework.pdf>). This framework consists of Commonwealth initiatives developed to promote electronic procurement. State governments have also established business centres to encourage acceptance of online procurement and have developed their own online portals for e-procurement, including New South Wales (<http://www.cpsc.nsw.gov.au/e-procurement/links.htm>), Victoria ([http://www.ec4p.dtf.vic.gov.au/domino/web\\_notes/ec4p/ec4p.nsf/frameset/EC4P?OpenDocument](http://www.ec4p.dtf.vic.gov.au/domino/web_notes/ec4p/ec4p.nsf/frameset/EC4P?OpenDocument)) and Queensland ([http://www.qgm.qld.gov.au/prc/English/prc\\_intro.htm](http://www.qgm.qld.gov.au/prc/English/prc_intro.htm)).

<sup>9</sup> In Brazil, ERAs were introduced to public procurement by Decree 3.697 of 21 December 2000. In 2001, 3.2 per cent of the total volume of goods and services procured by the Federal Government were procured through ERAs, growing to 12 per cent, in 2003, and to approximately 20 per cent, in 2004. COMPRASNET ([www.comprasnet.gov.br](http://www.comprasnet.gov.br)) is the web platform for e-Government Procurement of the Federal Government in Brazil. It is supplemented by OBRASNET (<http://www.obrasnet.gov.br/>) that includes a database of costs,

United States.<sup>11</sup> A strong trend towards introducing ERAs in public procurement exists in a number of countries, including various countries in Asia, Central and Eastern Europe and some countries in Latin America.<sup>12</sup> This trend is reinforced by initiatives at international and regional levels, in particular by the multilateral development banks (MDBs)<sup>13</sup> and WTO.<sup>14</sup> However, most countries have not yet introduced ERAs in their public procurement for various reasons.

### C. Benefits and concerns

7. In the view of some analysts, if used properly, ERAs have the potential to improve value for money,<sup>15</sup> efficient allocation of resources,<sup>16</sup> and transparency in the process of

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progress reports of works, photography, and material regarding civil works implemented by the Federal Government, based on information available from the National Court of Accounts (TCU) and the Government Housing Development Bank (CEF).

<sup>10</sup> See the website of the Office of Government Commerce in the United Kingdom (OGC) (<http://www.ogc.gov.uk>).

<sup>11</sup> For news on experience in the United States and elsewhere in governments' use of ERAs, see <http://www.egov.vic.gov.au/Research/OnlineAuctions/auctions.htm>. For a discussion group on successes and failures in the use of ERAs in U.S. procurement, see <http://www.wifcon.com/arc/forum62.htm>.

<sup>12</sup> With respect to Latin America, although the results of the survey demonstrate that, with the exception of Brazil, none of the countries surveyed and apparently no other country in the region is currently using ERAs as a means of procuring goods and/or services for the public sector, some countries, such as Chile, Costa Rica and Mexico, are looking into such a possibility. The pace of introduction of ERAs in public procurement is connected to the pace of e-government initiatives and particularly e-procurement which is advancing rapidly in those countries. Current legislation generally permits—and in some countries even mandates—the use of electronic means in procurement. Nevertheless, the enactment of legislation specifically permitting and regulating the use of ERAs is required. Constraints found are of a technical, financial and political nature.

<sup>13</sup> See, in particular, the Electronic Government Procurement Portal launched by the Asian Development Bank, the Inter-American Development Bank and the World Bank in November 2004 (available at <http://www.mdb-egp.org/data/default.asp>). It contains a number of documents prepared by the MDBs and used by many countries in designing their e-government procurement portals. One of the sections of the portal provides a snapshot on the usage and readiness for e-government procurement of various countries as well on system functions and characteristics and also enables to make comparisons between countries.

<sup>14</sup> The World Trade Organization (WTO) is currently negotiating draft revisions to the Agreement on Government Procurement (GPA) (see Annex 4(b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations available at [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf)) which will include an explicit provision on ERAs (Article XI.3 bis of the draft text as at 4 November 2003. Official version is not published).

<sup>15</sup> In that better value for money can be achieved through a competitive market price, and substantial cost savings through dynamic and real-time trading as a result of increased competition among tenderers and direct link between buyers and sellers without any middleman, effectively putting power to set prices in the hands of the buyer and transforming pricing from static to dynamic. In a number of ERAs held by public entities, tangible cost savings directly attributable to the use of the on-line auction have been reported. See Stein A. and Hawking P. "Reverse auction e-procurement: a suppliers viewpoint," available at <http://ausweb.scu.edu.au/aw02/papers/refereed/stein/paper.html>. See also Wyld D. C. "Auction model: how the public sector can leverage the power of e-commerce through dynamic pricing", 2000, available at <http://www.businessofgovernment.org/pdfs/WyldReport.pdf>; and Curran E.,

awarding contracts.<sup>17</sup> It has also been observed that they can make governmental systems more accessible and user-friendly, allow governments to keep up with changes in technology, business practices and prices found in the private sector, gain better knowledge of the market and open government bidding markets to suppliers who had not enjoyed access to them previously.<sup>18</sup> The potential of ERAs to exert a positive effect on competition, in particular by dismantling the preferential purchasing patterns in some States members of the European Union (EU), has been recognized in the recently-enacted EU directives in the field of public procurement.<sup>19</sup> It has also been noted that the use of ERAs reduced the number of contracts awarded through non-competitive methods.<sup>20</sup>

8. Most analysts agree that ERAs are successful for goods and services that can clearly be specified, whose non-price criteria can be quantified, for which switching costs (e.g. replacement of suppliers) are acceptable, and for which a competitive market exists. In contrast, it is generally considered that for one-off products where quality is more important than price, and for strategic items, for which alliance level supplier relationships are critical, they are not suitable.<sup>21</sup>

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Bernert A., Wiegand A. "Electronic procurement in the public sector: factsheet on latest developments in e-procurement in the EU and its Member States," August 2004, available at [http://www.eic.ie/downloads/e\\_procurement.pdf](http://www.eic.ie/downloads/e_procurement.pdf). Also OGC's "E-procurement: cutting through the hype", at <http://www.ogc.gov.uk>.

<sup>16</sup> The time required to conduct an acquisition using the on-line auction technique is said to be significantly reduced compared to the traditional paper proposal process. They can also reduce many administrative difficulties and costs associated with the traditional open procedure, such as costs of handling and evaluating bids, costs of communication, and even costs that potential bidders spend on industrial and business espionage before submitting bids. See CAPS Research Focus Study, "Role of reverse auctions in strategic sourcing", 2003 (see above, footnote 2). Shortened time frames for actions in the context of ERAs have already been reflected in some legislative texts. On the other hand, it is observed that such a pattern may impact other methods of procurement where, however, reduction of time frames for certain acts may not be justifiable.

<sup>17</sup> Some analysts noted clear advantages of auctions with respect to transparency of the contract award process over the traditional tendering procedure. This stems from the fact that under the ERA procedure, the danger of having the procuring entity favouring a particular firm by providing it information on other tenders is limited: information on other bids is available to all tenderers in an open and equal manner; and all bidders are allowed to amend their tender at any time within the limits of the time period. Thus, the ERA can increase transparency in two levels: (1) information available on other tenders; and (2) the availability of the procedure phases and its outcome to all interested tenderers. See Soudry O. "Promoting economy: electronic reverse auctions under the EC directives on public procurement", 2004. *Journal of Public Procurement*, vol. 4, No. 3, p. 354. See also Wyld D. C., "Auction model: how the public sector can leverage the power of e-commerce through dynamic pricing", 2000, available at <http://www.businessofgovernment.org/pdfs/WyldReport.pdf>.

<sup>18</sup> See CAPS Research Focus Study, "Role of reverse auctions in strategic sourcing", 2003 (see above, footnote 2). See also Wyld D. C., "Auction model: how the public sector can leverage the power of e-commerce through dynamic pricing", 2000, available at <http://www.businessofgovernment.org/pdfs/WyldReport.pdf>.

<sup>19</sup> See Soudry O. "Promoting economy: electronic reverse auctions under the EC directives on public procurement", *Journal of Public Procurement*, vol. 4, No. 3, pp. 340-342. (In the recent study of the European Commission, it was indicated that direct cross-border procurement in Europe accounts for only 3 per cent of the total number of bids submitted by the sample firms, and no more than 30 per cent of indirect cross-border penetration (i.e., foreign firms using local subsidiaries)).

<sup>20</sup> As the secretariat was advised during consultations with experts.

<sup>21</sup> See, e.g., the OGC guidance, available at <http://www.ogc.gov.uk/index.asp?docid=1001034>.

9. For ERAs to function properly, complex technology, operating capabilities, legal and regulatory infrastructure, and systems that allow the submission and opening of bids electronically, and that ensure security, reliability, and accessibility of the process, should be in place. Implementation costs, in particular in connection with designing appropriate software or adapting generic software to local conditions, may be significant and of concern, especially if the costs are not commensurate with the value of procurement or the use of ERAs is not so extensive to ensure that the system will pay for itself in the long term. Another concern expressed is that, in the countries where the Internet penetration is low and unevenly shared among the different income levels, ERAs may have a potentially discriminatory effect on suppliers depending on the latter's access to new technology and on quality of the connection.

10. In some countries where ERAs have been introduced, concerns have been expressed that, at least for some types of procurement, ERAs seldom provide benefits comparable to currently-recognized selection procedures. For instance, it has been suggested that they: (a) do not guarantee the lowest responsible and responsive price<sup>22</sup> and continued savings in subsequent ERAs;<sup>23</sup> (b) have hidden costs that may negate any savings realized from the auction process itself;<sup>24</sup> (c) may encourage imprudent bidding and thus create a higher risk of abnormally low bids;<sup>25</sup> (d) do not adequately handle non-price factors, such as quality of performance and buyer-supplier relationships;<sup>26</sup> (e) create conflict of interests in market players, such as software firms<sup>27</sup> and "market makers" or "e-market operators";<sup>28</sup> (f) are

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Also, CAPS Research Focus Study, "Role of reverse auctions in strategic sourcing", 2003 (see above, footnote 2).

<sup>22</sup> It is suggested that unlike in traditional sealed biddings where competitors have only one opportunity to bid, in ERAs, each bidder recognizes that it will have the option to provide successive bids and therefore has a little incentive to offer its best price and subsequently may never offer its best price. Consequently, the winning bid may be simply an established increment below the second lowest bid rather than the lowest responsible and responsive bid.

See the white paper of the Associated General Contractors of America (AGC), "Reverse auctions over the Internet: efficiency—at what cost?", 2003, available at [http://www.agchouston.org/content/public/pdf/cornerstone/Winter2003\\_Reverse\\_Auctions.pdf](http://www.agchouston.org/content/public/pdf/cornerstone/Winter2003_Reverse_Auctions.pdf).

<sup>23</sup> Ibid.

<sup>24</sup> See Emiliani M. L. and Stec D. J., "Aerospace parts suppliers' reaction to online reverse auctions". Supply Chain Management: An International Journal, 2004. For instance, there is a tendency not to involve suppliers during the design stage when significant saving and quality improvements could be made for the production stage. Although the concern was expressed in the context of B2B transactions, it may also be relevant in B2G environment. For the summary and key points of the article as well as other articles by the same authors on ERAs, see <http://www.theclbm.com/research.html>.

<sup>25</sup> For the analysis of existing approaches for handling the risk of abnormally low prices, including in ERAs, see a note by the Secretariat (A/CN.9/WG.I/WP.36).

<sup>26</sup> There seems to be a consensus that ERAs, with their anonymous and extreme pressure to force down prices, are not always optimal tools for agencies seeking to forge lasting supply-chain relationships built on quality, much as the industrial *keiretsu* of Japan would shun ERAs in their carefully built supply chains. See Liker J. K. and Choi T. Y., "Building deep supplier relationships," HARVARD BUSINESS REVIEW, December 2004, pp. 104, 106 (also available at <http://www.nbbc.org/builddeep.pdf>). See also Emiliani M. L. and Stec D. J. at <http://www.theclbm.com/research.html>.

<sup>27</sup> In the United States, for example, it was noted that the launch of ERAs was accompanied by a stampede of interest from software developers that sell ERA solutions. See Yukins C. R., "Conduct of electronic reverse auctions: a comparative report on experience in the U.S. procurement system," October 2004, available with the Secretariat. See also Nash R. C. and Cibinic J., "Reverse auctions: more thoughts," NASH & CIBINIC REPORT (West Group,

more vulnerable than traditional bidding processes to collusive behaviour by bidders, especially in projects characterized by a small number of bidders, or in repeated bidding in which the same group of bidders participate;<sup>29</sup> and (g) have negative effects on the market, including an anti-competitive impact<sup>30</sup> and a negative impact on technical innovations and innovative practices.<sup>31</sup> In addition, some analysts question the legality of such a technique in light of the conflict of its inherent features with traditional procurement principles and practices, such as rules forbidding the disclosure of information on other bids,<sup>32</sup> pre-closing negotiations or bid-shopping.<sup>33</sup>

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December 2000), vol. 14, No. 12, p. 67 ("It seems that the computer software marketing people are launching a full-force attack on Government procurement offices pushing the 'reverse auction' online bidding software programs that they developed for use in the commercial world.")

<sup>28</sup> Those are agencies that provide a buyer the services of an auction manager to set up and administer the auction, and advice on purchasing method to utilize. They may be in an especially delicate situation, representing and having access to both suppliers and buyers in the market place. The European experience has borne out the serious threat these potential organizational conflicts may pose. See Yukins C. R., "Conduct of electronic reverse auctions: a comparative report on experience in the U.S. procurement system," October 2004, available with the Secretariat; and Kennedy-Loest C. and Kelly R., "EC competition law rules and electronic reverse auctions: a case for concern?", 2003, 12 PUBLIC PROCUREMENT LAW REVIEW, NO.1, PP. 27-33. In the United States, the move to ERAs has been driven, at least in part, by "entrepreneurial" federal agencies that offer other agencies reverse-auction services on a fee-for-service basis ([www.buyers.gov](http://www.buyers.gov)). See Yukins C. R., "Conduct of electronic reverse auctions: a comparative report on experience in the U.S. procurement system," October 2004, available with the Secretariat.

<sup>29</sup> Collusion can be defined as an arrangement among a group of bidders, either explicit or implicit, that is designed to restrict competition (Porter & Zona, 1993). Collusion can occur in the ERA when two or more bidders work in tandem to manipulate the price of an auction, or, alternatively, when a seller uses shells to enter fake bids and drive up the asking price. As a result, contracting authorities might face higher prices and the members of the cartel will enjoy profits above the competitive prices. See Soudry O., "Promoting economy: electronic reverse auctions under the EC directives on public procurement", 2004, Journal of Public Procurement, vol. 4, No. 3, pp. 360-363 and 366.

<sup>30</sup> See, generally, Trepte P., "Electronic procurement marketplaces: the competition law implications," 2001, 10 PUBLIC PROCUREMENT LAW REVIEW, pp. 260-280 (discussing anti-competitive concerns in the context of an electronic government procurement market). Also Kennedy-Loest C. and Kelly R., "The EC competition law rules and electronic reverse auctions: a case for concern?", 2003, 12 PUBLIC PROCUREMENT LAW REVIEW, NO.1, PP. 27-33 (talks about three main areas of concerns identified by the European Commission in relation to the compatibility of electronic marketplaces (and, by analogy, ERAs) with the EU competition rules: information exchange, in particular because the auction marketplace provides a forum for competitors to exchange commercially sensitive information; access and foreclosure issues (has a marketplace or auction been set up to exclude certain competitors or to require them to participate on an exclusive basis?); and the aggregation of purchasing power (does the auction or marketplace facilitate joint purchasing or joint selling by participants in an auction?).

<sup>31</sup> In particular, due to the level of detail usually required in the specifications of the objects of ERAs.

<sup>32</sup> In the United States, the debate over ERAs has centred, in important part, on the disclosure of competitive information as the ERA proceeds. The Procurement Integrity Act provides that procurement officials, as defined in the Act, "shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before award of a contract to which the information relates." 41 U.S.C. § 423(a)(1) - (2) (2000). See also Federal Acquisition Regulation (FAR) 3.104-4(a). Disclosure is permitted in certain cases, such as with the offeror's permission (i.e., where the disclosure is voluntary). 41 U.S.C.



11. It has been recognized that most of the problems stemming from the use of ERAs in public procurement, including a potential danger of overuse, could be mitigated if adequate regulations were in place. The regulatory process, however, even in the countries where ERAs have been used in public procurement for some time already, has been slow.<sup>34</sup> Apart from public procurement, ERAs raise competition and governance issues, which require treatment under relevant branches of law.

### III. The regulatory framework and practice with respect to the use of ERAs in public procurement: comparative study

#### A. The extent of regulation

12. At the international level, there is no specific regulation of ERAs. At present, the most universal procurement specific international instrument, the World Trade Organization (WTO) Agreement on Government Procurement (GPA), does not address ERAs.<sup>35</sup>

13. Except for the new EU directives, dated 31 March 2004,<sup>36</sup> no regional instruments regulate the use of ERAs. EU current directives in the field of public procurement<sup>37</sup> were

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§ 423(h)(1) - (2) (2000) and FAR 15.306(e)(3). According to the American Bar Association, Public Contract Law Section, "Comments on reverse auction notice", 5 January 2001, available at [http://www.abanet.org/contract/federal/regscmm/ecommm\\_003.html](http://www.abanet.org/contract/federal/regscmm/ecommm_003.html), in ERAs conducted to date, potential offerors have expressly agreed to disclosure of their pricing in order to participate in the procurement. It appears, however, that they would have been precluded from participating if they had refused, so that the effectiveness and "voluntariness" of their consent may be open to question. See Yukins C. R., "Conduct of electronic reverse auctions: a comparative report on experience in the U.S. procurement system," October 2004, available with the Secretariat.

<sup>33</sup> The extension of bid closing times and the ability to resubmit prices as allowed by ERAs can be interpreted as a form of pre-closing negotiation or bid-shopping which may compromise a fair and open competitive process. See Boucher P., "Technology versus industry practices", February 2003, available at [http://www.findarticles.com/p/articles/mi\\_qa4088/is\\_200302/ai\\_n9176581](http://www.findarticles.com/p/articles/mi_qa4088/is_200302/ai_n9176581).

<sup>34</sup> See Yukins C. R., "Conduct of electronic reverse auctions: a comparative report on experience in the U.S. procurement system," October 2004, available with the Secretariat (stating that no standard legal response to the issues arising from the use of ERAs appears yet to have been developed beyond broad "enabling provisions," and further that it is too often overlooked in the literature when the use of ERAs is inappropriate or, more specifically, when procurement officials should curb what may well be an overuse of ERAs).

<sup>35</sup> See footnote 14.

<sup>36</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (*Official Journal of the European Union*, No. L 134, 30 April 2004, pp. 114 and 1, respectively. Both available at [http://europa.eu.int/comm/internal\\_market/publicprocurement/legislation\\_en.htm](http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm)).

<sup>37</sup> Directive 92/50/EEC of 18 June 1992 (Services Directive), *Official Journal of the European Communities*, No. L 209, 24 July 1992, p. 1, as amended by Directive 97/52/EC of 13 October 1997, *Official Journal of the European Communities*, No. L 328, 28 November 1997, p.1; Directive 93/36/EEC of 14 June 1993 (Supply Directive), *Official Journal of the European Communities*, No. L 199, 9 August 1993, p. 1, as amended by Directive 97/52/EC above;



not written with ERA procurement technique in mind. The new EU procurement directives, which EU member States have to implement by 31 January 2006,<sup>38</sup> include a specific provision for ERAs.<sup>39</sup>

14. At the national level, only a few countries, including Austria,<sup>40</sup> Brazil,<sup>41</sup> France<sup>42</sup> and some Eastern European countries,<sup>43</sup> regulate the use of ERAs in public procurement. In most cases, enabling provisions are found in statutes, while detailed aspects, such as the mechanics of holding an ERA, are addressed in implementing regulations. Although linked to electronic commerce, no specific provisions on ERAs have been found in the legal acts regulating e-commerce. Rather, the subject is regulated by general public procurement law and regulations or, in some instances, by ERA-specific legislation.<sup>44</sup>

15. In some Asian countries that regulate ERAs, the regulation is found mainly at the level of local governments or ministries. In China, regulations on online public procurement bidding have been adopted by a number of local governments<sup>45</sup> while in Singapore, the subject is regulated by internal documents of procuring agencies.<sup>46</sup>

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Directive 93/37/EEC of 14 June 1993 (Works Directive), *Official Journal of the European Communities*, No. L 199, 9 August 1993, p.54, as amended by Directive 97/52/EC above. These are often referred to as the “classic sector directives”. Directive 89/665/EEC of 21 December 1989, *Official Journal of the European Communities*, No. L 395, 30 December 1989, p. 33, as amended by Directive 92/50 above, deals with enforcement in these sectors.

<sup>38</sup> See article 80(1) of Directive 2004/18/EC and article 71(1) of Directive 2004/17/EC.

<sup>39</sup> See article 54 of Directive 2004/18/EC and article 56 of Directive 2004/17/EC.

<sup>40</sup> See the Federal Act on the Award of Purchase Contracts of Austria (Purchase Contracts Award Act 2002), available at <http://wko.at/rp/vergabe/gesetzestextbvergg2002.pdf>.

<sup>41</sup> Federal Law No. 10.520/2002 of 17 July 2002 (available at [https://www.planalto.gov.br/ccivil\\_03/Leis/2002/L10520.htm](https://www.planalto.gov.br/ccivil_03/Leis/2002/L10520.htm)), complemented by Law 8.666 to the extent it does not conflict; Decrees 1.094/94, 3.555/00, 3.693/00, 3.697/01 and 3.784/01; and Internal Instructions (Portarias) SAF/PR 2.050 and MARE 5.

<sup>42</sup> See the Public Procurement Code, article 56 (3), and Decree No. 2001-846 of 18 September 2001.

<sup>43</sup> See, e.g., article 25(1)(a) of Government Decree 167/2004 (V.25) of Hungary that envisages the practice of ERAs; articles 74 to 81 of the Public Procurement Law of Poland of 29 January 2004 that expressly authorizes and regulates the use of ERAs; article 36 of Government Ordinance No. 20 of 24 January 2002 of Romania dealing with an open bid procedure (further information on the ERA procedure is provided on the website [www.e-licitatie.ro](http://www.e-licitatie.ro)); and the Rules on the content, conditions and restraints for rendering electronic auction in contract award procedures of Slovenia, published in the Official Gazette of the Republic of Slovenia No. 130/2004, 3 December 2004 (the “Slovenian Rules”).

<sup>44</sup> See, e.g., Decree No. 3.697 of 21 December 2000, of Brazil, that created “electronic procurement auction”.

<sup>45</sup> See the Nanning City Interim Measures for the Management of Online Public Procurement Bidding of 18 June 1999; the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding of 1 September 2000; the Hefei City Interim Measures for the Management of Online Public Procurement Bidding of 13 March 2001; the Wuxi City Interim Measures for the Management of Online Public Procurement Bidding of 1 April 2001; the Zhuhai City Interim Measures for the Management of Online Public Procurement Bidding of 27 June 2002; the Shenzhen City Interim Measures for the Management of Online Public Procurement Bidding of 15 October 2003; and the Shanghai Interim Measures for the Management of Online Public Procurement Bidding of December 2004. The text of the latter in Chinese and its unofficial translation in English are available with the Secretariat.

<sup>46</sup> See, e.g., the Administrative guidelines for assisted reverse auction event of the Ministry of Defense (the “Singapore guidelines”).

16. In some countries, like Australia, the United Kingdom and the United States, ERAs are used in the absence of binding regulations. Centralized regulatory guidelines exist in Australia<sup>47</sup> and the United Kingdom<sup>48</sup> while in the United States,<sup>49</sup> the procedures are largely determined on an agency-by-agency basis, and sometimes on a procurement-by-procurement basis.<sup>50</sup> Some other States work with experimental laws in order to allow pilot projects to carry out real-life ERAs.<sup>51</sup>

## B. Conditions for use

### 1. General conditions

17. The recourse to ERAs is normally subject to general principles of government procurement. Provisions of international agreements, including regional and bilateral

<sup>47</sup> In Australia, regulation is currently limited to policy documents, non-statutory procurement guidelines and broad statutory provisions about electronic procurement. New South Wales remains the only State to provide any specific guidance on topic. See the NSW Government Procurement Guidelines on Reverse Auctions of March 2001 (available at <http://www.dpws.nsw.gov.au/NR/rdonlyres/ezac4yppqkqqzaj5qdjgerv3aj62n4ishpa3xhofh4fd13cqu4m7l4ibv3a2w67sslw5zuhmjpois43joel4ees4xe/Reverse+Auctions.pdf>) (the “Australian Guidelines”).

<sup>48</sup> In the United Kingdom, rules on public procurement are mainly limited to those of the EU law. The British Government has considered that the EU current directives allow scope for ERAs in public procurement and has endorsed their use. OGC, in promoting the use of ERAs in government procurement, has issued the on-line guidance (available at <http://www.ogc.gov.uk/index.asp?docid=1001034>).

<sup>49</sup> Attempts to formulate centralized binding rules have not yet been successful, reportedly because of industry opposition and because there is no consensus on when reverse auctions should be used. See, e.g., Turley S. L., “Wielding the virtual gavel—DOD moves forward with reverse auctions,” 173 *MILITARY LAW REVIEW*, September 2002, pp. 1, 25-31 (discussing sources of industry opposition to ERAs); and Yukins C. R., “Conduct of electronic reverse auctions: a comparative report on experience in the U.S. procurement system,” October 2004, available with the Secretariat. In the opinion of many commentators in the United States, ERAs are permitted under FAR 15.306(e)(3) construed against the back-drop of FAR 1.102(d), which permits any procurement practice consistent with sound business judgment, provided that the practice is consistent with law, regulation, and case law, and is not addressed in the FAR. See, e.g., Feldman S. W., “Government contract awards: negotiation and sealed bidding” § 16:18.10, “Revealing prices without permission”, March 2004 (available on Westlaw); Whiteford, “Agencies celebrated the auction prohibition’s demise, as demonstrated by their use of the reverse online auction technique”; and a special notice of the administrative councils that publish the Federal Acquisition Regulation, 2000. However, concerns on the legality of such a technique under US law also exist. See, e.g., American Bar Association, Public Contract Law Section, “Comments on reverse auction notice”, 5 January 2001, available at [http://www.abanet.org/contract/federal/regscomm/ecommm\\_003.html](http://www.abanet.org/contract/federal/regscomm/ecommm_003.html); also Antonio R., “Do reverse auctions violate FAR 15.307 (b)?”, 24 July 2000, available at <http://www.wifcon.com/anallegal.htm>.

<sup>50</sup> For a buying agency which has endorsed the use of ERAs but has not provided detail guidance on when ERAs may be appropriate (or inappropriate), see the June 2003 letter from the U.S. Department of Veterans Affairs to its contracting offices, available at <http://www1.va.gov/oamm/info/il03-11.pdf>.

<sup>51</sup> See Curran E., Bernert A. and Wiegand A., “Electronic procurement in the public sector: factsheet on latest developments in e-procurement in the EU and its Member States”, August 2004, available at [http://www.eic.ie/downloads/e\\_procurement.pdf](http://www.eic.ie/downloads/e_procurement.pdf).

agreements, promulgating the principle of freedom of movement of goods and services, are also applicable.<sup>52</sup>

18. Other general conditions imposed, for instance by the new EU directives, are that contracting authorities may not have improper recourse to ERAs or use ERAs in such a way as to change the subject-matter of the contract, as put up for tender in the published contract notice and defined in the specification.<sup>53</sup> In some other regulations, ERAs are to be used only when it makes “good business sense” to do so.<sup>54</sup>

19. Although security, safety and integrity of data are usually addressed in the broader context of using electronic means of communication in the procurement process (see A/CN.9/WG.I/WP.34 and Add.1), some existing regulations reaffirm those principles in the context of ERAs and impose specific responsibilities in this regard on ERA service providers<sup>55</sup> and bidders.<sup>56</sup>

## 2. Limitations of objects of ERAs

20. Although a monetary cap for the use of ERAs could be found in some legislation,<sup>57</sup> generally the ERA is allowed to be used irrespective of the value of the procurement.<sup>58</sup> It is more common to restrict the use of ERAs to certain types of purchases. There has been a

<sup>52</sup> See, e.g., articles 28 and 49 of the Treaty establishing the European Community (available at <http://europa.eu.int/abc/obj/treaties/en/entoc05.htm>); as well as general principles relevant to public procurement in Australia New Zealand Government Procurement Agreement (ANZGPA) (available at [http://www.dfat.gov.au/geo/new\\_zealand/anz\\_cer/anzcerta\\_1997revised\\_npa.pdf](http://www.dfat.gov.au/geo/new_zealand/anz_cer/anzcerta_1997revised_npa.pdf)).

<sup>53</sup> See, e.g., article 54(8) of Directive 2004/18/EC.

<sup>54</sup> See, e.g., the Australian Guidelines (see above, footnote 47).

<sup>55</sup> Requirements found are: (a) separation of records of different databases; (b) the development and operation of the system by agencies that are not end users of the system, work in a separate environment and do not access the operational environment of the system's end users (in Brazil); (c) generation of detailed records of ERA; and (d) authentication of messages, including bids, by means of electronic signature and encryption (see article 78 of the Public Procurement Law of Poland) or, more commonly, through the assignment of an identification key and password to access the electronic system (e.g., in Brazil and the United States).

<sup>56</sup> Decree No. 2001-846 of France, articles 4 and 7. Some ERA systems include standard warning for bidders that they may not artificially manipulate the price of a transaction by any means or place bad faith offers, use decoys in the process or to collude with the intent or effect of hampering the competitive process. See, e.g., solicitations at [www.FedBid.com](http://www.FedBid.com).

<sup>57</sup> See, e.g., para. 28 of the Purchase Contract Awards Act 2002 of Austria that restricts the application of ERAs to purchases valued (excluding VAT) less than 40,000 Euro; and article 74(2) of the Public Procurement Law of Poland, which refers to an 60,000 Euro cap. However, one of the rationales for confining the use of ERAs to lower value procurement in those cases was to keep those transactions below the thresholds for application of the EU current directives, which do not deal with ERAs, a consideration which is no longer relevant as the new EU directives endorse the ERA procedure.

<sup>58</sup> As the secretariat was advised during consultations with experts, establishing maximum or minimum monetary caps may be counter-productive. For instance, the imposition of the cap in Poland is said to have contributed to the low rate of usage of ERAs in that country, since small value ERAs do not allow the costs of conducting the auction (including the fees and costs of the service provider) to be recouped. Apart from cost-recovery factor, the urgency of which may diminish with the development of appropriate technology, software and widespread practice, the value of a procurement through ERAs must be substantial enough to attract meaningful competition and at the same time should not be so high as to hinder participation of potential bidders. Establishing a monetary cap that would take into account those considerations for all types of procurement may not be possible.

general tendency in international practice to confine the use of this procurement technique to standardized goods and some simple types of services. Commodities, such as fuel, standard information technology equipment, office supplies and primary building products, are seen as examples of items appropriately procured by ERAs.<sup>59</sup> The position of the MDBs has also been that ERAs should be used for commodities only.

21. In Australia, for example, the use of ERAs is restricted to products or commodities with no or little value-added or service component and appropriate products have the following characteristics: very strict and unambiguous specifications that ensure homogeneity, a competitive market, with price as a primary selection criterion, no or limited impact from whole-of-life costs or consideration and no services or added benefits specified in the requirement.<sup>60</sup> In France, ERAs are authorized for the purchase of standard supplies.<sup>61</sup> An implementing regulation further specifies that standard supplies are those with no individual specifications.<sup>62</sup> In Poland, the use of ERAs is restricted to procurement where the object of the contract includes generally available supplies of fixed quality standards.<sup>63</sup>

22. In some countries, for example in Brazil,<sup>64</sup> the use of ERAs is also allowed for the procurement of simple services.

23. Illustrative lists of goods and services that could be procured using ERAs exist in some jurisdictions, such as Brazil<sup>65</sup> and Romania.<sup>66</sup> The Federal Government in Brazil, however, is considering substituting the positive list by a definition of eligibility, thus eliminating the need for periodically updating the list with the appearance of new commodities.<sup>67</sup>

24. Works are usually excluded from ERAs.<sup>68</sup> In some countries, such as Canada and the United States, grave concerns are expressed particularly over the use of ERAs for the procurement of construction.<sup>69</sup> In some states of the United States, such as Pennsylvania and Kansas, state procurement regulation explicitly prohibits procurement of construction contracts through ERAs.<sup>70</sup> It has been observed, however, that some construction works

<sup>59</sup> See, e.g., the Australian Guidelines (see above, footnote 47); and article 4 of the Shanghai Interim Measures for the Management of Online Public Procurement Bidding (see above, footnote 45).

<sup>60</sup> The Australian Guidelines (see above, footnote 47).

<sup>61</sup> Public Procurement Code, article 56(3). Refers to “fournitures courantes”.

<sup>62</sup> Decree No. 2001-846 of 18 September 2001, article 1.

<sup>63</sup> Public Procurement Law of Poland of 29 January 2004, article 74(2).

<sup>64</sup> Under article 1 of Law No. 10.520 of 17 July 2002, auctions can be used only for “common” goods and services, defined as those for which quality and performance standards can be objectively and precisely defined according to standard specifications used in the market.

<sup>65</sup> For the full list, see the annex of Decree 3.784, dated April 6, 2001, that amended lists contained in Decrees 3.555 and 3.693. The list is limited to the procurement conducted by federal entities. States and municipalities may promulgate their own regulations on the subject.

<sup>66</sup> See [www.e-market.e-licitatie.ro](http://www.e-market.e-licitatie.ro).

<sup>67</sup> As the secretariat was advised by experts.

<sup>68</sup> Brazilian regulations do not mention works in the list of eligible items for ERAs. Under the Australian Guidelines (see above, footnote 47) as well, the use of ERAs is to be restricted to the procurement of products or commodities only.

<sup>69</sup> Special Bulletin of the Canadian Construction Association, December 2001, available at <http://www.cca-acc.com/news/committee/rag/rag-owner.pdf>.

<sup>70</sup> See AGC’s white paper, “Reverse auctions over the Internet: efficiency—at what cost?”, 2003 (see above, footnote 22).

and services (e.g., road maintenance) may be appropriately procured through ERAs. In Austria, for instance, ERAs can be used for procurement of standard works.<sup>71</sup> Under the new EU directives, any purchases can be procured through ERAs if certain conditions are met. The directives omit the qualifier “standard”, predominantly used in other regulations, in describing purchases eligible for the procurement through ERAs.<sup>72</sup> Instead, they specify that ERAs can be used for any purchases (works, supplies or services) provided that “specifications can be established with precision,” such as recurring supplies. “Intellectual” works or services, such as the design of works, are explicitly excluded.<sup>73</sup>

25. In the United States, restrictions as to the size and type of the procurement that can be subject to ERA are set on an ad hoc basis. At least one vendor of ERA services has suggested that ERAs are appropriate across a broad spectrum of procurements<sup>74</sup> and a U.S. Army procuring entity has similarly urged that ERAs are appropriate for a very wide variety of procurements.<sup>75</sup> A U.S. Navy entity that sponsors ERAs has taken a different approach, suggesting that ERAs are appropriate under the following more limited circumstances: (a) for “high-dollar”, large quantity, clearly-defined purchases; (b) items to be acquired must be fully and accurately specified; (c) it is expected that two or more suppliers will agree to participate in the event; however, an item for which there are only two approved sources of supply may not be a good candidate because the anonymity factor may not be present during the ERAs; and (d) sufficient time is available to conduct the acquisition using the ERA (in particular for the training of suppliers and the configuration of the dynamic pricing event).<sup>76</sup>

### 3. Ways of using ERAs in procurement proceedings

26. Regulations provide for two ways of using ERAs, either as a stand-alone method of procurement or as an optional phase in other methods of procurement.<sup>77</sup> The latter

<sup>71</sup> Purchase Contract Awards Act 2002, para. 28.

<sup>72</sup> The same is true in the Slovenian rules. See articles 2 and 4 of the Slovenian Rules (see above, footnote 43).

<sup>73</sup> See article 1(7) of EU Directive 2004/18/EC that defines “reverse auction”. It explicitly provides that certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of works, may not be the object of electronic auctions. Recital paragraph 14 explains this restriction as follows: “In order to guarantee compliance with the principles of transparency, only elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting authority, may be the object of electronic auctions, that is the elements which are quantifiable so that they can be expressed in figures or percentages. On the other hand, those aspects of the tender which imply an appreciation of non-quantifiable elements should not be the object of electronic auctions. Consequently, certain work contracts and certain service contracts having as their subject-matter intellectual performances, such as the design of works should not be the object of electronic auctions.”

<sup>74</sup> <http://www.fedbid.com/faq.jsp>.

<sup>75</sup> See Power Point presentation, dated 14 June 2001, of DASA(P), Headquarters, Department of the Army, “Reverse auctions,” at slide 8, available at <http://www.hq.usace.army.mil/cepr/RoundTable/ReverseAuctionBrief.ppt>.

<sup>76</sup> U.S. Navy Supply Systems Command, Navy Auction Site, “Getting started,” available at <http://www.auctions.navy.mil/about/gettingstarted.html>.

<sup>77</sup> Although this means that ERAs can be used in open tendering proceedings, it has been observed that, in practice, the restricted procedure will normally be used when an ERA is involved. ERAs are likely to be used only rarely in negotiated procedures since many of the grounds permitting recourse to such procedures are concerned with situations in which specifications and other conditions cannot be easily set in advance, something which is generally essential for an

approach is taken by the new EU directives<sup>78</sup> and in Australia,<sup>79</sup> some Eastern European countries,<sup>80</sup> France,<sup>81</sup> Singapore<sup>82</sup> and the United States.<sup>83</sup> In most of those cases, an ERA is a final stage preceding the award of a public contract.<sup>84</sup> It is not necessarily the case in the United States, where a typical ERA results in bidders being ranked by price only, and the successful bid is selected after the ERA phase, when the results of the auction are evaluated with non-price criteria.

27. In some jurisdictions, like in Austria, Brazil, China and Poland, ERA is a distinct award procedure.<sup>85</sup> In those cases, ERAs can be conducted in an open market to all suppliers, as in Brazil, or to a limited number of pre-selected or pre-qualified suppliers, as in Austria (see A/CN.9/WG.I/WP.35/Add.1, paras. 13-14).

#### 4. Evaluation and award criteria

28. Depending on the permitted criteria for the award of a contract procured through ERAs, two systems are found: those based on the lowest price alone and those that permit additional criteria.

29. In the systems where the price is the only permitted criterion for the award, as in Brazil, China and Poland,<sup>86</sup> quality requirements are limited and factored in the bidding documents as minimum qualification requirements, which, if met, put suppliers in an equal footing. In addition, in Brazil, quality requirements of the goods being procured are established when cataloguing the goods and services in the Materials and Services Catalogues (CATMET and CATSERVE).<sup>87</sup> In China, some quality requirements, such as

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auction. See Arrowsmith S., "Electronic reverse auctions under the EC public procurement rules: current possibilities and future prospects," 11 Public Procurement Law Review, No. 6, 2002, pp. 299-330 (originally prepared for Achilles Information Ltd.).

<sup>78</sup> Article 54 (2) of EU Directive 2004/18/EC states that: "In open, restricted or negotiated procedures in the case referred to in Article 30(1)(a), the contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the contract specifications can be established with precision." It may also be held on the reopening of competition among the parties to a framework agreement and on the opening for competition of contracts to be awarded under the dynamic purchasing system.

<sup>79</sup> Under the Australian Guidelines (see above, footnote 47), ERAs could be used as part of the tender process, as a means of obtaining quotes from suppliers, and as the second stage of a two-stage tender process where price is the remaining selection criteria.

<sup>80</sup> See, e.g., article 2 of the Slovenian Rules (see above, footnote 43).

<sup>81</sup> See Decree No. 2001-846.

<sup>82</sup> Section 1.1 of the Singapore Guidelines (see above, footnote 46).

<sup>83</sup> In the United States, in the absence of explicit prohibition, ERAs could be used in combination with any available procurement methods and is also used in the context of frameworks and dynamic purchasing systems. However, according to US Navy activity, normal solicitation procedures applicable for a competitive negotiation should be used (FAR Part 15) and the reverse auction technique is not suited for Sealed Bidding, and simplified acquisition procedures (FAR Part 13), in the latter case unless projected savings will be substantial enough to offset the cost of conducting the procurement using FAR Part 15 procedures. See U.S. Navy Supply Systems Command, Navy Auction Site, "Getting started," available at <http://www.auctions.navy.mil/about/gettingstarted.html>.

<sup>84</sup> This approach is said to be taken in the revised GPA as well (see above, footnote 14).

<sup>85</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para.23.8 and 9.

<sup>86</sup> Article 78(2) of the Public Procurement Law of Poland. This approach has also been preferred by the MDBs.

<sup>87</sup> For more details see Internal Instructions (Portaria) 2.050, dated 18 May 1992, on the COMPRASNET website ([www.comprasnet.gov.br](http://www.comprasnet.gov.br)).



ability to provide quality after-sale service and complete technical maintenance, are evaluated upon the application for the membership in the online public procurement bidding system, without which no participation in ERAs is possible.<sup>88</sup> Quality aspects are also taken into account in the event of a price tie, when a supplier with a higher credibility is selected.<sup>89</sup>

30. By contrast, the Austrian law permits other award criteria in addition to price. It differentiates two types of auctions: simple ERAs, in which the price is the only award criterion; and other types of ERAs where the technically and financially “most advantageous” offer is given the award on the basis of evaluation of all award criteria fixed in the tender documents.<sup>90</sup> In the latter case, the procuring entity defines such parts of the tender to be covered by the ERA, to be only those parts for which any variation can be represented by figures or quantity parameters. Provisions of the law imply that all criteria not subject to the ERA are to be evaluated prior to the auction.<sup>91</sup> In the tender documents, the procuring entity states all award criteria intended to be used within the framework of a mathematical formula and in the order of importance attributed to them. In the course of the ERA, the respective ranking of the participants is fixed in accordance with the new bids calculated using the formula.

31. Provisions to the same effect are found in the new EU directives. ERAs may be based solely on prices when the contract is awarded to the lowest price; or on prices and/or on the new values of the features of the tender indicated in the specification, if the contract is to be awarded to the most economically advantageous tender.<sup>92</sup> As in Austria, the values of only those features that are quantifiable and can be expressed in figures or percentages can be the subject of ERAs.<sup>93</sup> However, by contrast with the Austrian system, in the EU system, all features of the tender, auctionable and non-auctionable, are to be evaluated prior to the auction in accordance with their relative weightings.<sup>94</sup> The outcome of the full evaluation of each tenderer is made known before the ERA in the invitation to the auction. The invitation also states the mathematical formula<sup>95</sup> to be used in ERA to determine automatic reranking on the basis of the new prices and/or new values submitted (see A/CN.9/WG.I/WP.35/Add.1, para.17).

32. In the United States, award criteria are determined on an ad hoc basis. Typically, ERAs are limited to price only (see above, para. 26).

<sup>88</sup> See, e.g., the Shanghai Interim Measures for the Management of Online Public Procurement Bidding”, article 6, and the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding”, article 8.

<sup>89</sup> See the Shanghai Interim Measures for the Management of Online Public Procurement Bidding, article 19; and the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding, article 22. Factors considered to assess suppliers’ credibility are inter alia a good record of legal compliance, past performance, business integrity, strong credit standing, considerable capital strength and sound financial status.

<sup>90</sup> See, e.g., Purchase Contract Awards Act 2002, paras. 28, 117 and 118.

<sup>91</sup> Ibid, para. 118.

<sup>92</sup> Article 54 (2) of EU Directive 2004/18/EC.

<sup>93</sup> Ibid., article 54(3).

<sup>94</sup> Ibid., article 54(4).

<sup>95</sup> Ibid., article 54 (5). That formula incorporates the weightings of all criteria fixed to determine the most economically advantageous tender, as indicated in the contract notice or in the specifications; for that purpose, any ranges shall be reduced beforehand to a specified value. Where variants are authorized, a separate formula is provided for each variant.

## 5. Models of ERAs

33. Depending on which evaluation criteria are assessed and when, three models for conducting ERAs are used in practice by procuring entities:

- Model 1, in which all aspects of tenders that are to be compared in selecting the winning supplier are submitted through the ERA itself. Often lowest price is the sole award criterion in competitions conducted entirely through an ERA. Tenderers know their position both during the ERA phase and its close;
- Model 2, with prior assessment of all tender aspects or only those not subject to the ERA phase. Before the ERA phase, suppliers are provided with information on their ranking based on the outcome of an evaluation of the relevant tenderer prior to the ERA. All evaluation criteria are factored in a mathematical formula, which re-ranks the tenderers on the submission of each bid. Thus, during the ERA phase and at its close, suppliers know their overall standing;
- Model 3, in which there is no prior assessment of any aspects of the tender. During the ERA phase, suppliers have information only on how they compare with their competitors in respect of those criteria that are subject to the ERA phase (usually, but not always, just the price). Thus, in contrast with models 1 and 2, when the ERA phase closes, the suppliers do not know whose tender is the best; this is established once the “non-auction” aspects of the tender have been factored in.

## 6. Conclusion

34. It is generally recognized that not all types of procurement are appropriate for ERAs. The primary factor to consider in deciding whether a certain type of procurement is appropriate for ERA is the level of product/service complexity for the procurement and with what level of accuracy the procurement can be specified, i.e., whether suppliers can easily understand the requirement or the requirement can only be defined superficially and needs early supplier intervention. Other factors considered are: (a) predicted value of procurement to determine whether procurement would be attractive to suppliers; (b) market competition (whether it is high enough to ensure the participation of sufficient number of suppliers in the ERA);<sup>96</sup> and (c) award procedure (to what extent the procurement award criteria are quantifiable). Those considerations would determine the procurement and auction strategy.

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<sup>96</sup> Some systems specifically address a minimum number of participants in the ERA while in other systems general provisions of procurement law apply. The requirement of at least three participants in an ERA is commonly found in the regulations. See, e.g., article 22 of the Shanghai Interim Measures for the Management of Online Public Procurement Bidding. It has been observed that a higher number of participants effectively prevents the risk of collusion. In Austria, participation in ERA of minimum ten participants is required (see Purchase Contract Awards Act 2002, para. 116.7).



## A/CN.9/WG.I/WP.35/Add.1

**Note by the Secretariat on possible revisions to the  
UNCITRAL Model Law on Procurement of Goods, Construction  
and Services – Issues arising from the use of electronic communications  
in public procurement: comparative study of practical experience with the  
use of electronic (reverse) auctions in public procurement, submitted  
to the Working Group on Procurement at its seventh session**

*[Chapters I through III (sections A and B) are published in document  
A/CN.9/WG.I/WP.35]*

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### **III. The regulatory framework and practice with respect to the use of ERAs in public procurement: comparative study**

#### **C. Procedural aspects of ERAs**

1. The extent to which the procedural aspects of ERAs are regulated depends on how ERAs stand in relation to other methods of procurement. While little difference is found in the regulations of the auction phase, stages before and after it are regulated differently depending on whether ERA is an optional additional phase in other procurement methods (“optional phase”) or a distinct procurement method (“distinct method”) (see A/CN.9/WG.I/WP.35, paras. 26 and 27). In the former case, most of the procedural aspects of the procurement proceedings before and after the ERA, such as giving notice of auction, identification and selection of bidders and qualification processes, are regulated in the context of the relevant procurement method in general, rather than in the more narrow context of the ERA itself. If the ERA is used as a distinct method, while some general procurement rules may still apply, most of the aspects are subject to separate regulations.

The sections below address aspects of pre-auction, auction and post-auction stages commonly regulated by ERA specific provisions of existing regulations.

## 1. Pre-auction stage

2. Whether ERA is an optional phase or a distinct method, a decision on the use of ERA in procurement proceedings is to be made at the procurement planning stage since it has to be reflected in the procurement notice (see below, para. 7). In some systems, an online tool has been developed that assists procuring entities to assess the suitability of ERA for an individual procurement.<sup>1</sup>

3. If the procuring entity decides to hold the ERA, it: (a) gives notice of the ERA with usually simultaneous provision of solicitation documents; (b) identifies, selects and invites potential participants to the ERA; (c) clarifies solicitation documents and assists otherwise potential participants in their preparation for the ERA; (d) evaluates potential participants' initial proposals; and (e) takes other steps towards holding the ERA (for example, secures services of a third-party ERA service provider).

### *ERA service providers*

4. The ERA process may be conducted by the procuring entity itself,<sup>2</sup> using licensed software, or outsourced to a third party ERA service provider. Such a third party may be a private firm selected through a competitive process, as for instance in Australia and the United Kingdom,<sup>3</sup> or a centralized purchasing agency, as in the United States, offering ERA services to other United States agencies.<sup>4</sup> A third party ERA service provider usually charges a commission for its services. The form of the commission varies and may include: (a) a percentage of the successful auction price; (b) a flat percentage agreed in advance; and (c) a flat fee. The commission may be payable by the procuring entity, the successful bidder or a combination of both. The commission fee usually covers all charges such as advertising, insurance, administrative fees, connection time costs and miscellaneous charges.

5. The countries surveyed appear not to have developed specific regulation of the conduct of third-party ERA service providers, apart from a general requirement that an external provider has to carry out the procurement function on behalf of a government agency in accordance with existing procurement procedures, process and requirements. In at least one jurisdiction, delegating strategically important decisions to an external provider

<sup>1</sup> See, e.g., e-auction decision tool (available at <http://www.ogc.gov.uk/index.asp?id=1001034&syncNav=1-eAuctionDecisionTool>) of the Office of Government Commerce (OGC) of the United Kingdom.

<sup>2</sup> At the stage of introduction or trial of ERAs, some countries limit the list of procuring entities that can use ERAs in public procurement. In Brazil, for instance, the use of procurement auctions in both versions, conventional and electronic, was initially restricted to the Federal Public Administration bodies but by article 2(1) of Federal Law No. 10.520/2002 of 17 July 2002 (available at [http://www.planalto.gov.br/ccivil\\_03/Leis/2002/L10520.htm](http://www.planalto.gov.br/ccivil_03/Leis/2002/L10520.htm)), their use was extended to the states, the Federal District and municipal entities.

<sup>3</sup> OGC launched Reverse Auction Framework (RAF, available at **Error! Hyperlink reference not valid.**), a framework agreement concluded with five ERA service providers, designed to supply the ERA services to the public sector.

<sup>4</sup> The United States General Services Administration provided such services, through its Rocky Mountain Regional Office (Region 8) of the Federal Technology Service. For a review of the procedures used in launching such a reverse auction, see <http://www.r8.gsa.gov/FTSWeb.nsf/0def311033320029b87256c07004811b0?OpenDocument>.

is explicitly prohibited.<sup>5</sup> Responsibilities outsourced are usually of a procedural nature, such as setting up necessary systems and procedures for conducting ERAs, providing assistance and training to suppliers, ensuring safety and security and availability of back-up options, and maintaining and managing appropriate reporting system and electronic records.<sup>6</sup>

6. In Brazil, ERAs can be conducted only by the reverse auctioneers<sup>7</sup> who are employees of a procuring entity, accredited after special training.<sup>8</sup>

*Notice of ERA, its content and means of dissemination*

7. It is generally required that the decision on holding an ERA be made known to potential participants in the procurement notice.<sup>9</sup> In the systems that recognize ERAs as an optional phase, general rules on the content and means of providing such a notice apply. In addition, under the new EU directives, the following ERA-specific data is to be included in the specifications: (a) the features, the value for which will be the subject of the ERA; (b) any limits on the values which may be submitted; (c) the information which will be made available to bidders in the course of the ERA; (d) the relevant information concerning the ERA process; (e) the conditions under which the bidders will be able to bid, in particular the minimum differences; and (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.<sup>10</sup>

8. In the systems that recognize ERAs as a distinct method, the notice of an ERA is usually given through the Internet on the dedicated website of the central government registry for procurement opportunities and/or of the procuring entity, as well as on the website of any third-party ERA service provider.<sup>11</sup> In addition, suppliers registered in a central registry may receive an e-mail notification.<sup>12</sup> Notice of an ERA is to contain all the details necessary for interested parties to judge whether to participate in the auction.<sup>13</sup> Basic information usually included in the invitation to tender is usually provided, such as the identity of the procuring entity, the nature of the object of the procurement, contractual

<sup>5</sup> See, e.g., the Procurement Guidelines on Reverse Auctions of the New South Wales Government of Australia of March 2001 (available at <http://www.dpws.nsw.gov.au/NR/rdonlyres/ezac4yppqkqzaj5qdjgerv3aj62n4ishpa3xhofh4fdl3cqt4m7l4ibv3a2w67sslw5zuhmjpois43joel4es4xe/Reverse+Auctions.pdf>) (the “Australian Guidelines”).

<sup>6</sup> Ibid.

<sup>7</sup> “Pregoeiros” in Portuguese.

<sup>8</sup> The National School of Public Administration (Escola Nacional de Administração Pública)—ENAP designed and administers a standard 40 hour course for reverse auctioneers. Auctioneers are to be selected with the adequate profile in initiative, creativity, flexibility, integrity and fairness.

<sup>9</sup> See, e.g., article 54(3) of Directive 2004/18/EC; article 75 of the Public Procurement Law of Poland; and article 4 of the Rules on the content, conditions and restraints for rendering electronic auction in contract award procedures of Slovenia, published in the Official Gazette of the Republic of Slovenia No. 130/2004, 3 December 2004 (the “Slovenian Rules”).

<sup>10</sup> See article 54(3) of EU Directive 2004/18/EC.

<sup>11</sup> Such a requirement is found in article 75(1) of the Public Procurement Law of Poland.

<sup>12</sup> This is practiced in Brazil and required in some provinces of China (see, e.g., article 14 of the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding).

<sup>13</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para. 44.1. Also, the Shanghai Interim Measures for the Management of Online Public Procurement Bidding, article 14.

terms,<sup>14</sup> and quality and performance standards.<sup>15</sup> When participation in the ERA is subject to prior registration or pre-qualification, this fact is stated and formalities as well as the manner in which compliance with those formalities is to be demonstrated or certified by applicants are described. More specific information will depend on the complexity of the procurement. At a minimum, it includes: (a) the date, time and modality of opening and termination of ERA; (b) the address of the website where ERA will be held and at which the auction rules, the tender documents as well as other auction related documents will be accessible; (c) requirements for registration and identification of bidders at the opening of the ERA; (d) the number and/or name that identify the procurement; (e) technical requirements as to information technology equipment to be utilized in conducting the ERA; (f) information about auction procedure, including which auction model will be utilized, whether there will be only a single stage, or multiple stages, and, in the latter case, the number of stages and the duration of each stage; (g) the minimum increment between bids; and (h) the type of information to be provided to participants during the course of the auction.<sup>16</sup>

9. Other information, such as the starting price in the ERA<sup>17</sup> or information about a third-party ERA service provider, is also usually provided. In Brazil, the procuring entity is required to indicate that the auction will be held electronically, and to provide contact details of call centre/help desk, and the name and qualifications of the reverse auctioneer in charge.<sup>18</sup> In Australia, it is recommended that the notice state that the procuring entity is not bound by the results of the ERA.

#### *Provision of solicitation documents*

10. In the systems that recognize ERAs as an optional phase, general procurement rules address the provision of solicitation documents. In the systems that recognize ERAs as a distinct method, the bidding documents are provided at the time when the notice of the ERA is given.<sup>19</sup>

#### *Identification and selection of potential participants*

11. In the systems that recognize ERAs as an optional phase, suppliers register and qualify to participate in procurement in the usual way applicable to the chosen method of procurement and no additional qualification or registration requirements are found for participating specifically in the ERA. Only those participants that submitted admissible tenders after an initial evaluation of the tenders will be admitted to ERAs.<sup>20</sup> Generally, the

<sup>14</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, Schedule VIII.

<sup>15</sup> Article 1 of Law No. 10.520 of 17 July 2002 of Brazil.

<sup>16</sup> See, e.g., the Public Procurement Law of Poland, article 75(2); and Purchase Contract Awards Act 2002 of Austria, para. 116.2-4.

<sup>17</sup> See, e.g., the requirement in the OGC's "E-auctions guidelines" (available at <http://www.ogc.gov.uk/index.asp?docid=1001034>).

<sup>18</sup> Article 7 of Decree No. 3.697.

<sup>19</sup> In Austria (Purchase Contract Awards Act 2002, para. 116.2-4), it is required by law that the procuring entities grant unrestricted access free of charge to any and all documentation concerning the auction, including the solicitation documents, as of the day of the notice. The same requirement is found in Brazil.

<sup>20</sup> See, e.g., article 54(4) of EU Directive 2004/18/EC; article 5, second paragraph, of the Slovenian Rules (see above, footnote 9); and section 3.1.1(a) of the Administrative guidelines for assisted reverse auction event of the Singapore Ministry of Defence (the "Singapore guidelines").

law requires that the number of bidders admitted to an ERA shall ensure effective competition.<sup>21</sup> In practice, those admitted to ERA may be required to take additional procedural steps before the auction, such as acquiring security codes to access the system.

12. The systems that recognize ERAs as a distinct method require, at a minimum, registration of prospective participants that involves, in particular, assigning an identification code and password to allow the participants to log in to the system to participate in ERA. In some systems, pre-qualification is also required.<sup>22</sup> Other systems give the procuring entity the option of including, in addition to registration, a pre-qualification step.<sup>23</sup>

13. A registration-only requirement is found in Brazil and China. In Brazil, ERAs are open to all suppliers registered in the centralized contractor/supplier register (SICAF).<sup>24</sup> Bidders interested in a particular ERA have to register for it by expressing an interest at least 3 days prior to its opening date.<sup>25</sup> Qualifications of bidders are not evaluated at this stage,<sup>26</sup> but rather after the auction and only with respect to the winner.<sup>27</sup> In China, ERAs are open only to members of the local online public procurement bidding system maintained by local public procurement centres.<sup>28</sup> Membership is free of charge and

<sup>21</sup> See, for instance, article 44 of EU Directive 2004/18/EC; or para. 116.7 of the Purchase Contract Awards Act 2002 of Austria.

<sup>22</sup> See, e.g., the Shanghai Interim Measures for the Management of Online Public Procurement Bidding.

<sup>23</sup> See, e.g., the Public Procurement Law of Poland, article 76, that subjects the participation of bidders in ERA to their compliance with applicable procedural conditions for participation, which may include pre-qualification.

<sup>24</sup> *Sistema de Cadastro de Fornecedores* (SICAF) is the unified registry system of the Federal Government.

<sup>25</sup> While minimum is three participants, no maximum limit is established.

<sup>26</sup> At the pre-auction stage, registered bidders certify before the opening of the auction only that they meet the qualification requirements (usually by typing in the designated space that they are fully aware of qualification requirements and that they are fully qualified).

<sup>27</sup> Articles 7.20-21 of Decree 3.697. There are also manuals that explain the procedure to the reverse auctioneer and suppliers. Post-auction evaluation of qualifications is limited to the verification of legal, economic and financial information of the company, its fiscal compliance, and compliance with possible additional requirements contained in the notice of auction. If guarantees were requested, they are also verified. In practice, most of the evaluation takes place online as the auctioneer may access most of the required information from SICAF and other government databases (Decree 3.555 explicitly permits the procurement entity not to require paper evidence of the fiscal qualification). There is a special application allowing such an online process to which both the auctioneer and the winner have to log on immediately after the winning bid is announced. Other bidders may continue to be logged on and see the exchange of information but cannot participate in the evaluation process. Proponents of the system argue that post-auction evaluation considerably expedites the process, as little room is left for frivolous complaints and a procuring entity does not have to handle complaints on the ground of disqualification before the auction.

<sup>28</sup> To obtain the membership, suppliers fill out and submit the online information form and register in the database at public procurement centres. Suppliers must then submit to procurement centres originals and duplicates of the following documents: (a) business licences and certificates of organizational code; (b) tax registration certificates; (c) financial reports of the previous year; (d) relevant qualification certificates; (e) e-mail accounts; and (f) other documents required by the procurement centre. Upon receipt of the application documents, the procurement centre will examine and decide, within the period of time set by law, whether to grant membership to the suppliers (see articles 7-9 of the Shanghai Interim Measures for the Management of Online Public Procurement Bidding; and article 11 of the Interim Measures for

available to all interested applicants upon proof of a minimum set of qualifications, which usually include legal capacity and compliance, good tax, credit and financial standing, ability to provide quality after-sale service, a minimum amount of the charter capital and access to the Internet.<sup>29</sup> Once a member, a bidder can participate in any ERA advertised through that system without any additional registration or pre-qualification.

14. In Austria, two types of ERAs are envisaged: with unlimited and a limited number of participants.<sup>30</sup> The decision as to the number of bidders is within the procuring entity's discretion but there must be at least ten participants in auctions with a limited number of participants. In both types of ERAs, an unlimited number of participants is publicly invited to submit an application to participate in the ERA. Applicants are subject to pre-qualification or pre-selection which serves two purposes: to ascertain that applicants meet the minimum requirements for performance of the contract and, if the number of qualified suppliers exceeds the number that the entity wishes to invite to the auction, to choose which of the qualified suppliers should receive such an invitation.<sup>31</sup> If more applications are received than a procuring entity had determined, it has to select the best applicants in accordance with the selection criteria (which are to be objective and non-discriminating, published in advance, and must take into account the special requirements of the object of the auction). If a smaller number than anticipated is received, and if no effective competition can be expected, a procuring entity has to withdraw the ERA.<sup>32</sup>

#### *Participation by foreign bidders*

15. The question of access to ERAs by foreign bidders is generally dealt with under the existing principles related to public procurement.<sup>33</sup> However, it has been observed that the manner in which ERA systems operate in a number of countries may de facto discriminate against foreign bidders. In particular, ERAs generally operate in local languages, and no multi-lingual versions are currently in place (although some countries are exploring the possibility of introducing multilingual versions). Registration requirements may also hinder the participation of foreign bidders in ERAs as they often impose local conditions.

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the Management of Online Public Procurement Bidding of Shunyi District of Beijing).

<sup>29</sup> See the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding, article 8; the Shanghai Interim Measures for the Management of Online Public Procurement Bidding, article 6; and the Xuzhou City Interim Measures for the Management of Online Public Procurement Bidding, article 8.

<sup>30</sup> Purchase Contract Awards Act 2002, para. 23.8 and 9.

<sup>31</sup> Purchase Contract Awards Act 2002, para. 23.8, addressing auctions with unlimited number of participants, states that all qualified applicants chosen from unlimited number of entrepreneurs publicly invited to submit applications to participate are permitted to participate in the auction, while para. 23.9 dealing with ERAs with a limited number of participants states that only selected applicants chosen from an unlimited number are permitted to participate. Proof of qualifications must be presented at the latest at the time of admission to the auction (para. 52.5.3).

<sup>32</sup> Purchase Contract Awards Act 2002, para. 116.5-9. The result of the evaluation or selection, including the reasons as to whom to invite, are to be recorded and the records in relevant parts are open to applicants for inspection. The procuring entity is obliged to inform without delay applicants not admitted to the ERA including information as to the reasons for such refusal, unless such information would be contrary to the public interest or the legitimate business interests of companies, or would prejudice free and fair competition.

<sup>33</sup> For instance, in Romania, Government Ordinance No. 20 suggests, in the context of e-procurement, the application of the non-discrimination principle, also with regard to the nationality of a bidder (article 2(a)), however, on the basis of reciprocity (article 8).

*Invitation to auction*

16. Where pre-qualification or selection of participants for ERA is involved, the invitation to the auction is sent to those pre-qualified or selected.<sup>34</sup> In the systems that recognize ERAs as an optional phase, all tenderers who submitted admissible tenders are invited to participate in the ERA.<sup>35</sup>

17. Under the new EU directives, the invitation has to include all relevant information concerning individual suppliers' connection to the electronic equipment being used; the date and time of the start and closure of the electronic auction, including the number of phases; timetable for each phase of the auction; and the time which they will allow to elapse after receiving the last submission before they close the electronic auction. When the contract is to be awarded on the basis of the most economically advantageous tenders, the invitation is to be accompanied by the outcome of a full evaluation of the relevant tenderer and has also to state the mathematical formula to be used in the auction to determine automatic re-ranking on the basis of the new prices and/or new values submitted. Where variants are authorized, a separate formula is to be provided for each variant.<sup>36</sup>

18. In Austria, no requirements on the content of the invitation are provided. Most information related to an ERA is made available to participants already at the stage of advertising a notice of auction, in particular in the auction rules.<sup>37</sup>

*Clarification and modification of solicitation documents and withdrawal of the solicitation*

19. In most jurisdictions, the general procurement rules apply to all methods, including ERAs. In Brazil, clarification may be requested by interested parties online or by phone through telephone centres at any time during the notice period. Clarifications communicated to one party are subsequently made available to all other interested parties without identifying the source of the request for clarifications. Brazilian regulations also allow the procuring entity to modify solicitation documents during the notice period and depending on the timing and content of the modifications, the notice period may be extended (see below, para. 24).

<sup>34</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para. 116.5. Those pre-qualified or selected have to be immediately informed accordingly by e-mail.

<sup>35</sup> See, e.g., article 54(4) of EU Directive 2004/18/EC. Invitations are to be sent simultaneously to all invitees by electronic means.

<sup>36</sup> Article 54(4 and 5) of EU Directive 2004/18/EC. See also the Slovenian Rules (see above, footnote 9), articles 5 and 6.

<sup>37</sup> Purchase Contract Awards Act 2002 of Austria, para. 116.2-4. The auction rules must include at least the following: (a) requirements for registration and identification; (b) auction procedure (in particular minimum between bids); (c) time of beginning and modality of termination of the auction; (d) rights of use and exploitation; (e) reasons for exclusion; (f) deadlines; (g) website publishing the currently lowest bid or, in case of award based on the technically and economically most advantageous bid, the current ranking of bidders during the auction; (h) information that will be made available to bidders during the auction and time/phase of the auction when it will be made available; (i) website where such information is made available; and (j) any deposit, if applicable.

*Evaluation of initial proposals*

20. The requirement for evaluation of initial proposals is found both in the systems that recognize ERAs as an optional phase and in the systems that recognize ERAs as a distinct method. In Brazil, the evaluation of initial proposals is used solely for the purpose of determining the starting price of the auction. It takes place at the start of the auction when all registered bidders submit their initial prices. The lowest submitted price is announced as the starting price of the auction.<sup>38</sup>

*Other pre-auction measures*

21. Other measures may be required to be taken to set up an ERA and to ensure that all bidders are capable of participating in an ERA, for instance, through provision of training and holding simulated auctions.<sup>39</sup>

**2. Auction stage**

22. At the auction stage: (a) the participating bidders access a screen by logging in to the auction address provided in the notice of auction or invitation to the auction, as applicable, using their respective identification and personal password that permits them to participate in the auction; (b) the object of the ERA is announced (usually a screen is completed to describe the items to be procured); (c) the auction rules are announced (i.e., start time, duration, minimum bid, the method of termination, etc.); and (d) the call for bids is communicated simultaneously to all bidders.<sup>40</sup>

23. Details of the auction stage are not regulated but left to a procuring entity or a third party ERA service provider. They may vary depending on the size and complexity of procurement. The existing regulations usually regulate the timing of the auction, bidding requirements and the extent of disclosure of information during the bidding process.

*Timing*

24. A minimum period of time is usually required to elapse between the issuance of the notice of auction or invitation to the auction, as the case may be, and the opening of the auction.<sup>41</sup> In practice, the more complicated the procurement, the longer such a period usually is.

<sup>38</sup> Articles 7.4 and 7.6 of Decree No. 3697, before amended, provided for the exclusion at the evaluation stage of those bidders whose initial submitted prices were higher than the lowest submitted initial price by certain predetermined percentage. However, those provisions were deleted as not promoting competition.

<sup>39</sup> The Singapore Guidelines (see above, footnote 20), section 3.1.1(d) and (e), require participants to sign a bidding/license agreement, and to undergo a training session as a precondition for participation in ERA. Although no requirement on training for a particular auction exists in Brazil, by general way of education, manuals and an online simulator have been developed for different users of ERAs (see <http://www.comprasnet.gov.br/>).

<sup>40</sup> Required by law, for example, in Austria, Purchase Contract Awards Act 2002, para. 116.10(4).

<sup>41</sup> See para.116.2 of Purchase Contract Awards Act 2002 of Austria, providing that an ERA must not begin before expiry of two working days after having been advertised in the Internet; Law 10.520 of Brazil that provides for at least 8 days after the notice of auction is given; article 54(4) of EU Directive 2004/18/EC, providing that ERAs may not start sooner than two working days after the date on which invitations are sent out; and article 76(4) of the Public Procurement Law of Poland, which refers to a five-day waiting period between the transmittal of the invitation and the opening of the auction.



25. Usually, regulations provide flexibility to procuring entities with respect to the closure of the auction. For example, under the new EU directives, auctions may be closed in one or more ways: (a) at the date and time fixed in advance as communicated to tenderers in the invitation; (b) when contracting authorities receive no more new prices or new values which meet the requirements concerning minimum differences; or (c) when the number of phases fixed in the invitation has been completed.<sup>42</sup> The Austrian law adds to that a possibility of terminating an auction by a procuring entity if serious reasons objectively justify (“abortion of the auction”).<sup>43</sup> The end of the bidding session may be set electronically or, as in Brazil, if expressly provided in the notice of auction, announced by the auctioneer.<sup>44</sup> The Brazilian system permits bidders to challenge the time fixed for the auction and request extensions of the auction. However, it is within the discretion of auctioneer to satisfy such a request.<sup>45</sup>

26. In practice, the greater the value and complexity of the procurement, the longer the duration of the ERA. Rarely, ERAs close after a fixed duration of time has expired (what is called “hard close time”). Usually, the closing time of the ERA is automatically extended for a specified period of time (e.g., 5 minutes) if a new lowest bid or a bid that changed top bid rankings (usually one of the top three ranked bids) is received in the last few minutes (e.g., within 2 minutes of the closing time). Such extensions may be continuous for an indefinite period of time (known as “unlimited soft close”) or limited in the amount of overtimes (e.g., maximum of three 5-minute extensions). This process continues until there are no longer any lower bids being submitted within the stated period prior to closing. Some guidelines recommend considering a possibility for extensions for only very high value procurements, as they can be seen as imposing undue pressure on bidders to lower prices and disadvantaging bidders who may have allocated a fixed period of time to attend the ERA.

#### *Bidding requirements*

27. It is affirmed in some sets of rules that only bids submitted online are acceptable.<sup>46</sup> In some jurisdictions, this is implied in the definition of ERA.<sup>47</sup> On the other hand, a procuring entity may permit participation in ERAs through proxies, for example, if technical problems arise that prevent some participants from participating in the ERA, provided that such option is made known in advance and available to all participants on a non-discriminatory basis.<sup>48</sup>

<sup>42</sup> Article 54(7) of Directive 2004/18/EC.

<sup>43</sup> Purchase Contract Awards Act 2002, para. 116.10(4). Immediately after abortion of an auction, the reasons for the abortion shall be communicated at the Internet address fixed in the auction rules to those bidders who were last in participating in the auction (para. 116.11).

<sup>44</sup> Decree 3.697.

<sup>45</sup> Auctioneer’s discretion in this regard has been criticized by some analysts, as well as by the MDBs that prefer fully automated systems without little, if at all, human intervention.

<sup>46</sup> See the Singapore Guidelines (see above, footnote 20), section 3.1.2(b).

<sup>47</sup> For instance, under article 1(7) of EU Directive 2004/18/EC, “electronic auction” is defined as a repetitive process involving an electronic device for presentation of new prices and/or new values. Although an “electronic device” is not defined, it implies electronic means, defined in article 1(13) of the directive as using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means and by other electromagnetic means.

<sup>48</sup> See Arrowsmith S., “Electronic reverse auctions under the EC public procurement rules: current possibilities and future prospects,” 11 Public Procurement Law Review, No. 6, 2002,

28. When the price only is subject to ERA, it is usually required that the value of each bid has to be necessarily lower than the value of the last bid registered by the system. In Romania, it is explicitly provided that the new bid cancels the previous one.<sup>49</sup> In Brazil, in the event of a bid tie, only the bid registered first will be considered.

29. In Austria and Poland, after each round of bids, participants who did not bid at all or did not vary their bids within the fixed increment are excluded.<sup>50</sup> A procuring entity is required to ensure that participants excluded are informed about the exclusion and reasons for the exclusion without delay, and prevented from participating any further in the auction.<sup>51</sup> In Brazil, no provisions on exclusion of bidders by the auctioneer are found but bidders are permitted to withdraw their bids at any time and, if they are not interested in continuing, disconnect at any time. The time of disconnection is automatically registered and this comes out in the records of the ERA.

#### *Disclosure of information during the auction*

30. One of the inherent features of an ERA is that it enables current information about the status of the auction to be provided to bidders automatically and instantaneously as an auction unfolds. It has been observed that, unless properly regulated, this feature of ERAs gives rise to concerns, especially from competition law standpoint.<sup>52</sup>

31. Most regulations are flexible with respect to the extent of disclosure. In some systems, a general requirement is found to provide to participating bidders certain basic information about the progress of an auction on an on-going basis, such as information that allows bidders to ascertain their current relative rankings,<sup>53</sup> the number of bidders participating in the proceeding,<sup>54</sup> and the time remaining for the reverse auction. To determine relative ranking, some systems require real-time disclosure of the lowest price to be bid<sup>55</sup> while in other systems, only ranking but not prices are disclosed.<sup>56</sup> In yet other systems, such as France, participants are informed of the level of offers of the other participants.<sup>57</sup> Under the new EU directives and the Austrian law, information about other prices or values submitted may be disclosed if the specifications or auctions rules, as

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pp. 299-330 (originally prepared for Achilles Information Ltd.).

<sup>49</sup> Article 36(4) of Government Ordinance No. 20 of 24 January 2002.

<sup>50</sup> See Purchase Contract Awards Act 2002 of Austria, para. 116.10(4) and article 79(2) of the Public Procurement Law of Poland.

<sup>51</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para. 116.10(4).

<sup>52</sup> See Kennedy-Loest C. and Kelly R., "EC competition law rules and electronic reverse auctions: a case for concern?", 2003, 12 Public Procurement Law Review, No. 1, pp. 28-30.

<sup>53</sup> Article 54(6) of EU Directive 2004/18/EC requires contracting authorities to instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their "relative rankings" at any moment. The same provisions exist in Austria (Purchase Contract Awards Act 2002, para. 118.3).

<sup>54</sup> See, e.g., the Purchase Contract Awards Act 2002 of Austria, paras. 117.2 and 118.3; article 54(6) of EU Directive 2004/18/EC; and article 79(3) of the Public Procurement Law of Poland.

<sup>55</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para. 117.2.

<sup>56</sup> See, e.g., the Shanghai Interim Measures for the Management of Online Public Procurement Bidding. According to the analysts of the EU competition law rules, showing during the auction overall ranking instead of prices is preferable from competition law prospective. See Kennedy-Loest C. and Kelly R., "EC competition law rules and electronic reverse auctions: a case for concern?", 2003, 12 Public Procurement Law Review, No. 1, p. 29.

<sup>57</sup> Decree No. 2001-846, article 1.

applicable, provide for the disclosure of that information.<sup>58</sup> In practice, suppliers are sometimes given information not only on their ranking but also on the extent to which their tender must be improved to win the contract (which may be of concern in view of generally applicable procurement rules).

32. A distinct feature of the Brazilian ERA system is a possibility for a reverse auctioneer and bidders to communicate through the “chat”, a tool used to clarify the understanding between the auctioneer and the suppliers on issues related to the auction during the ERA, such as conditions of the bidding documents, specifications, suspensions, extensions and abnormally low bids. Either side can initiate the chat. All communications through the chat are visible to all participants of the auction. The chat is open only for the interaction between the reverse auctioneer and the individual suppliers, not the suppliers among themselves. No regulations exist in Brazil that address the use of chats which operate as an application of COMPRASNET.<sup>59</sup>

33. It is general practice, and often required by law, that the identity of those submitting particular tenders in the auction phase is not disclosed to other bidders.<sup>60</sup> In some systems, the identity is not disclosed to the procuring entity.<sup>61</sup> Usually anonymity requirements apply until the closure of ERA<sup>62</sup> and is ensured through computerized or automatic means. In some systems, anonymity of bidders is preserved also after the auction.<sup>63</sup>

#### *Suspension of auctions*

34. In most countries surveyed, no specific rules regulating suspension of ERA have been found. Generally, applicable provisions of procurement law may apply, for instance suspension may be ordered by a court or supervisory authority. In the practice of many countries, procuring entities retain broad flexibility to suspend reverse auction procedures and fix the time frame of suspension.

35. At least one country, Brazil, addresses the subject specifically in the context of ERAs. The usual causes of an ERA’s suspension are system or communications failures. If the auctioneer is disconnected from the system, the latter will remain accessible to bidders for up to 10 minutes. The auctioneer will return to the bidding session whenever it is possible to do so, without prejudice to the bids submitted during the time the auctioneer was disconnected. If, however, the auctioneer is disconnected for more than 10 minutes, the ERA is suspended and resumes on the date and time notified to the participants by the

<sup>58</sup> Purchase Contract Awards Act 2002 of Austria, para. 118.3 and article 54(6) of EU Directive 2004/18/EC.

<sup>59</sup> The multilateral development banks (MDBs) view the chat feature as offering a potential for fraudulent activities, for example price-signalling and corruption. The position of the MDBs, as communicated to the secretariat, is that for the operations that they fund, they will not accept such a chat facility and will require a fully-automated auction without the participation of an individual representative of a government.

<sup>60</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para.116.12; Decree No. 3.697 of Brazil; article 54(6) of EU Directive 2004/18/EC; Decree No. 2001-846 of France, article 1; and Government Ordinance No. 20 of Romania, section 36(2).

<sup>61</sup> In Brazil, the system only provides an identification number of the bidders, so that the reverse auctioneer may control the receiving of bids from the different bidders, but not be able to identify them physically. The bidders themselves have sufficient information to perceive only which is the lowest bid and if it is theirs or not.

<sup>62</sup> See article 7 of the Slovenian Rules (see above, footnote 9); and Government Ordinance No. 20 of Romania, section 36(5).

<sup>63</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para. 116.12.

auctioneer through the COMPRASNET website.<sup>64</sup> Disconnection of a bidder does not necessarily suspend the process. If disconnection happens through the fault of the procuring entity or the government system, the bidder may seek suspension or cancellation of the process or damages from the government. If disconnection is caused by a third party, including the bidder's own Internet provider, the bidder can seek only damages. In case of disconnection, suppliers may contact a call centre/helpdesk (toll free) which function throughout the bidding process to inform about the situation. The auctioneer may suspend the ERA until communications are re-established with all interested parties or, if more than 10 minutes have elapsed, may postpone the event and set a new date and/or time to resume the ERA.

36. The Brazilian system permits suspension on other grounds. Decisions to suspend may be taken by auctioneers either on their own initiative or at the request of bidders. For instance, temporary suspensions may be requested by participants and granted by the reverse auctioneer to give time to bidders to rethink their bids. The fact of suspensions and justifications are automatically reflected in the records of ERA. Notably, complaints filed by bidders during the auction (the system allows filing those online through the specific e-mail service provided on the website) do not suspend the ERA although they must be dealt with by the auctioneer before closing an ERA.

#### *Record keeping*

37. In most countries surveyed, the rules applicable generally to preservation of procurement-related documentation apply also in the context of an ERA.<sup>65</sup> In other systems, a more specific requirement is found on recording the course of the ERA and any and all data transfers made in connection with it.<sup>66</sup> In Brazil, all ERA proceedings are automatically generated by COMPRASNET, in the form of the records of the proceedings, which is electronically signed by the reverse auctioneer and assistants, and is published on the COMPRASNET website at the end of the session. An extract is also generated and automatically sent to the Official Journal, which exists in paper and electronic forms, for the publication the next day. Usually the procuring organization also publishes an extract of the results on its website.<sup>67</sup>

### **3. Post-auction**

38. At the post-auction stage, the selection of a winner and award of the contract takes place. At that stage, a procuring entity may also have to deal with complaints and appeals by aggrieved bidders. Some systems impose special duties on a procuring entity with respect to the monitoring of ERA systems.

<sup>64</sup> Article 11 of Decree 3.697.

<sup>65</sup> E.g., under article 43 of EU Directive 2004/18/EC.

<sup>66</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para. 116.13.

<sup>67</sup> The information published includes: (a) the name and other details of the bidders and the procuring organization; (b) the items of the procurement and the budgeted unit price for each; (c) the initial price proposal of all bids; (d) the initial and closing time of the reverse auction session and suspensions; (e) all decisions taken by the reverse auctioneer; (f) the communications exchanged between bidders and the reverse auctioneer in the "chat"; (g) the complaints filed, if any, and decisions taken regarding them; (h) clarifications requested and given; and (i) the complete data on the adjudication procedure and any procedure that would be dealt afterwards, such as the testing of samples.

*Selection of the winner*

39. When auctions of models 1 and 2 are utilized (see A/CN.9/WG.I/WP.35, para. 33), the winning bidder should be known in the end of the auction as it is normally the bidder offering the lowest bid. In model 3 auctions, the winning bidder is not known until after the full evaluation of auctionable and non-auctionable criteria.

40. However, even in auctions of models 1 and 2, there may be situations in which the lowest bid is not necessarily the winning bid. Some systems allow the notice on ERA or the terms and conditions of auctions to state that the final decision to accept the offer rests with the procuring entity allowing it to ascertain if the product meets the standards required and whether the supplier is able to proceed with the supply (see above, para. 9). In Brazil, the bidder offering the lowest bid may be disqualified in the course of evaluation of its qualifications, which takes place after the auction.<sup>68</sup> In China, the lowest bid may be invalidated by the procuring entity, for instance, if it is higher than the market price or abnormally low or in case of a misconduct of the winning bidder during the bidding process or the registration.<sup>69</sup> Notably, in resolving a price tie, a bidder with a higher credibility will win.<sup>70</sup> The right to reject all bids at the end of ERAs is explicitly provided in some ERA-specific regulations.<sup>71</sup>

41. The existing regulations usually allow the procuring entity to accept the second best offer, if for legitimate reasons it rejected the lowest bid, provided that such a possibility was disclosed in advance to the bidders.<sup>72</sup> In other systems, however, if the lowest bid is invalidated, the procuring entity has to reconduct ERA or adopt other methods of procurement.<sup>73</sup>

<sup>68</sup> Law 10.520 and Decree 3.697. Another distinct feature of the Brazilian system found in article 4 of the Decree, is that the auctioneer may negotiate the price directly with the winner or with the next best bidder if the first is disqualified, if the auctioneer is not satisfied with the lowest price obtained in the ERA (paras. XI and XVI). Regulations do not impose any limit on the price that can be negotiated indicating only that unrealistic pricing is not permitted. The winning bidder, however, has the right to refuse lowering the price submitted in the ERA and the auctioneer is not allowed to disqualify the bidder for that reason. The utility of the procedure has been questioned by some analysts and, in practice, the procedure has not been utilized often.

<sup>69</sup> See, e.g., in China, the Shanghai Interim Measures for the Management of Online Public Procurement Bidding, articles 22 and 27; the Shenzhen City Interim Measures for the Management of Online Public Procurement Bidding, article 31; the Zhuhai City Interim Measures for the Management of Online Public Procurement Bidding, article 29; and the Hefei City Interim Measures for the Management of Online Public Procurement Bidding, article 25.

<sup>70</sup> See, in China, the Shanghai Interim Measures for the Management of Online Public Procurement Bidding, article 19; and the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding, article 22.

<sup>71</sup> Section 3.1.2(c) of the Singapore Guidelines (see above, footnote 20).

<sup>72</sup> See, e.g., in China, the Liuzhou City Rules of Implementation for Public Procurement through Online Procurement, article 19. The Brazilian system permits an auctioneer to approach the bidder who submitted the second lowest bid if the winning bidder is disqualified or the bid is deemed to be unacceptable or non-responsive. If the second lowest bidder is not logged on to the system, the reverse auctioneer will call by e-mail to continue the procedure. In the case of disqualification or refusal by the second bidder to provide the goods or services at the price of the original winner, the next lowest bidding bidder is called upon, and so on until the contract is awarded. If none agree, the ERA is cancelled.

<sup>73</sup> See, in China, the Shanghai Interim Measures for the Management of Online Public Procurement Bidding, article 22; the Shunyi District of Beijing Interim Measures for the Management of Online Public Procurement Bidding, article 20; and the Liuzhou City Rules of

42. In most jurisdictions bids are binding on bidders<sup>74</sup> and withdrawal of bids may be subject to the forfeiture of a bid security, if any. However, in the United States, bidders are allowed to submit quotations (rather than bids), which are not considered to be binding offers under United States law until the purchase order is extended by the procuring entity and accepted by the bidder.

*Announcement of the winner*

43. In some systems, the law requires the name of the successful bidder to be communicated immediately after termination of the auction to the Internet address fixed in the auction rules.<sup>75</sup> In other systems, regulations do not require an immediate release of the results of the ERA. At least in one province of China, regulations recommend that this should be done on the second day after the closing date.<sup>76</sup>

44. Some systems regulate specifically the content of the notice on the winning bid, including the identity and coordinates of the winning bidder, the price of the winning bid,<sup>77</sup> and the place of publication (e.g., on the website specified in the notice of the auction).<sup>78</sup>

*Contract award*

45. Under the new EU directives, contracts are awarded after closing an ERA on the basis of the results of the electronic auction.<sup>79</sup> The directives do not specify the precise time when the contract award should take place. This may be subject to provisions regulating review and appeal mechanism. In Austria, the contract must not be awarded until three working days have elapsed from the date of the contract award notice; otherwise it is null and void.<sup>80</sup> The contract award notice, in turn, is given to tenderers simultaneously, without delay, using electronic or telefax service.<sup>81</sup> In China, while the timing of the contract award is to be stated in the solicitation documents,<sup>82</sup> regulations in some provinces recommend that this should happen three days after the publication of the notice of auction.<sup>83</sup>

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Implementation for Public Procurement through Online Procurement”, article 22.

<sup>74</sup> As the secretariat was advised during consultations with experts, imposing the requirement of binding bids may be regarded as an effective tool against potential abuses in the ERA, such as by “phantom” bidders, or members of a cartel who may keep bids artificially high.

<sup>75</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para. 116.11.

<sup>76</sup> See, e.g., the Working Procedure for Online Procurement Bidding (Office Equipment), article 6, under the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding.

<sup>77</sup> Under the Shanghai Interim Measures for the Management of Online Public Procurement Bidding, only the name of the winning bidder but not the winning price is disclosed.

<sup>78</sup> See, e.g., the Public Procurement Law of Poland (article 80(2)); and, in China, the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding, article 22.

<sup>79</sup> See article 54(8) of EU Directive 2004/18/EC.

<sup>80</sup> See Purchase Contract Awards Act 2002 of Austria, para. 100.2.

<sup>81</sup> Ibid., para. 100.1.

<sup>82</sup> See, e.g., the Shanghai Interim Measures for the Management of Online Public Procurement Bidding, article 17; and the Interim Measures for the Management of Online Public Procurement Bidding of Shunyi District of Beijing, article 15.

<sup>83</sup> See, e.g., the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding”, article 22.

*Review*

46. In most jurisdictions, a general review mechanism applies to ERAs. Specific detailed regulations on appeals in the context of ERA exist in Austria. The following decisions by a procuring entity may be appealed: the invitation (within 7 days), the exclusion from participation (within 3 days), the selection of participants for auctions with a limited number of participants (within 3 days of the notice of the choice), and the award decision (within 3 days from the date of the contract award notice).<sup>84</sup> The law allows unsuccessful tenderers to request information on the reasons for which their tender was unsuccessful as well as on the characteristics and advantages of the successful tender immediately after publication of the name of the successful tenderer. It requires a procuring entity, immediately after being served the request, at the latest one day before expiry of the waiting period, to inform the unsuccessful tenderer of the contract sum awarded and of the characteristics and advantages of the successful tender. A procuring entity is released from such obligation if disclosure of such information would prejudice public interest, the legitimate commercial interests of any company or free and fair competition.<sup>85</sup>

47. At least one country, the United States, permits the reopening of the auction after an ERA had closed on the basis of a protest. In a 2001 decision in *Royal Hawaiian Movers, Inc.*,<sup>86</sup> for example, the Government Accountability Office (GAO) held that the purchasing agency could properly reopen a competition, after an ERA had closed, to accept revised price proposals in order to correct an ambiguity in the solicitation that one of the offerors had protested to the agency.<sup>87</sup> The GAO summarized its decision as follows:

“Notwithstanding a provision in a request for proposals that price revisions could only be made during a reverse auction, the agency reasonably determined to request revised price proposals after the end of the auction, in response to an agency-level protest, where the solicitation was ambiguous concerning when the auction would end and the agency reasonably believed that offerors may have been misled.”

## IV. Conclusion

48. Empirical studies demonstrate that ERAs are currently being used in public procurement in some countries and are being considered for introduction in some others. In the light of experience gained and of initiatives at the regional and international levels, it appears likely that this purchasing method will receive acceptance as an appropriate method of public procurement. A consensus appears to be emerging at the international level that, if properly used, ERAs generate substantial savings for governments without undermining, but rather enforcing, such procurement objectives as economy and efficiency in procurement, transparency, fair and equitable treatment of all suppliers, and the integrity and fairness and public confidence in the procurement process.

<sup>84</sup> Purchase Contract Awards Act 2002 of Austria, para. 20(13 a ii).

<sup>85</sup> *Ibid.*, para. 100.4.

<sup>86</sup> Decision of the Comptroller General of the United States, File No. B-288653, 31 October 2001, available at <http://archive.gao.gov/legal/d425p10/a02467.pdf>.

<sup>87</sup> See also Nash R. L., and Cibinic J., “Oversight of procurements: delayed addendum”, vol. 16, No. 1, Nash & Cibinic Report 1 (West/Thomson, January 2002).

49. It has been observed that absence of regulation, or of adequate regulation in some countries where ERAs have been introduced, has deterred some of the procuring entities from using ERAs. The questions that such regulation should address, without however over-regulating the subject, include: (a) when, and for what type of goods and services, the use of ERA is appropriate and when it is not; (b) how to prevent its overuse; and (c) what safeguards must be in place to mitigate risks stemming from the use of ERAs. Although most aspects of ERAs are to be addressed in procurement laws and regulations, the introduction of this electronic purchasing method in public procurement may necessitate adjustments in other relevant branches of law, such as competition and general public administration law.

50. The Model Law does not deal expressly with ERAs, and certain provisions effectively prevent them. For instance, substantial changes to tenders after submission, including to their price, and disclosure of tender information, are prohibited (article 34(1)(a) and (8)). The provision conferring a right to tender in writing in a sealed envelope also precludes an ERA if a supplier does not agree to the use of the method (article 30(5)).

51. Thus, the Working Group may wish to decide: (a) whether ERAs should be incorporated in the Model Law at all; (b) if so, the approach to be taken as to whether ERAs are to be a distinct procurement method, or an optional phase in the existing procurement methods; and (c) the content of such regulation.

52. The main possible advantages of a distinct-method approach are that: (a) it avoids including in the general provisions on other relevant procurement methods any modifications to take account of the use of ERAs, which may make such provisions overly complex; and (b) it permits governments to restrict the grounds for using ERAs (for example, ERAs may be inappropriate in open tendering). The main arguments for an optional phase approach are: (a) flexibility—an ERA can be used within more than one procurement method (e.g., open tendering, restricted tendering and two-stage tendering); and (b) special regulations have to be drafted only for those aspects of ERA proceedings that are different from normal rules and procedures, as the general aspects of procurement methodology will continue to apply.

53. The choice of the approach, to a large degree, will depend on the Working Group's view on which types of purchases will be eligible for procurement using ERAs. Consequential decisions may also include: (a) the auction scope (i.e., which variables could be subject to ERA, e.g., price only, as in Brazil, or non-price criteria in addition, as in the EU) and evaluation and award criteria; (b) the auction model (1, 2 and/or 3); (c) parameters preventing overuse of ERAs; and (d) if the Working Group adopts an optional-phase approach, in which procurement method an ERA phase should be envisaged and whether it should necessarily be the final phase.

54. Regardless of the preferred approach, ERA-specific provisions in the Model Law would need to be consistent with the principles and objectives of the Model Law and, if the optional-phase approach is chosen, with the rules governing the relevant procurement method (e.g., in terms of degree of transparency, advertising requirements).

55. The answers to the policy questions raised in the above paragraphs will determine the direction of the Working Group's future work on the subject and on the revision of the Model Law and its Guide to Enactment generally. The extent of regulation of most procedural aspects will follow from the approach chosen. Nevertheless, it could be expected that aspects of the auction phase worth addressing regardless of the chosen option would include: (a) the type and extent of disclosure of information during the auction



phase; (b) the binding or non-binding nature of bids on bidders; (c) the circumstances under which bidders would be authorized to withdraw their bids or themselves from the ERA; (d) the right of a procuring entity to exclude bidders from ERA during the bidding process; (e) the obligation of the procuring entity to accept the lowest bid; (f) justifiable grounds for suspension of ERAs; (g) the level of protection of aggrieved bidders; and (h) the need for and extent of record keeping specifically in the context of ERAs. Other questions that may need to be addressed by the Working Group are of a more general nature, including: (a) the extent to which the issues of ERAs should be addressed in the Model Law or implementing regulations or the Guide to Enactment; and (b) safeguards that the Model Law should establish to prevent the problems stemming from the use of ERAs, such as risks of collusion and obstacles to the participation in ERAs by foreign bidders.

## A/CN.9/WG.I/WP.36

**G. Note by the Secretariat on possible revisions to the  
UNCITRAL Model Law on Procurement of Goods, Construction  
and Services – Issues arising from the use of electronic communications  
in public procurement: comparative study of abnormally low tenders,  
submitted to the Working Group on Procurement  
at its seventh session**

(A/CN.9/WG.I/WP.36) [Original: English]

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## I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “UNCITRAL Model Procurement Law” or the “Model Law”)<sup>1</sup> is set out in paragraphs 1 to 5 of document A/CN.9/WG.I/WP.34, submitted to the Working Group for its consideration at its seventh session.

2. At its sixth session (Vienna, 30 August-3 September 2004), the Working Group considered (inter alia) the issue of unrealistically-priced or abnormally low tenders in procurement. The Working Group was advised that under-priced contracts involve a risk that, as a result of the low contract price, the selected supplier might be unable to meet its obligations under the contract concerned. The Working Group noted that the risk had also been observed in the context of electronic reverse auctions (this procurement method is reviewed in detail in document A/CN.9/WG.I/WP.35).

3. The Working Group therefore requested the Secretariat to conduct a comparative study on how procuring entities handled unrealistically-priced or abnormally low tenders, both in the context of electronic reverse auctions and generally, also considering the relationship between abnormally low prices and competition law (document A/CN.9/568, paragraph 54). This Note provides the results of the comparative study requested.

## II. The phenomenon of unrealistically-priced or abnormally low tenders

### A. Definition of “unrealistically-priced or abnormally low tenders”

4. The phenomenon of under-priced contracts is discussed under various names and the Secretariat will refer to it as an “abnormally low tender” (“ALT”). The term ALT covers a response to any type of procurement opportunity (whether a formal tender proceeding or

<sup>1</sup> For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I (also published in the Yearbook of the United Nations Commission on International Trade Law, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/procure/ml-procure.htm>).

not). Similarly, and for consistency, the Secretariat will use procurement terms from the Model Law even when discussing other systems.<sup>2</sup>

5. The Secretariat will use the following working definition of an ALT:

“A tender price is assumed to be abnormally low if it seems to be unrealistic, in that it appears not to provide a margin for a normal level of profit or appears to be below cost, such that it may not be feasible to perform the contract at that price; and if the supplier cannot explain his price on the basis of the economy of the solution chosen, or the exceptionally favourable conditions available to the supplier, or the originality of the work proposed.”<sup>3</sup>

## B. The impact of ALTs

6. The submission of an ALT gives rise to a performance risk. In 1989, the then Procurement Working Group pointed out that ALTs involve a risk that “the tenderer would be unlikely to be able to perform the contract at (such) a price ... or could do so using only substandard workmanship or materials by suffering a loss... it could also indicate collusion between the tenderers.”<sup>4</sup>

7. For the supplier, fulfilling a contract at a loss can lead to excessive pressures to save costs, restricted cash flow, and even to insolvency. The procuring entity may sustain increased costs in seeking alternative supply, in attempting to ensure adequate contractual performance, and in reduced quality of the goods or services contracted. It may also be put under pressure to pay additional amounts without proper justification (also raising the risk of corruption), and it may have to devote internal resources to higher than normal monitoring functions. If reduced quality goods or services provided leads to maintenance and replacement being needed earlier in time than would have been the case had the quality been as stipulated in the specifications, then the overall costs of a contract may increase. Subcontractors can be pressured into submitting abnormally low sub-tenders, such that subcontract performance and the supply chain are also jeopardized.

8. From the macroeconomic perspective, ALTs may compromise environmental, health and safety provisions (as compliance with such provisions involves costs, and suppliers under cost constraints seek to reduce their costs wherever they can), they may give rise to reduced research and development and investment, they may put downwards pressure on employment conditions and they may increase the risks of the evasion of taxes and social security contributions. The longer-term effects may also include an anti-competitive impact on national economies and reduced international competitiveness, if there is a reduction in the number of market-players through insolvencies, and reduced working capital, investment, training, and poorer working practices. ALTs may therefore involve additional costs to the national Government outside the contract concerned.

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<sup>2</sup> Terms in direct quotations have been left as in the original texts. Further, the Secretariat makes reference to tender proceedings as a procurement model in this Note, but the Note applies equally to other procurement methods.

<sup>3</sup> See European Commission Directorate General III Working Group Report, 19 May 1999, “Prevention, Detection and Elimination of Abnormally Low Tenders in the European Construction Industry”, available at <http://www.ceetb.org/docs/Reports/DG3ALT-final.pdf>.

<sup>4</sup> Procurement: Report of the Secretary-General (A/CN.9/WG.V/WP.22), UNCITRAL Yearbook 1989, p. 116.

9. These impacts may be incidental to the unintentional submission of ALTs, or direct consequences of ALTs submitted intentionally so as to drive out competition. Small- and medium-sized enterprises (SMEs) tend to have limited financial resources, and the cash constraints normally found with under-priced contracts (as explained in paragraph 6 above) are proportionately more severe for SMEs.

10. In summary, ALTs can be seen as contrary to several aims of the Model Law, including economy and efficiency in procurement, the promotion of competition among suppliers and contractors, and the fair and equitable treatment of all suppliers and contractors.

### C. Possible reasons for the submission of ALTs

11. Empirical data indicate that ALTs are most prevalent in times of decreasing economic demand and in situations in which competition is fiercest.<sup>5</sup>

12. The Secretariat's study has identified various reasons why ALTs may be submitted, including:

(a) Unintentional ALTs:

(i) Imprecise and ambiguous project and tender documentation, and errors in evaluating the specifications and tender, increasing the risk that a supplier may misinterpret the requirements;

(ii) Inadequate time to prepare tenders, preventing suppliers from undertaking adequate costs evaluation and risk analysis;

(iii) Errors in estimating the internal costs of production. Estimates use historical data, and studies have shown that errors in estimation tend to be under-estimates;<sup>6</sup> and

(iv) Below-cost pricing during the auction process.<sup>7</sup>

(b) Intentional ALTs:

(i) Issues relating to anti-competitive behaviour in the marketplace. Suppliers may submit contracts knowingly at a loss, seeking market share, and may engage in predatory pricing,<sup>8</sup> to drive out other suppliers and thereby gain excess profits. Anti-

<sup>5</sup> See E. Engel and A. Wambach, "Risk Management in procurement Auctions", 2004, Working Paper, University of Erlangen-Nuernberg, available at [http://www.acquistinretepa.it/pls/portal30/docs/FOLDER/CONSIP/DOCUMENTI/DOCS\\_HOME\\_3/Paper.pdf](http://www.acquistinretepa.it/pls/portal30/docs/FOLDER/CONSIP/DOCUMENTI/DOCS_HOME_3/Paper.pdf), p. 18.

<sup>6</sup> See European Commission Directorate General III Working Group, endnote 3, above.

<sup>7</sup> See the American Bar Association, Public Contract Law Section, Comments on Reverse Auction Notice (Jan. 5, 2001), available at [http://www.abanet.org/contract/federal/regscmm/ecommm\\_003.html](http://www.abanet.org/contract/federal/regscmm/ecommm_003.html) (citing D. Wald, "The Auction Model: How the Public Sector Can Leverage the Power of E-Commerce Through Dynamic Pricing", p. 18 (The PricewaterhouseCoopers Endowment for The Business of Government (October 2000)), available at <http://www.businessofgovernment.org/pdfs/WyldReport.pdf>).

<sup>8</sup> Predatory pricing is the practice of cutting prices below the marginal costs of production to drive out a new enterprise (or to deter future entry into the market of new enterprises), at which point prices can be raised again (see, e.g. P. Areeda and D. F. Turner, (1975) "Predatory Pricing

competitive behaviour is normally controlled and regulated in competition law, though certain procurement regimes prohibit unrealistically low pricing.<sup>9</sup> Also, large enterprises may keep branches in business, even though they operate at a loss, because they serve the strategy of the enterprise as a whole, and those branches may submit ALTs as they do not have to cover their own costs;<sup>10</sup>

(ii) Issues related to potential insolvency. A supplier may seek a contract at any price, even if it will make a loss in fulfilling the contract, because its only aim at the time is to stay in business, or to secure credit and avoid insolvency. Its motivation may therefore be to cover its fixed costs, such as salaries, and an ALT may reflect those costs alone. Some suppliers may also fail to meet fiscal, social or environmental obligations, in which case the supplier can avoid such costs in its bids.<sup>11</sup>

13. Additionally, it has been noted that there is a greater risk of an ALT if procuring entities are authorized to enter into pre- or post-tender negotiations.<sup>12</sup> Negotiations may be held with the sole aim of reducing prices or imposing onerous contractual terms. Under pressure from the procuring entity, suppliers may have to offer prices below costs or lose the contract.

14. The most common reasons why procuring entities may accept ALTs are insufficient awareness of the risks of and identification of ALTs, inadequate resources for drafting specifications and evaluation of tenders and supplier qualification, and pressure to award a contract to the supplier with the lowest price, irrespective of quality. Further, where procuring entities are required to publish and justify their contract awards, and in order to give as little cause for criticism as possible, the lowest tender price may be taken as the decisive award criterion.

15. Additionally, there is a risk that evaluation criteria may not be adequate to identify performance risks, and procuring entities may not take into account aspects of an ALT that can increase the overall price of a contract, such as:

- (a) Excess variations to the contract as suppliers seek to make up losses, with increased numbers of contractual disputes;
- (b) Poor execution of work;
- (c) Inadequate quality of materials and systems, and consequently higher costs of use, maintenance and replacement;
- (d) Additional monitoring and oversight costs; and
- (e) Insolvency of suppliers during the contract phase.

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and Related Issues Under Section 2 of the Sherman Act,” *Harvard Law Review*, 88, pp. 697-733).

<sup>9</sup> See, further, paragraph 26 and endnote 24, below.

<sup>10</sup> Similarly, ALTs may be submitted by public entities that do not have private-sector capital costs. A less common source of ALTs is State-imposed use of official price lists.

<sup>11</sup> This observation was brought to the attention of the Secretariat during consultations held for the preparation of this Note. See, further, European Commission Directorate General III Working Group Report, endnote 3, above.

<sup>12</sup> See, for example, European Commission Directorate General III Working Group Report, endnote 3 above, and J. Roselle, “The Abuse of Reverse Auctions In The Utility Industry”, p. 2, available at <http://www.mccallan.com/AbuseofReverseAuctions.pdf>.

16. Modern procurement methods have a high emphasis on price, in some cases obliging the procuring entity to take the lowest tender price or the lowest evaluated tender, with inadequate attention to quality issues. Certain commentators have observed that this aspect is seen in electronic reverse auctions,<sup>13</sup> which have a very high emphasis on price,<sup>14</sup> and perhaps in procurement methods aimed at taking advantage of economies of scale.<sup>15</sup>

#### D. Provisions addressing ALTs in the Model Law

17. ALTs were the subject of preliminary discussion during the formulation of the 1993 Model Law, from the perspective of whether ALTs might indicate collusion between suppliers. At that time, the Working Group also considered whether permitting procuring entities to set minimum or maximum prices would be appropriate,<sup>16</sup> and although transparency advantages were recognized, the Working Group did not recommend setting minimum or maximum prices, nor did it explicitly make provision for ALTs.

18. The only provisions in the Model Law that can therefore be used to address the issue of ALTs are those providing for the qualification of suppliers and the evaluation of tenders.

19. Article 6 of the Model Law regulates the proceedings for qualification of suppliers, and states that suppliers should satisfy the procuring entity regarding (inter alia) professional, managerial and technical qualifications and competence, resources, legal capacity, solvency, and that they have paid taxes and social security contributions, that their directors are not subject to criminal investigation or prosecution, and any other requirements set out in the solicitation documents. The Guide to Enactment states that the qualification exercise should afford the procuring entity “sufficient flexibility to determine the exact extent to which it is appropriate to examine qualifications in a given procurement proceeding”.<sup>17</sup>

20. On the question of evaluating tenders, the procuring entity shall, under article 34(4)(a) of the Model Law:

“Evaluate and compare the tenders that have been accepted in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents.”<sup>18</sup>

<sup>13</sup> This procurement method is reviewed in detail in document A/CN.9/WG.I/WP.35.

<sup>14</sup> O. Soudry, “Promoting economy: electronic reverse auctions under the EC directives on public procurement”, 2004, *Journal of Public Procurement*, vol. 4, No. 3, p. 365, though other commentators have noted that distributing awards (multi-sourcing) in larger contracts can offset this risk. See, for example, R. Gilbert and P. Klemperer, 2000, “An equilibrium theory of rationing”, *RAND Journal of Economics*, vol. 31(1), pp. 20-21.

<sup>15</sup> For example, framework agreements, as described in the Report of Working Group I (Procurement) on the work of its sixth session (Vienna, 30 August-3 September 2004) A/CN.9/568, paragraphs 68-78.

<sup>16</sup> Procurement: Report of the Secretary-General (1989), paragraph 170, see endnote 4, above.

<sup>17</sup> UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment (1994) (*Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)*, Annex I, UNCITRAL Yearbook 1994, part three, chap. I), paragraph 23.

<sup>18</sup> This analysis does not address socio-economic issues, such as margins of preference and balance of payments.

21. During the amendment of the Model Law to incorporate provision for services, Article 41 *quater* was proposed,<sup>19</sup> to include the “effectiveness of the proposal in meeting the needs of the procuring entity” as one of the evaluation criteria, along with the qualifications, experience, etc., of the supplier and its personnel.<sup>20</sup> The procuring entity would then be able to disregard a tender that had been inflated with regard to technical and quality aspects as compared with the price proposed for the items concerned. (This provision can now be found within Article 39.2 of the current Guide to Enactment.)

22. The Model Law does not, however, provide detailed guidance on the evaluation to be undertaken, providing that “the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents” (article 34(2)(a)), subject to the correction of clerical and similar errors. Under article 34(4)(b), the basis of evaluation and determination of the successful tender is the lowest tender price (or the lowest evaluated tender, if the latter basis is set out in the solicitation documents, and using the criteria specified in those documents). As regards the costs of completion of a contract, a procuring entity can take into account only “the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction or provision of the services, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction or services” (article 34(4)(c)(ii)), and only where it is carrying out a lowest evaluated tender assessment. Additional costs that might arise from an ALT, such as are described in paragraph 15 above, may therefore not be taken into account in an evaluation carried out under these provisions.

23. Article 34(1)(a) permits the procuring entity to seek clarification of a tender, though a modification of substance or price is not permitted, and article 31 allows the procuring entity to set a bid validity period of a sufficient length to accommodate a clarification procedure, and to extend it if necessary. However, when drafting these provisions, the Working Group expressed concern at a potential for abuse,<sup>21</sup> and noted that the provision “[was] not intended to refer to abnormally low tender prices that are suspected to result from misunderstandings or from other errors not apparent on the face of the tender.”<sup>22</sup> The Model Law does not therefore provide a procuring entity with the means to clarify possible ALTs as such with suppliers.

24. The Model Law does not permit a procuring entity to reject an ALT as such, though article 12 does enable it to reject all tenders, proposals, offers or quotations. The Guide to Enactment notes that the purpose of article 12 is to enable the procuring entity to reject all tenders for reasons of public interest (such as where there appears to have been a lack of competition), provided that the right to do so has been reserved in the solicitation documents.

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<sup>19</sup> Draft amendments to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction: Note by the Secretariat (A/CN.9/394), paragraph 21.

<sup>20</sup> See discussion of article 39(2) in the Guide to Enactment.

<sup>21</sup> Report of the Working Group on the New International Economic Order on the work of its eleventh session (New York, 5-16 February 1990) (A/CN.9/331), paragraph 144.

<sup>22</sup> Draft Guide to Enactment of UNCITRAL Model Law on Procurement: Note by the Secretariat (A/CN.9/375), UNCITRAL Yearbook 1993, p. 114.



### III. Comparative study—ALTs in existing legislation

25. This section will examine three elements of current law: first, that in use for the identification of possible ALTs; secondly, the steps that can be taken to establish whether there is in fact an ALT; and thirdly, available measures to combat an ALT once identified. Procurement law generally addresses these three notions, and this section will also briefly consider relevant aspects of competition law and policy.

#### A. Prohibition of the submission of an ALT in public procurement

26. The Secretariat has encountered little legislation explicitly barring the submission of ALTs. Exceptions are found in the China Tendering and Bidding Law, which provides that “a bidder shall not bid in competition at a price below cost, nor shall he bid in the name of another person or resort to any other false and deceptive means to win the bid by cheating,”<sup>23</sup> and in the United States Federal Acquisition Regulation 3.501, which bars unrealistically low pricing.<sup>24</sup> In Thailand, regulation provides for imprisonment or a fine when the submission of an ALT results in the award of a contract that it is not possible to fulfil, and provides for liability to compensate the procuring entity for its share additional costs incurred.<sup>25</sup> In the Philippines, there are general prohibitions against fraudulent activities on the part of bidders, with penal sanctions.<sup>26</sup>

#### B. Legislative measures designed to identify possible ALTs and subsequent steps to address them

27. The Secretariat has encountered more widespread procurement law aimed at preventing ALTs, normally found as part of the overall evaluation and supplier qualification procedures. The legislative measures seek to address possible ALTs from the perspective of avoiding performance risk, using procedures to identify possible ALTs and subsequent steps to address them.

28. The Secretariat has encountered various approaches in the systems surveyed, including identification of possible ALTs through tender evaluation, risk analyses, and price analyses. A risk or price analysis aims to assess whether an otherwise responsive bid would expose the procuring entity to a performance risk because, for example, the contract price would not involve a normal or adequate level of profit for the supplier (and the attendant risk of insolvency). Other systems permit (or oblige) procuring entities to investigate potential ALTs before any bids can be rejected, through the mechanism of requesting price justifications from the supplier(s) concerned.

29. The regulation of tender evaluation, supplier qualification and how those procedures can identify and address ALTs and performance risk are therefore examined together in this section.

<sup>23</sup> Article 33 of the Tendering and Bidding Law of China.

<sup>24</sup> France prohibits sales at a loss (“*vente à perte*”) but only as regards sales to private consumers and not to public entities. See article L. 420-5 of the *Code de Commerce*.

<sup>25</sup> Act on Offences related to submission of bids, section 8.

<sup>26</sup> Art. XXI(b)(4) of the Act Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes (Republic Act No. 9184, 22 July 2002).

## 1. Identification of ALTS

30. The identification of possible ALTs submitted is the first step towards addressing the risks that they pose. The main identification methods are arithmetical or statistical techniques to identify bids that fall outside the normal price range (“statistical analysis”), using market information to identify reference prices for comparative purposes and analysing the price structures of suppliers (“price analysis”), and considering whether a particular tender appears to pose a performance risk (“risk analysis”). This section will look at each of these techniques in turn, though an evaluation of tenders and suppliers will not necessarily include each technique, nor will it necessarily treat each technique as a separate stage in the evaluation process.

### (a) Statistical analysis

31. There are number of existing systems aimed at the identification of possible ALTs using arithmetical or statistical methods (sometimes carried out as part of price analysis), including:

(a) Arithmetic systems that measure the deviation of a particular tender price (normally by between 10 per cent and 15 per cent) from an average of all tender prices submitted, found, for example, in Belgium, Greece, Italy, Lithuania, Portugal and Spain;<sup>27</sup>

(b) Analysing whether the prices and costs provide the contractor with a profit margin lower than a “normal” margin; and

(c) Analysing whether the price proposed appears to be exceptionally low (whether generally, as envisaged under the new European Commission Directives on procurement,<sup>28</sup> or, for example, establishing a threshold below which a tender is considered as abnormally low).

32. For example, Spain’s Procurement Law<sup>29</sup> considers tenders to be ALTs (“temerity” offers) if there is only one supplier and his price is 25 per cent below the reference price, if there are only two suppliers, one of whose prices is more than 20 per cent below the other, and so on using a decreasing percentage scale for more than two suppliers.<sup>30</sup>

<sup>27</sup> See European Commission Directorate General III Working Group, see endnote 3, above.

<sup>28</sup> References to EU Directives are to the new directives governing public procurement (Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (Official Journal of the European Union, No. L 134, 30 April 2004, pp. 114 and 1, respectively. Both available at [http://europa.eu.int/comm/internal\\_market/publicprocurement/legislation\\_en.htm](http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm)) (the first and second new EU Directives, respectively). The previous EU Directives on public procurement contained broadly similar provisions (Directive 93/36/EEC of 14 June 1993 (Supply Directive), Official Journal of the European Communities, No. L 199, 9 August 1993, p. 1, as amended by Directive 97/52/EC of 13 October 1997, Official Journal of the European Communities, No. L 328, 28 November 1997, p. 1; Directive 93/37/EEC of 14 June 1993 (Works Directive), Official Journal of the European Communities, No L 199, 9 August 1993, p. 54, as amended by Directive 97/52/EC, above).

<sup>29</sup> *Ley de Contratos de las Administraciones Públicas, Real Decreto Legislativo 2/2000.*

<sup>30</sup> Exceptionally, the procuring entity may reduce the percentages by one third if the solicitation documents have reserved the possibility, and it may consider the relationship between the

33. Commentators have noted that any fixed percentage rates or other “arithmetical methods” can be arbitrary and question their efficiency, especially as they may be distorted by tenders that are high-priced in relation to the average.<sup>31</sup> In Bangladesh, the previous practice of rejecting bids more than five per cent below the procuring entity’s estimated price has been abandoned in the new Public Procurement Regulations, 2003, which provide, in Regulation 31(8), that “[t]here shall be no automatic exclusion of tenders which are above or below a predetermined percentage of the official estimates”, a change that commentators have linked to the arbitrariness of arithmetical methods.<sup>32</sup>

**(b) Price analysis**

34. Reference or market prices may be available to a procuring entity for some, but not all, products or services to be procured. Items that are bespoke, novel or not normally procured in the quantities the procuring entity may require will not have a reference or market price, and for items that are not commodities, the accuracy of reference or market prices will be difficult to ensure. Furthermore, the procuring entity may not have the resources or data available to it that would be necessary to estimate reference or market prices.

35. In some Latin American countries, notably Brazil and Argentina, reference prices (or maximum prices) can be set in the announcements of procurement opportunities, against which prices submitted can be compared for analytical purposes.<sup>33</sup> Brazil’s COMPRASNET electronic government procurement system<sup>34</sup> provides recent historical reference prices, and requires each procurement to be accompanied by a corresponding budget forecast. Legislation also requires procuring entities to evaluate proposals using an analysis of local costs and prices.<sup>35</sup>

36. In Indonesia, the procuring entity is required to assess a “self-estimated price”, to be used as tool for evaluating the reasonableness of the tender price and its constituent parts, and while it can also be used for assessing the value of any independent guarantee required to address an ALT,<sup>36</sup> it cannot be used as the basis for bringing down the tender price itself.<sup>37</sup>

37. Under the United States Federal Acquisition Regulations (FAR), a price analysis must be undertaken to evaluate and examine “a proposed price without evaluating its separate cost elements and proposed profit”, known as a “price realism” analysis. The FAR

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solvency of the supplier and the offer presented. See, further, article 85 of the regulations issued under the *Ley de Contratos de las Administraciones Públicas (Real Decreto Legislativo 2/2000)*, the *Reglamento General de la Ley de Contratos de las Administraciones Públicas, Real Decreto 1.098/2001*.

<sup>31</sup> For example, the French system has rejected such an approach, as it does not provide a true comparison (*Avis du Conseil de la concurrence*, 96A-08, 2 July 1996 and *Avis* 97-A-11, 5 March 1997).

<sup>32</sup> This observation was brought to the attention of the Secretariat during consultations held for the preparation of this Note.

<sup>33</sup> See Brazilian General Procurement Law 8.666, article 40, and Argentina’s procurement regulations, Decree 436/2000, article 41, available at <http://infoleg.mecon.gov.ar/normas/textactdto436%2D2000.htm>.

<sup>34</sup> Available at <http://www.comprasnet.gov.br/>

<sup>35</sup> The Brazilian General Procurement Law 8.666 requires each acquisition to have a corresponding budget forecast.

<sup>36</sup> See, further, paragraph 64, below.

<sup>37</sup> *Keppres* 80/2003.

has a non-exhaustive list of techniques and procedures that can be used for the purpose, including comparison of tendered prices among themselves and with those previously proposed, with previous contract prices, with independent Government cost estimates, with competitive published prices and indexes, and with prices obtained through market research. It also suggests the use of statistical and other estimates to highlight significant inconsistencies that warrant additional enquiry, and the analysis of pricing information from the supplier. Significantly, cost information (as opposed to price information) cannot be sought.<sup>38</sup>

38. By contrast, in Mexico, legal regulation stipulates that tender evaluations must demonstrate that both costs and prices are commensurate with prevailing conditions in the relevant regional or other market where the works will be carried out, requires budget consistency, and mandates an analysis of price and cost components, including comparisons with prevailing norms, profit margins and other expenses.<sup>39</sup> Similarly, in Buffalo City Municipality, South Africa, procuring entities estimate prices (called shadow prices) by considering (inter alia) statutory obligations, bills of quantities, the scope of the work, site conditions, production rates, statutory wage rates, contractual obligations and requirements, levels of remuneration of staff, profit, overheads and purchase and replacement of tools.<sup>40</sup>

39. However, setting maximum or minimum prices is not generally viewed as appropriate.<sup>41</sup> In the Philippines, regulations provide that “[t]here shall be no lower limit or floor on the amount of the award”.<sup>42</sup> Commentators have noted, in particular, that the procurement may become a lottery in the case of a minimum price, as suppliers all bid at the minimum price.<sup>43</sup>

### (c) Risk analysis and tender evaluation

40. The various multinational and domestic systems surveyed by the secretariat all contain some guidance as to the evaluation of tenders to be carried out, but the level of detail of the elements of that evaluation varies considerably. (The relevant provisions of the Model Law are found in paragraphs 20 to 24, above.) The two main award criteria are lowest price tender and lowest evaluated tender,<sup>44</sup> with the latter criterion affording greater flexibility in assessing the quality of a particular tender. However, some systems explicitly link the award criteria with the qualification of the supplier, as further set out in the following paragraphs.

<sup>38</sup> FAR 15.404-1(b), available at <http://www.arnet.gov/>, and as advised to the Secretariat by experts during consultations held for the preparation of this Note.

<sup>39</sup> Article 37 of the Law of Public Works and Related Services (*Ley de Obras Públicas y Servicios Relacionados*), available at <http://www.funcionpublica.gob.mx/unaopspfdgaop/loptlcu.htm>.

<sup>40</sup> See [http://www.buffalocity.gov.za/municipality/internalaudit\\_tenders.stm](http://www.buffalocity.gov.za/municipality/internalaudit_tenders.stm) (paragraph 3.9 of the Procurement Policy).

<sup>41</sup> See, for example, S. Parlane, “Procurement contracts under limited liability,” *Economic and Social Review*, 34, 1-21, p. 13.

<sup>42</sup> Section 31 of the Implementing Rules and Regulations Part A (IRR-A) of the Government Procurement Reform Act.

<sup>43</sup> This observation was brought to the attention of the Secretariat during consultations held for the preparation of this Note.

<sup>44</sup> See paragraphs 20 to 22, above.

(i) *Evaluation of tenders in multilateral legislation*

41. Article 44 of the second new EU Directive addresses the “[v]erification of the suitability and choice of participants and award of contracts”, and in addition to specific procedures where an ALT is suspected (in article 55, see paragraph 52, below),<sup>45</sup> the procuring entity is obliged to check “the suitability of the economic operators not excluded under Articles 45 and 46 ... in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3 [of article 44].” The procuring entity is therefore obliged to consider both the responsiveness of the tender and the suitability of the supplier.

42. Article 53 of the second new EU Directive sets out the criteria for awarding contracts themselves, noting that the provisions are “without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services”, and that when the award is made to the most economically advantageous tender, the procuring entity is to set out in its solicitation documents, or equivalent, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender (for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion).<sup>46</sup>

43. Under the GPA, procuring entities must award contracts to the supplier who has been determined to be fully capable of undertaking the contract and whose tender is either the lowest price tender or the lowest evaluated tender.<sup>47</sup> The GPA also sets out general principles for the assessment of a supplier’s suitability on the basis of non-discrimination, but notes that “[t]he financial, commercial and technical capacity of a supplier shall be judged on the basis both of that supplier’s global business activity as well as of its activity in the territory of the procuring entity, taking due account of the legal relationship between the supply organizations”.<sup>48</sup>

44. The North American Free Trade Agreement (NAFTA) authorizes a procuring entity to inquire into suspected ALTs as part of its tender assessment, and notes that the successful tender shall be that which is the lowest price or most advantageous tender, and in respect of which the supplier “has been determined to be fully capable of undertaking the contract”. The text also provides that if a procuring entity “has received a tender that is abnormally lower in price than other tenders submitted, the entity may inquire of the supplier to ensure that it can comply with the conditions of participation and is or will be capable of fulfilling the terms of the contract”.<sup>49</sup>

<sup>45</sup> Leaving aside the possibility of permissible “variants” under article 24.

<sup>46</sup> The weightings can be expressed by providing for a range with an appropriate maximum spread and, if it is impossible to weight them, the documents must set out the criteria in descending order of importance.

<sup>47</sup> Article XIII:4. For a description of the GPA provisions generally, see [http://www.wto.org/english/tratop\\_e/gproc\\_e/over\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/over_e.htm). The World Trade Organization (WTO) is currently negotiating draft revisions to the Agreement on Government Procurement (GPA) (see Annex 4(b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations available at [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf)).

<sup>48</sup> Article VIII:b.

<sup>49</sup> Article 1015.

(ii) *Evaluation of tenders in domestic legislation*

45. In Chile, legislation requires an economic and technical analysis of the present and future benefits and costs of the goods and services quoted in each tender, and stipulates that evaluation criteria must include the price, experience of the supplier, quality, technical assistance, technical support, after-sales service, delivery times, transportation costs, and other items that are deemed relevant.<sup>50</sup>

46. In Singapore (a signatory to the GPA), procurement is largely decentralized to individual Government ministries, but there are two central government registration authorities (GRAs),<sup>51</sup> which carry out centralized purchasing services for common items. The GRAs are required to assess the track record and financial capability of potential suppliers, and those who are assessed to be suitable receive a certificate from the central registration authority, which can then be submitted in future tenders.<sup>52</sup> The GRA registration may be specified in the solicitation documents as critical, non-critical or fully exempted for a particular procurement,<sup>53</sup> but if it is not required, procuring entities are required to carry out an equivalent assessment.

47. In the Hong Kong SAR, which is also a signatory to the GPA, potential suppliers can be required under tender conditions to demonstrate their financial capability to the Government.<sup>54</sup>

48. In the municipality of Buffalo City, South Africa, procuring entities are required to conduct a risk analysis (that is, additional to the price analysis described in paragraph 38, above) to ensure that the tender would not place the municipal council or the procuring entity at undue risk were it to be accepted. The regulation requires the following items to be considered, and notes that suppliers can be interviewed for the purpose: first, the tender price and its constituent elements and particularly any imbalance in prices, and unduly high or low individual rates; and secondly, the supplier's ability to obtain an independent guarantee, if applicable, its previous experience, financial and human resources, track record, its ability to supervise and control labour and, if required, to supply materials and provide plant/transport, and its understanding of the scope of work required. Tenders may be disregarded if "the price make up of portions of the work differ substantially from the estimated price and the [supplier] is unable to account for such discrepancies."<sup>55</sup>

49. In the United Kingdom, procuring entities, when assessing whether a supplier meets any "minimum standards of economic and financial standing", are authorized to seek statements from a supplier's bankers in addition to assessing its published financial statements.<sup>56</sup>

<sup>50</sup> Law 19,886, Articles 37 and 38.

<sup>51</sup> The Expenditure and Procurement Policies Unit, and the Building and Construction Authority, respectively. For a description of the Singaporean procurement regime, see [http://www.gebiz.gov.sg/scripts/itt\\_gitis/biz\\_oppG\\_itt\\_procure\\_regime.jsp](http://www.gebiz.gov.sg/scripts/itt_gitis/biz_oppG_itt_procure_regime.jsp).

<sup>52</sup> Appendix B22 of the Contracts and Purchasing Procedures, available at [www.gebiz.gov.sg/](http://www.gebiz.gov.sg/).

<sup>53</sup> Article 264 of the Contracts and Purchasing Procedures, available at [www.gebiz.gov.sg/](http://www.gebiz.gov.sg/).

<sup>54</sup> See <http://www.fstb.gov.hk/tb/eng/procurement/tender04.html>.

<sup>55</sup> See [http://www.buffalocity.gov.za/municipality/internalaudit\\_tenders.stm](http://www.buffalocity.gov.za/municipality/internalaudit_tenders.stm) (paragraph 3.8 of the Procurement Policy).

<sup>56</sup> Public Supply Contracts Regulations 1995 (S.I. 1995 no. 201), to be amended when the new EU Directives come into force.

## 2. Measures that can be taken to address a possible ALT once identified

### (a) Ability or obligation to seek price justification where a possible ALT is suspected

50. Most systems permit or require procuring entities to provide suppliers with an opportunity to explain prices that appear to indicate a possible ALT, and to take account of the explanations received in considering whether tenders are responsive, in broadly similar terms.

#### (i) *Price justification in multilateral legislation*

51. A justification or explanation stage prior to any rejection of a tender is authorized (but not required) under article XIII (4) of the GPA, the aim being to ensure that the supplier can comply with the conditions of participation and is capable of fulfilling the terms of the contract.

52. Article 55 of the second new EU Directive, concerns, inter alia, ALTs and their identification and subsequent actions, and provides as follows:

“1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

“Those details may relate in particular to:

“(a) the economics of the construction method, the manufacturing process or the services provided;

“(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;

“(c) the originality of the work, supplies or services proposed by the tenderer;

“(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

“(e) the possibility of the tenderer obtaining State aid.

“2. The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

“3. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact.”<sup>57</sup>

<sup>57</sup> See footnote 28, above. An equivalent provision is found in article 57 of the first EU directive, and, as advised to the Secretariat during consultations held for the preparation of this Note, the procuring entity is afforded greater flexibility in considering acceptable explanations for apparent ALTs in the new EU Directives.

(ii) *Price justification in domestic legislation*

53. France follows the same approach as that of the EU set out above, providing that should a tender appear to be abnormally low, it may be rejected (with written justification) after written clarification of details of the constituent elements of the tender has been requested, and after having taken the explanations received into account.<sup>58</sup> Similar provisions are found in Austria,<sup>59</sup> Sweden<sup>60</sup> and the United Kingdom.<sup>61</sup> The United States FAR also follows a price justification approach, as set out in paragraph 37, above), but it is important to note that, unlike in other systems, price information alone (and not costs information) may be sought.

54. The EU approach has also been followed by most Central and Eastern European systems (such as the Slovak Republic).<sup>62</sup>

55. In China, if there is a possibility of an ALT, the evaluation committee will seek explanations from the supplier concerned. If the explanations are not satisfactory, it can decide not to award the contract to that supplier.<sup>63</sup>

56. A procuring entity may be authorized to seek an extension of the bid validity period so as to complete bid evaluation while bids are still valid, such as is found in Tamil Nadu, India.<sup>64</sup>

(b) **Assessing explanations of prices submitted following price justification procedure**

57. The procurement laws of various States, and provisions in the new EU Directives, indicate some or all of the factors to which the procuring entity may give weight in considering explanations given by suppliers for apparently abnormally low prices, addressing favourable conditions available to the bidder.

58. The factors set out in the new EU Directives are:

- (a) The methods and economics of the manufacturing process, of the construction methods or of the services provided;
- (b) The technical solutions chosen and/or any exceptionally favourable conditions available to the bidder for the execution of the work, for the supply of the goods or services;
- (c) The originality of the work, supplies or services proposed by the tenderer;
- (d) Compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

<sup>58</sup> Article 55 of the *Code de Commerce*.

<sup>59</sup> Purchase Contract Awards Act 2002, sections 93-99, available at [http://www.ris.bka.gv.at/erv/erv\\_2002\\_1\\_99.pdf](http://www.ris.bka.gv.at/erv/erv_2002_1_99.pdf).

<sup>60</sup> The Act (SFS 1992:1528) on Public Procurement, section 23, available at <http://www.nou.se/loueng.html>.

<sup>61</sup> The Utilities Contracts Regulations 1996 (S.I. 1996 No. 2911).

<sup>62</sup> Act No. 523/2003 (24 October 2003) on Public Procurement, Section. 43(5).

<sup>63</sup> China—article 21 of the Provisional Rules on the Bid Evaluation Committee and Method of Bid Evaluation, which implements article 33 of the Tendering and Bidding Law. See paragraph 26, above.

<sup>64</sup> Section 26 of the Tamil Nadu Transparency in Tenders Rules, 2000.



- (e) The possibility of the tenderer obtaining State aid.<sup>65</sup>

**(c) Possibility of rejection of an ALT**

59. Under article 55 of the second new EU Directive, a procuring entity, if it anticipates rejecting a tender, must request price justification explanations from the supplier as set out above, but is otherwise free to accept or reject a tender in the normal way.

60. The Secretariat has found no system that allows a potential ALT to be rejected without an evaluation (that is, using arithmetical or statistical methods to disqualify ALTs is not permitted). This position has been reaffirmed by decisions of the European Court of Justice, which has held that tenders may not automatically be excluded if they deviate more than a fixed percentage rate from the average of all other tenders submitted.<sup>66</sup> Laws to the same effect are widespread, and those systems that allow ALTs to be rejected as such (e.g. under the new EU Directives in the case of illegal state aid, see paragraph 52, above, South Africa's Buffalo City municipality, see paragraph 48, above, and China, see paragraph 55, above), authorize the rejection after a consultation or justification procedure. Thus, tenders that are ALTs are rejected generally on the basis that they are not considered to be responsive (for example, the procuring entity may consider that the supplier is not capable of carrying out the contract on time or on the basis of the quality stipulated). It may be considered that maintaining the link with responsiveness to specifications is critical if the potential for abuse inherent in permitting the rejection of ALTs is to be avoided.

61. A further element of provisions regulating the treatment of ALTs is a requirement that any rejection in such circumstances should be promptly notified to the bidder concerned.<sup>67</sup>

**C. Other issues regarding ALTs**

**1. Use of tender securities or independent guarantees**

62. A tender security guarantees that a supplier will enter into a contract if the tender is accepted and will provide performance and payment bonds as regards the performance of the contract, if the latter are required in the solicitation documents. An independent guarantee guarantees contract performance in accordance with the terms and conditions, accepted price and time allowed. A payment bond protects certain service providers, material suppliers and subcontractors against non-payment by the prime or main contractor.<sup>68</sup> Tender securities and bonds are in widespread use in Europe, in North America and under other systems such as the Uniform Rules for Contract Bonds of the

<sup>65</sup> Article 57 of the first new EU Directive, and article 55 of the Second new EU Directive. See endnote 28, above.

<sup>66</sup> See Judgment of 18 June 1991 in case C-295/89 ("Alfonso"); Judgment of 26 October 1995 in case C-143/94 ("Furlanis"), and Judgment of 16 October 1997 in case C-304/96 ("Genova").

<sup>67</sup> See, for example, section 21(3) of the Latvia Law on Procurement for State or Local Government Needs.

<sup>68</sup> See European Commission Directorate General III Working Group, endnote 3, above.

International Chamber of Commerce,<sup>69</sup> and the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995).<sup>70</sup>

63. As to independent guarantees, in Chile, for example, legislation provides that “when the price of an offer is below 50 per cent of the price of the next offer and the procuring entity verifies that the costs of the offer are economically inconsistent, the procuring entity may, through a properly justified resolution, award the contract to the lower offer, requesting an increase in the contract fulfilment guarantee up to the difference in price with the next offer.” (New regulations will reduce the 50 per cent figure to 20 per cent.)<sup>71</sup>

64. In Indonesia, regulations state that the supplier of a possible ALT can be required to provide an additional independent guarantee up to 80 per cent of the procuring entity’s estimate of the price, and that if the supplier refuses to do so, its tender security is forfeit, its tender is disqualified, and it will be blacklisted.<sup>72</sup>

65. If a supplier’s obligations are backed by an independent guarantee, it is likely that the provider of the security has undertaken a review of the supplier’s capabilities and solvency. It has therefore been argued that an independent guarantee system greatly decreases the probability of the failure of the enterprise during the currency of a contract, and therefore reduces the risks inherent in the submission of ALTs.

66. However, it has also been argued that tender securities (as opposed to independent guarantees) do not protect against ALTs,<sup>73</sup> and that the cost of securing bonds of any type is a significant fetter on the participation of small- and medium-sized enterprises (SMEs) in procurement. Further, the discipline of being required to complete contracts and the negative impact of failing to do so for future business have been cited as sufficient incentive not to submit an ALT. On the other hand, it has been noted that SMEs can suffer from the perception that they are a reliability risk because of their size, and an independent guarantee system may improve the perception.

67. It has also been argued that independent guarantees are disproportionately costly to SMEs, and their cost is simply an additional cost in any procurement. Their use as a deterrent to ALTs is therefore not universally accepted; with commentators stating that (as with tender securities) appropriate evaluation is a more cost-effective solution.<sup>74</sup>

## 2. Electronic reverse auctions and ALTs

68. As noted in paragraph 16 above, an additional situation in which the submission of an ALT has been encountered is the electronic reverse auction. The mechanisms of electronic reverse auctions in various systems are described in document A/CN.9/WG.I/WP.35. Observers have noted that the intense competition and price focus of electronic reverse auctions increase the risk of ALTs.<sup>75</sup>

<sup>69</sup> Uniform Rules for Contract bonds, ICC Publication 524.

<sup>70</sup> Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17) Annex I (1995 Yearbook, part one, sect. D, Annex).

<sup>71</sup> Law 19,886, Section 41.

<sup>72</sup> *Keppres* 80/2003, Chapter II of the Annex.

<sup>73</sup> Some commentators argue that a bond system might prevent the repeated submission of ALTs.

<sup>74</sup> For a fuller discussion of tender securities and ALTs, see the Report of the European Commission’s Construction Task Group 1 (YP, ICIA 08/2001), available at <http://europa.eu.int/comm/enterprise/construction/alo/bonds/bondsfin.htm>.

<sup>75</sup> See O. Soudry, pp. 356-7, see endnote 14, above, and as further advised to the Secretariat during

69. In Brazil, the electronic reverse auction is accompanied by an Internet “chat” facility during the auction itself, where anonymous bidders are able to “chat” with the electronic reverse auctioneer. If the electronic reverse auctioneer considers that a bid is abnormally low, he may signal through the “chat” facility that he has received a bid that is very low and the bidder may wish to withdraw it. Although designed to address the risk of ALTs, some commentators have noted that this facility offers a potential for fraudulent activities.<sup>76</sup> Certain multilateral lending agencies have decided against funding auctions run with a “chat” facility (and indeed, auctions other than those run in a fully automated fashion).

70. It is noted in A/CN.9/WG.I/WP.35 that electronic reverse auctions are in some systems mainly or only for the purchase of standardized goods or commodities,<sup>77</sup> and in those types of supply contracts there is little performance risk beyond the possible insolvency of the supplier. In essence, the significant feature of the auction is that bidders are virtually congregated and bid against each other and a price, and assuming each knows his cost base, rational suppliers will not bid at a price that would involve a loss on the contract concerned. Commentators have therefore noted that the phenomenon of submission of ALTs in electronic reverse auctions should not be a long-term one, and that the greater the information available to suppliers during the auction itself (such as other suppliers’ tenders), the lower the risk of an ALT being submitted.<sup>78</sup>

### 3. Aspects of competition law

71. The survey conducted by the Secretariat has considered elements of competition law that regulate anti-competitive behaviour in the marketplace, such as anti-dumping legislation (legislation seeking to prevent the export of a product at a lower price than that charged on the home market), and measures prohibiting below-cost pricing with the intention of gaining or maintaining market share and driving out competitors.<sup>79</sup> In Canada, for example, legislation prohibits enterprises from engaging in anti-competitive acts, one of which is defined as selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.<sup>80</sup> Other provisions prohibiting below-cost sales are noted above.<sup>81</sup>

72. Article 86 of the Treaty establishing the European Community (the EC Treaty),<sup>82</sup> which EU member States are required to enforce domestically, prohibits enterprises that have a “dominant position” in a market from abusing that position.<sup>83</sup> The EC Treaty and

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consultations held for the preparation of this Note.

<sup>76</sup> As advised to the Secretariat during consultations held for the preparation of this Note.

<sup>77</sup> See paragraph 20 of A/CN.9/WG.I/WP.35.

<sup>78</sup> See O. Soudry, pp. 356-7, see endnote 14, above, and as further advised to the Secretariat during consultations held for the preparation of this Note.

<sup>79</sup> For a definition of such behaviour, known as predatory pricing, see footnote 8, above.

<sup>80</sup> “Cut-throat competition or abuse of dominant position? Challenges to the conduct of firms in a new technological era”, WS 13 National Report for CANADA, by A. Neil Campbell and Jeffrey P. Roode, available at: [http://www.globalcompetitionforum.org/regions/n\\_america/canada/Cutthroat%20Competition%20Report%20with%20Appendices\\_Aug%202001.pdf](http://www.globalcompetitionforum.org/regions/n_america/canada/Cutthroat%20Competition%20Report%20with%20Appendices_Aug%202001.pdf).

<sup>81</sup> See, for example, paragraph 26 and endnotes 8 and 24, above.

<sup>82</sup> The text of which is available at <http://europa.eu.int/abc/obj/treaties/en/entoc05.htm>.

<sup>83</sup> A “dominant position” in a market was defined by the European Court of Justice in the United Brands case (27/76 of February 1978) as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant

European Commission provide examples of abusive practice, including low pricing with the object of eliminating a competitor.<sup>84</sup> Many EU member States have legislated that abusers of a dominant position (such as through the systematic submission of ALTs) can face potential fines of up to 10 per cent of the annual turnover of the enterprise.<sup>85</sup>

73. The measures found by the Secretariat rely on the notion of intentional below-cost or abnormally low pricing, and so can be invoked where intentional ALTs are established, but will not address unintentional ALTs submitted for the reasons set out in paragraph 12, above. There may also be time constraints in the use of competition law as regards a single procurement opportunity, in that the time required to establish a breach of competition legislation might extend well beyond that available for the award of a procurement contract.

## IV. Conclusions

74. In summary, the survey conducted by the Secretariat has found that the phenomenon of abnormally low tenders is addressed in both multinational and domestic procurement systems. It is not explicitly addressed in the Model Law, however. The measures in existence that seek to prevent ALTs are, in the main, found in the regulation of the evaluation of tenders and qualification of suppliers, requiring procuring entities to analyse whether a tender price is objectively reasonable (and whether quality is sufficient), and whether a supplier appears capable of performing the contract as stipulated. Measures seeking to prevent anti-competitive behaviour, such as the submission of ALTs with the intention of driving out competitors, are generally found in competition law rather than procurement law.

75. The Working Group may consider that procurement regulation should address unintentional ALTs, through the use of evaluation and qualification criteria, and the provisions governing price justification, but that intentional ALTs may more effectively be policed through competition law and policy (indeed, from the procuring entity's perspective there may be no reason to reject an ALT unless it involves a performance risk).<sup>86</sup> However, the Working Group may consider that provisions may be included in the Model Law, or in regulations or in the Guide to Enactment, to address the need for coordination between the two fields of law and cooperation between relevant competition law and procurement entities.

76. Items that the Working Group may also wish to bear in mind in considering how to provide for the prevention of ALTs include, in the context of regulating procurement procedures generally:

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market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers". The main indicator of dominance is a large market share; other factors include the economic weakness of competitors, the absence of latent competition and control of resources and technology.

<sup>84</sup> For further illustrations, see [http://www.europarl.eu.int/facts/3\\_3\\_2\\_en.htm](http://www.europarl.eu.int/facts/3_3_2_en.htm).

<sup>85</sup> See, for example, as regards the United Kingdom, <http://www.oft.gov.uk/NR/rdonlyres/0620258B-3006-4B1C-ADC6-5CC69E6EF4F1/0/OFT402.pdf>.

<sup>86</sup> Such laws may also address the unusual situation of non-performance risking ALTs, which may arise in the bids of public entities, which do not operate on the basis of private risk capital. For example, the Public Procurement Act of Slovenia (art. 53(4)) requires the issuance of an opinion by the Competition Protection Office in the case of an abnormally low-priced bid implicating State aid.

(a) Promoting awareness of the adverse effects of ALTs, and providing training to procurement officers;

(b) Addressing contract administration in procurement law, such as limiting variations to the contract awarded, and ensuring that specifications are strictly enforced, addressing contractor and subcontractor relations, and ensuring adequate dispute resolutions measures are available should it become necessary to terminate contracts or fire contractors;

(c) Ensuring appropriate emphasis is given to both price and non-price criteria in procurement proceedings;

(d) Respecting general prohibitions against post-tender negotiations, and restricting negotiations appropriately;<sup>87</sup>

(e) Including robust reporting and record requirements, requiring, for example, the reporting of a rejection of an ALT to a central procurement monitoring office; and

(f) Whether the use of tender securities and independent guarantees is effective.

77. As regards individual procurements, the Working Group may wish to consider whether to make provision for the following factors:

Pre-procurement:

(a) Ensuring that the procurement entity has adequate resources and information, including reference prices where possible;

(b) Ensuring that the specification is drafted as clearly as possible, and whether potential suppliers should be consulted in the drafting phase;<sup>88</sup>

(c) Whether to incorporate maintenance and replacement costs in price analyses;

(d) Allowing for sufficient time for each stage of the procurement process; and

(e) Ensuring effective qualification criteria, perhaps authorizing the compilation of accurate and comprehensive information about the qualifications and past performance of a bidder.

During procurement:

(a) Including in the solicitation documents a statement to the effect that the procuring entity is not obligated to accept the lowest-priced, or any tender;

(b) Including in the solicitation documents a statement to the effect that a procuring entity may carry out risk and price analyses, perhaps in addition to qualification criteria.

(c) Ensuring thorough evaluation of suppliers' qualifications and tenders, including risk and price analyses;

<sup>87</sup> Current provisions addressing these matters are found in article 35 of the Model Law ("Prohibition of negotiations with suppliers or contractors"). In Brazil, an electronic reverse auctioneer is authorized to negotiate with the "winner" of an electronic reverse auction.

<sup>88</sup> Current provisions addressing these matters are found in article 25 of the Model Law ("Contents of invitation to tender and invitation to prequalify"), article 27 ("Contents of solicitation documents"), article 28 ("Clarifications and modifications of solicitation documents") as regards open tendering, and there are equivalents for other procurement methods.

- (d) Requiring price justification if an ALT is suspected;
- (e) Regulating the factors that procuring entities may take into account when assessing the responses of suppliers to price justification requests; and
- (f) Requiring all steps taken to address a possible ALT be adequately reflected in the record of the procurement proceedings.<sup>89</sup>

78. The Working Group may therefore first wish to consider whether the items set out in the above paragraph that address stages of the procurement cycle which are not currently regulated in the Model Law, that is, the pre-procurement or planning stage and the contract administration stage, should be brought within its ambit.

79. Secondly, the Working Group may consider that the Model Law's current provisions concerning the evaluation of tenders and qualification criteria may usefully be amplified in the Guide to Enactment so as to aid the identification of ALTs, the assessment of performance risk and subsequent action to address these issues.

80. Thirdly, the Working Group may consider that article 34(4)(b) of the Model Law could be amended so as to provide explicitly that the lowest price tender or the lowest evaluated tender is that submitted by a fully qualified supplier, such as, for example:

“(b) The successful tender shall be that submitted by a supplier that has been determined to be fully qualified to undertake the contract, and whose tender is:

“(i) The tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph; or ...”

81. The Working Group may also wish to consider whether the addition of further explanation and cross-referencing in the Guide to Enactment as regards articles 6 (qualification of suppliers) and 34(4)(b) would be warranted.

82. Fourthly, the Working Group may wish to consider whether article 34(4)(b) or the Guide to Enactment should set out parameters that could be used so as to conduct a price analysis (for a description of “price analysis”, see paragraphs 34 to 39, above). The price analysis could include comparisons between the suppliers' (total) prices submitted and between those submitted and previously proposed prices for relevant items and any available market parameters, cost estimates, and the equivalent analysis of the component items from each supplier. The Working Group may also consider that commentary on the risks of the use of statistical methods as part of a price analysis should be included (these risks are set out in paragraphs 31 to 33 above). Further, the Working Group may wish to include a discussion on how price analyses can be conducted for those procurements for which there is no market or reference price.

83. Finally, the Working Group may wish to consider whether to amend the commentary in the Guide regarding article 34(1)(a) of the Model Law in order to enable that provision to be used to seek price justification in the submission of suspected ALTs.

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<sup>89</sup> The requirements as regards the procurement proceedings record are set out in article 12 of the Model Law. \_\_\_\_



### **III. INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION**

#### **A. Report of the Working Group on Arbitration on the work of its forty-first session (Vienna, 13 – 17 September 2004) (A/CN.9/569) [Original: English]**

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#### **I. Introduction**

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission considered that the time had come to, inter alia, evaluate in the universal forum of the Commission the acceptability of ideas and proposals for the improvement of arbitration



laws, rules and practices. The Commission entrusted the work to Working Group II (Arbitration and Conciliation) and decided that the priority items for the Working Group should include, among other matters, enforceability of interim measures of protection.

2. The most recent summary of the discussions of the Working Group on, inter alia, a revised draft of article 17 of the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) relating to the power of an arbitral tribunal to order interim measures of protection and a proposal for a new article to the UNCITRAL Model Law relating to the enforcement of interim measures of protection (tentatively numbered article 17 bis) can be found in document A/CN.9/WG.II/WP.130, paragraphs 5 to 17. The Secretariat was asked to prepare a revised version of these texts for consideration by the Working Group at its forty-first session.

3. The Working Group, which was composed of all States members of the Commission, held its forty-first session in Vienna, from 13 to 17 September 2004. The session was attended by the following States members of the Working Group: Algeria, Argentina, Austria, Belarus, Belgium, Brazil, Cameroon, Canada, China, Colombia, Croatia, Czech Republic, France, Germany, Italy, Japan, Kenya, Lebanon, Mexico, Morocco, Nigeria, Pakistan, Poland, Qatar, Republic of Korea, Russian Federation, Rwanda, Serbia and Montenegro, Singapore, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

4. The session was attended by observers from the following States: Bulgaria, Finland, Greece, Iraq, Ireland, Malaysia, Myanmar, Netherlands, New Zealand, Peru, Philippines, Slovakia and Yemen.

5. The session was also attended by observers from the following organizations of the United Nations system: the United Nations Industrial Development Organization (UNIDO).

6. The session was also attended by observers from the following international intergovernmental organizations invited by the Commission: Council of the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (IPA CIS), NAFTA Article 2022 Advisory Committee (NAFTA) and Permanent Court of Arbitration.

7. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Arbitration Association (AAA), Arab Union of International Arbitration, *Association Suisse de l'Arbitrage* (ASA), Association of the Bar of the City of New York (ABCNY), Cairo Regional Centre for International Commercial Arbitration, Center for International Legal Studies, Chartered Institute of Arbitrators, Club of Arbitrators of the Milan Chamber of Arbitration, Forum for International Commercial Arbitration (FICA), Inter-American Commercial Arbitration Commission (IACAC), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), Kuala Lumpur Regional Centre for Arbitration (KLRC), London Court of International Arbitration (LCIA), Regional Centre for International Commercial Arbitration (Lagos), School of International Arbitration and *Union des Avocats Européens*.

8. The Working Group elected the following officers:

*Chairman:* Mr. José María ABASCAL ZAMORA (Mexico);

*Rapporteur:* Mr. Il Won KANG (Republic of Korea).

9. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.130); (b) a note by the Secretariat containing a newly revised text of a draft provision on the power of an arbitral tribunal to order interim measures pursuant to the decisions made by the Working Group at its thirty-ninth session (A/CN.9/WG.II/WP.131); (c) a note by the Secretariat concerning a proposal to include the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”) in the draft convention on the use of electronic communications in international contracts (A/CN.9/WG.II/WP.132); and (d) the report of the Working Group on its fortieth session (A/CN.9/547).

10. The Working Group adopted the following agenda:

1. Opening of the session;
2. Election of officers;
3. Adoption of the agenda;
4. Preparation of uniform provisions on interim measures of protection for inclusion in the UNCITRAL Model Law on International Commercial Arbitration;
5. Possible inclusion of the New York Convention in the list of international instruments to which the draft convention on the use of electronic communications in international contracts applies;
6. Other business;
7. Adoption of the report.

## II. Deliberations and decisions

11. The Working Group discussed agenda item 4 on the basis of the text contained in the note prepared by the Secretariat (A/CN.9/WG.II/WP. 131). The deliberations and conclusions of the Working Group with respect to that item are reflected in chapter III. The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. The Working Group discussed agenda item 5, on the basis of proposals contained in the note prepared by the Secretariat (A/CN.9/WG.II/WP.132), and agenda item 6. The deliberations and conclusions of the Working Group with respect to those items are reflected in chapters IV and V respectively.

## III. Draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration regarding the power of an arbitral tribunal to grant interim measures of protection

12. The Working Group recalled that it had agreed to resume discussions on a revised version of a provision regarding the power of an arbitral tribunal to grant interim measures

of protection. The Working Group considered the text of a newly revised version of article 17 of the Model Law prepared by the Secretariat on the basis of discussions and decisions made by the Working Group at its fortieth session (A/CN.9/547, paras. 68-116), hereinafter referred to as “draft article 17” (A/CN.9/WG.II/WP.131):

“(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection.

“(2) An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

“(a) Maintain or restore the status quo pending determination of the dispute;

“(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm [, or to prejudice the arbitral process itself];

“(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

“(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

“(3) The party requesting the interim measure of protection shall satisfy the arbitral tribunal that:

“(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

“(b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

“(4) The arbitral tribunal may require the requesting party or any other party to provide appropriate security in connection with such interim measure of protection.

“(5) The requesting party shall promptly make disclosure of any material change in the circumstances on the basis of which the party made the request for, or the arbitral tribunal granted, the interim measure of protection.

“(6) The arbitral tribunal may modify, suspend or terminate an interim measure of protection it has granted, at any time, upon application of any party or, in exceptional circumstances, on the arbitral tribunal’s own initiative, upon prior notice to the parties.

“(6 bis) The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed, if the arbitral tribunal later determines that, in the circumstances, the interim measure should not have been granted. The arbitral tribunal may order an award of costs and damages at any point during the proceedings.

“(7) (a) [Unless otherwise agreed by the parties,] where prior disclosure of an interim measure to the party against whom it is directed risks frustrating the purpose

of the measure, the requesting party may file its application without notice to that party and request a preliminary order [directing that party to preserve the status quo until the arbitral tribunal has heard from that party and ruled on the application].

“(b) The provisions of paragraphs [(2),] (3), (5), (6) and (6 bis) of this article apply to any preliminary order that the arbitral tribunal may grant pursuant to this paragraph.

“(c) [The arbitral tribunal may grant a preliminary order if it concludes that the purpose of the requested interim measure may otherwise be frustrated before all parties can be heard.]

“(d) After the arbitral tribunal has made a determination in respect of a preliminary order, it shall give immediate notice to the party against whom the preliminary order is directed of the application, the preliminary order, if any, and all other communications between any party and the arbitral tribunal relating to the application [, unless the arbitral tribunal determines [pursuant to paragraph 7 (i)<sup>1</sup>] that such notification should be deferred until court enforcement or expiry of the preliminary order].

“(e) The party against whom the preliminary order is directed shall be given an opportunity to present its case before the arbitral tribunal at the earliest possible time, and [in any event] no later than forty-eight hours after notice is given, or on such [earlier] [other] date and time as is appropriate in the circumstances.

“(f) A preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal, unless it has been confirmed, extended or modified by the arbitral tribunal in the form of an interim measure of protection [or in any other form]. Such confirmation, extension or modification shall take place only after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

“(g) The arbitral tribunal shall require the requesting party to provide appropriate security in connection with such preliminary order.

“(h) Until the party against whom the preliminary order is directed has presented its case under subparagraph (7) (e), the requesting party shall have a continuing obligation to inform the arbitral tribunal of all circumstances that the arbitral tribunal is likely to find relevant to its determination whether to grant a preliminary order under subparagraph (7) (c).”

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<sup>1</sup> Proposed subparagraph relating to deferral of notification for the purpose of allowing court enforcement:

“[(i) If notification by the arbitral tribunal risks prejudicing court enforcement of the preliminary order, the arbitral tribunal may defer notification to the party against whom the preliminary order is directed of the application, the preliminary order and all other communications between any party and the arbitral tribunal relating to the application. The duration of such deferral shall be indicated in the order and shall not exceed the maximum duration of the preliminary order. At the expiration of the period fixed for the deferral of notification, the arbitral tribunal shall give immediate notice to the party concerned of the application, the preliminary order and all other communications between any party and the arbitral tribunal relating to the application. The party against whom the preliminary order is directed shall be given an opportunity to present its case before the arbitral tribunal at the earliest possible time, and [in any event] no later than forty-eight hours after notice is given, or on such [earlier] [other] date and time as is appropriate in the circumstances.]”

## Paragraph (7)

### General remarks

13. The Working Group recalled that, at its fortieth session (New York, 23-27 February 2004) due to lack of time, the text of paragraph (7) of draft article 17 had not been discussed. It was noted that the Commission, at its thirty-seventh session (New York, 14-25 June 2004), had reiterated that the issue of *ex parte* interim measures, which the Commission agreed remained an important issue and a point of controversy, should not delay progress on the revision of the Model Law. The Commission however noted that the Working Group had not spent much time discussing that issue at its recent sessions and expressed the hope that consensus could be reached on that issue by the Working Group at its forthcoming session, based on a revised draft to be prepared by the Secretariat (A/59/17, para. 58).

14. The Working Group recalled that the issue of including *ex parte* interim measures had been the subject of earlier discussions in the Working Group (see A/CN.9/468, para. 70; A/CN.9/485, paras. 89-94; A/CN.9/487, paras. 69-76; A/CN.9/508, paras. 77-79; A/CN.9/523, paras. 15-76; A/CN.9/545, paras. 49-92 and A/CN.9/547, paras. 109-116).

15. It was recalled that a provision allowing interim measures to be ordered on an *ex parte* basis had arisen in part from the recognition that, in some cases, an element of surprise was necessary, i.e. where it was possible that the affected party might try to preempt the measure by taking action to make the measure moot or unenforceable (A/CN.9/WG.II/WP.110, para. 69). It was also said that the granting of interim measures on an *ex parte* basis was quite usual in State courts and that the fact that such measures were rarely asked for in arbitration might be in part because of the lack of a statutory regime supporting such measures. It was said that omission of the provision would force parties that had chosen to resolve their dispute outside the court system to nevertheless revert to courts on questions of *ex parte* interim measures.

16. Opposition was expressed against the inclusion of the provision. It was stated that the inclusion of the *ex parte* provision ran counter to the principles of trust and consensus underlying international arbitration and contradicted the principle that parties to arbitral proceedings should be treated on the basis of fairness and equality. It was said that inclusion of the provision would be extremely difficult to reconcile with existing provisions of the Model Law, notably article 18 (which required that parties should be treated equally and be given a full opportunity of presenting their case), article 24 (3) (which required that all documents should be communicated to both parties) and paragraph 36 (a) (ii) (which allowed refusal to recognize or enforce an award if a party had been unable to present its case). As well, it was suggested that paragraph (7) introduced a level of complexity and could create obstacles to enactment of the Model Law in certain countries, to the extent it might be considered in those countries that *ex parte* measures ran counter to public policy, constitutional rules or international treaties. It was pointed out that, in countries where *ex parte* interim measures would be acceptable, such measures might be available on the basis of contractual arrangement in the absence of any specific legislation. From that perspective, the inclusion of a provision along the lines of paragraph (7) might even be seen as limiting party autonomy. In addition, it was also stated that, in jurisdictions where *ex parte* interim measures were rare or unknown, it might be difficult for State courts to enforce interim measures ordered on an *ex parte* basis by an arbitral tribunal.

17. In response, additional arguments were put forward in favour of a provision recognizing ex parte interim measures of protection. It was said that due process and equal treatment of disputing parties were essential to most systems of justice but that, nevertheless, ex parte practices had developed therein because it was recognized that, in certain circumstances, the unfairness of one party's frustrating the arbitral proceedings could only be avoided through ex parte proceedings. To meet concerns about ex parte measures, courts had fashioned strict safeguards. It was pointed out that paragraph (7) took account of such precedents in procedure before State courts and established strict safeguards, including strict limitation in time, a requirement that the party against whom the measure was ordered be given an opportunity to be heard as soon as possible, a requirement that mandatory security be provided and a requirement for full disclosure of the facts. However, it was recalled that, while ex parte proceedings were acceptable in the case of State courts given their public nature, it might be less acceptable to create a parallel mechanism for arbitral tribunals. It was also pointed out that attempts to equate fully arbitral tribunals and State courts might be counter-productive and detrimental to the development of international commercial arbitration in certain countries.

### **Opt-out/opt-in**

18. With a view to bridging the gap between the opposing views expressed above, the Working Group engaged in a discussion as to whether or not the Model Law should deal with the issue of ex parte measures by way of a provision allowing the parties to opt-out or opt-in.

19. The "opt-out" approach was reflected by the bracketed words "Unless otherwise agreed by the parties" as the opening words of the provision. Some support was expressed for that approach on the basis that it was more grounded in the contractual nature of arbitration. It was said that the opt-out approach better reflected the legislative approach taken elsewhere in the Model Law and that an opt-in provision was highly unusual in the legislative tradition observed in many countries. It was also said that leaving the question of ex parte measures to the choice of parties was not beneficial to providing uniformity on this question.

20. However, a number of delegations spoke in favour of an "opt-in" approach, with a proposal that the provision dealing with ex parte interim measures should open with wording along the lines of "If expressly agreed by the parties" or "When the parties so empower the arbitral tribunal". It was said that the opt-in approach was more likely to preserve the consensual nature of arbitration by limiting the possibility for automatic application of the ex parte provision. It was also suggested that the inclusion of an opt-out approach could raise public policy objections in some jurisdictions.

21. No consensus was reached at that stage as to whether the provision should allow the parties to opt-out of, or opt-in to, the ex parte regime. Support was expressed for the view that it might be impossible to deal with the issue by way of a harmonized rule. Thus, the matter might need to be left for individual legislators in enacting States to decide upon. As to practical formulations of paragraph (7) as an optional provision, it was suggested that precedents might be found in the footnote to article 35 (2) of the Model Law, or in the footnote to article 4 of the UNCITRAL Model Law on International Commercial Conciliation.

22. Before coming to a decision as to whether a specific mention of ex parte interim measures of protection should appear in a revised version of article 17 of the Model Law

and, if so, what form such a mention might take, the Working Group proceeded with a detailed review of the text of paragraph (7) of draft article 17 as it appeared in the note by the Secretariat (A/CN.9/WG.II/WP.131). In the course of its deliberations, the Working Group also considered a text that was proposed by one delegation as a possible alternative to draft article 17. Due to lack of time, the Working Group only considered paragraph (7) of that proposal. The complete proposed text was as follows:

“(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection or modify them.

“(2) An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

“(a) Maintain or restore the status quo pending determination of the dispute;

“(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm;

“(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

“(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

“(3) Except with respect to the measure referred to in sub-paragraph (d) of paragraph (2), the party requesting the interim measure of protection shall satisfy the arbitral tribunal that:

“(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

“(b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

“(4) The arbitral tribunal may require the requesting party or any other party to provide appropriate security in connection with such interim measure of protection.

“(5) If so ordered by the arbitral tribunal, the requesting party shall promptly make disclosure of any material change in the circumstances on the basis of which the party made the request for, or the arbitral tribunal granted, the interim measure of protection.

“(6) (deleted)

“(6 bis) The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed, if the arbitral tribunal later determines that, in the circumstances, the interim measure was unjustified. The arbitral tribunal may order an award of costs and damages at any point during the proceedings.

“(7) (a) Unless otherwise agreed by the parties, a party requesting an interim measure of protection may file its request without notice to the other party, together

with an application for a preliminary order necessary to prevent the frustration of the purpose of the interim measure requested.

“(b) The provisions of paragraphs [(2),] (3), (4), (5), (6) and (6 bis) of this article apply to any preliminary order that the arbitral tribunal may grant pursuant to this paragraph.

“(c) [The arbitral tribunal may grant a preliminary order if it concludes that the purpose of the requested interim measure may otherwise be frustrated before all parties can be heard.]

“(d) After the arbitral tribunal has made a determination in respect of a preliminary order, it shall give immediate notice to the party against whom the preliminary order is directed of the application, the preliminary order, if any, and all other communications between any party and the arbitral tribunal relating to the application, unless the arbitral tribunal determines that such notification should be deferred until court enforcement or expiry of the preliminary order.

“(e) The party against whom the preliminary order is directed shall be given an opportunity to present its case before the arbitral tribunal at the earliest possible time. Within 48 hours or such other short time period following the expiration of the time for the other party to present its case, the arbitral tribunal shall decide whether to confirm, extend or modify a preliminary order.

“(f) A preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal, unless it has been confirmed, extended or modified by the arbitral tribunal in the form of an interim measure of protection [or in any other form].

“(g) (deleted)

“(h) (deleted)”

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

*“[Unless otherwise agreed by the parties]”*

23. The Working Group agreed to defer discussions on whether or not to include the words “[Unless otherwise agreed by the parties]” until it had completed its review of paragraph 7.

#### *Nature of preliminary orders*

24. Doubts were expressed as to whether or not the notion of “preliminary order” should be regarded as a subset of the broader notion of “interim measure”. It was suggested that, should the two notions belong to the same legal category, the distinction between them might be regarded as artificial and might lead to difficulties in implementation and practice. It was suggested that, if the intention was that interim measures were the same in nature and effect as preliminary orders then, to avoid any confusion, it might be preferable to use the same term for both.

25. In support of the view that preliminary orders and interim measures shared the same legal nature, it was observed that the reference in paragraph (7)(b) to paragraphs (2), (3), (5), (6) and (6 bis) made the definition and the legal regime applicable to interim measures also applicable to preliminary orders. It was explained that the definition of interim



measures under paragraph (2) was so broad that a preliminary order would necessarily be encompassed by that definition.

*Purpose, function and legal regime of preliminary orders*

26. It was clarified that, although a preliminary order might be regarded as a subset of an interim measure, it could be distinguished from any other interim measure in view of its narrower purpose, which was limited to preventing the frustration of the specific interim measure being applied for. Another distinguishing feature of a preliminary order was that its function was limited to directing a party to preserving the status quo until the arbitral tribunal had heard from the other party and ruled on the application for the interim measure. Yet another distinctive characteristic of a preliminary order was to be found in its legal regime, which made it subject to stricter time limits than other interim measures. To summarize these specific characteristics of a preliminary order, it was stated that the preliminary order was effectively limited to providing a bridging device until an *inter partes* hearing could take place in respect of a requested interim measure.

*Proposed redrafts of subparagraph (a)*

27. With a view to clarifying the distinction between interim measures and preliminary orders, and to further restricting the functions served by a preliminary order, support was expressed in favour of the following alternative wording for subparagraph (a):

“Unless otherwise agreed by the parties, a party requesting an interim measure of protection may file its request without notice to the other party, together with an application for a preliminary order necessary to prevent the frustration of the purpose of the interim measure requested.”

28. It was stated that such alternative wording was more likely to achieve consensus since it appeared to provide a higher standard, limiting cases where a provisional order might be issued to situations where the arbitral tribunal determined that an *ex parte* order was necessary to prevent the frustration of the purpose of the interim measure. It was stated that, by omitting the reference to preserving the status quo, the alternative wording provided greater flexibility for the arbitral tribunal. It was also said that the proposal represented an improvement on the draft text by clarifying the differences between an interim measure and a preliminary order.

29. As a matter of drafting, it was suggested that the words “a preliminary order necessary” should be replaced by “such preliminary order as may be necessary”. Another drafting suggestion was made in response to a question as to whether the absence of notice to the other party applied to both the request for the interim measure and the application for a preliminary order. With a view to making it abundantly clear that both the request and the application were made without notice to the other party, it was suggested that the words “without notice to the other party” should be moved to the end of subparagraph (a). Some support was expressed for these suggestions.

30. It was suggested that subparagraph (a) was intended to reflect an existing practice, whereby arbitrators would notify a party of an application for a preliminary measure, together with an order by the arbitral tribunal (sometimes referred to as a “stop order”) requiring that party to refrain from taking any action that might affect the position of the parties until both parties had been heard. With a view to further restricting the function of an interim order to reflecting that practice, it was proposed that subparagraph (a) should read along the following lines:

“Unless otherwise agreed by the parties, a party requesting an interim measure of protection may file its request without notice to the other party, together with an application for a preliminary order directing the other party to take no action to frustrate the purpose of the interim measure requested.”

31. Although that proposal was too restrictive in the view of some delegations, it received broad support as a formulation that could reconcile the opposing views expressed in respect of ex parte interim measures. It was also pointed out that the proposed wording would be particularly helpful in providing a distinction between the limited purpose of a preliminary order and the more general functions served by interim measures. In response to questions, it was explained that the reference to “directing the other part to take no action to frustrate the purpose of the interim measure” should not be interpreted as only requiring a party to refrain from acting but rather should be broadly understood to also encompass a direction for an affirmative action. In addition, it was pointed out that the term “order” should not be interpreted as imposing any procedural requirement as to the form that a preliminary order should take.

32. After discussion, the Working Group adopted the alternative wording proposed above under paragraphs 30 and 31, subject to its future deliberations regarding the placement of paragraph (7) and the formulation of any opting-out or opting-in clause.

#### **Subparagraph (b)**

*References to paragraphs (2), (3), (5), (6) and (6 bis)*

33. Concern was expressed that the references in subparagraph (b) to paragraphs (2), (3), (5), (6) and (6 bis) could be interpreted as creating a single regime for both interim measures and preliminary orders. In response, it was said that references to paragraphs (3), (5), (6) and (6 bis) were designed to build in the same safeguards and conditions that applied to interim measures and should not be interpreted as equating a preliminary order with any other interim measure.

34. Given that the Working Group agreed to delineate preliminary orders in a more limited fashion (see above, paras. 30-32), the Working Group, after discussion, agreed to delete the reference to paragraph (2) in subparagraph (b). It was also agreed to maintain the reference to paragraphs (3), (5), (6) and (6 bis).

*Possible reference to paragraph (4)*

35. A proposal was made that subparagraph (b) should include a reference to paragraph (4) which provided that the arbitral tribunal “may” require security in the context of an application for an interim measure. As a consequence of that proposal, it was also suggested that subparagraph (g) (under which an arbitral tribunal came under an obligation to require security in connection with the issuance of a preliminary order) should be deleted. It was recalled that the Working Group had, in earlier discussions, concluded that the provision of appropriate security should be a mandatory requirement to the granting of ex parte interim measures of protection (see A/CN.9/545, para. 69). Some support was expressed for the retention of security as a mandatory requirement given that it was one of the most important safeguards in an ex parte situation.

36. However, concern was expressed that, in some circumstances, requiring security would not be feasible, for example, where a claimant was in an impecunious state because of action taken by the respondent or where injunctive relief was sought. In response, it was

said that paragraph (g) was already intended to accommodate these concerns through its reference to “appropriate” security.

37. Nevertheless, strong support was expressed for the view that it would be preferable to preserve a level of discretion for the arbitral tribunal to exercise when dealing with the matter of security. To achieve that result, it was suggested that subparagraph (g) should be modified so as to oblige the arbitral tribunal to consider the issue of security but leave the decision on whether to require such security to its discretion. Concerns were expressed, however, with the possible consequences of failure by the arbitral tribunal to meet such an obligation. To alleviate those concerns, a proposal was made that no reference should be made to paragraph (4) in subparagraph (b) and that, instead, the following words should be added at the end of subparagraph (g): “unless it is satisfied that there are special reasons not to do so”. Broad support was expressed for the substance of that proposal. As a matter of drafting, a question was raised as to whether the word “special” should be used, at the risk of suggesting that the arbitral tribunal ought to be presented with pre-defined specific reasons. In response, it was suggested that words along the following lines might be used: “unless the arbitral tribunal considers it inappropriate or unnecessary to do so”. The Secretariat was requested to prepare a revised draft of subparagraph (g) taking account of that discussion.

38. Concern was expressed that the point in time when security might be required was not clearly defined. As well, concern was expressed that insufficient attention had been given to date on the relationship between subparagraph (g) and provisions relating to enforcement dealt with in draft article 17 bis. It was recalled that that matter had been the subject of earlier discussions in the Working Group, but that the full implications of the relationship between an order for security made by an arbitral tribunal and its impact or relevance in later court proceedings for enforcement had not been fully considered (for earlier discussions, see A/CN.9/524, paras. 72-75). It was agreed that the matter might need to be further considered at a later stage.

#### **Subparagraph (c)**

39. The Working Group proceeded to consider subparagraph (c). It was suggested that subparagraph (c) should be omitted for the reason that it merely repeated what was already in subparagraph (a). Another suggestion was that, to the extent subparagraph (c) offered guidance that might be useful to arbitrators, its content could be included in explanatory material to clarify the meaning of subparagraph (a).

40. Views were expressed, however, for the retention of subparagraph (c) in the body of paragraph (7). It was stated that subparagraph (a) dealt with the procedure to be followed by a party when applying for a preliminary order whereas subparagraph (c) dealt with the issue from the perspective of the arbitral tribunal’s powers and provided guidance as to the considerations to be taken into account by an arbitral tribunal when granting such an order. In that way, subparagraph (c) could be seen as supporting and strengthening subparagraph (a).

41. To emphasize the exceptional nature of preliminary orders and to ensure that subparagraph (c) complemented rather than duplicated paragraph (a), it was suggested that subparagraph (c) should be replaced by the following: “The arbitral tribunal may not grant a preliminary order unless it concludes that there are grounds for concern that the purpose of the requested interim measure will otherwise be frustrated before all parties can be heard”. Support was expressed for that proposal, which was said to place adequate

emphasis on the exceptional circumstances that were required to justify the issuance of a preliminary order. It was suggested that, to further emphasize the serious implications of a preliminary order, the words “grounds for concern” (which were considered imprecise and too broad in scope) should be replaced by the words “substantial likelihood” or “reasonable basis for concern”. In that connection, it was suggested that the draft provision should not only concern itself with the risk of frustration of the measure but also with the appropriateness of the measure.

42. Concern was expressed that requiring arbitrators to apply standards such as “substantial likelihood” or “reasonable basis for concern” might lead to uncertain results and might not offer the simple guidance called for, in particular by less experienced arbitrators. The Working Group took note of that concern.

43. Another suggestion was made that subparagraph (c) might be more helpful if it was to be drafted in an affirmative rather than negative way. As a matter of drafting, it was suggested that the term “concludes” should be replaced by the term “considers” and that the word “otherwise” should be deleted as unnecessary. It was suggested that subparagraph (c) should be redrafted along the following lines: “The arbitral tribunal may only grant a preliminary order if it considers that there is a reasonable basis for concern that the purpose of the requested interim measure will be frustrated before all parties can be heard”. After discussion, the Working Group adopted the substance of that proposal.

#### **Subparagraph (d)**

##### *Notice*

44. The Working Group focused its attention on the first unbracketed text of subparagraph (d). Noting that, in some cases, it would be difficult for an arbitral tribunal to give notice to the party against whom the preliminary order was directed, it was suggested that, in line with the approach taken elsewhere in the Model Law, the question of who shall give notice should be left open. For example, article 24 (2) of the Model Law provided that the parties “shall be given sufficient advance notice” and did not specify who would give such notice. It was said that such an approach could allow the arbitral tribunal to direct the requesting party to give notice. The Working Group agreed that subparagraph (d) should provide such flexibility to the arbitral tribunal.

45. It was suggested that subparagraph (d) required that notice of the application for a preliminary order should be given but did not expressly include an obligation that notice should also be given of the request for an interim measure. It was suggested that, although that request might already be covered by the term “all other communications”, the term “, the request for an interim measure” should be added after the word “application” when first appearing in subparagraph (d) to put that point beyond doubt. The Working Group adopted the substance of that suggestion and requested the Secretariat to redraft subparagraph (c) accordingly.

##### *Deferral of notification and court enforcement*

46. The Working Group then turned its attention to the issue of deferral of notification until court enforcement of the preliminary order as set out in the bracketed text at the end of subparagraph (d).

47. It was stated that including the bracketed text would permit a continuing dialogue between the party applying for the preliminary order and the arbitral tribunal to the

exclusion of the other party and allow the arbitral tribunal to become enmeshed in episodic renewals of the deferral of notification to the other party. It was submitted that confidence in the arbitral process would be undermined by the inclusion of text that would disregard the principle of due process by allowing an arbitral tribunal to make an enduring decision against a party without first hearing from that party. In response, it was stated that the issue was one of preventing frustration of the requested interim measure and, in any event, the maximum period during which notification to the other party could be deferred would be limited to twenty days under subparagraph (f). As to the view that including the bracketed text would undermine confidence in arbitration, it was pointed out that there were often times in the course of an arbitration when arbitrators made decisions that were against the desire of one party, as for example, in setting terms of reference and time periods. The view was expressed that confidence in arbitration came from preventing one party from gaining an unfair advantage, not from avoiding unpopular decisions. The view was expressed, however, that these examples were inapposite as such matters were settled *inter partes* so that due process was not affected.

48. The view was also expressed that requiring an arbitral tribunal to take account of the need for court enforcement presupposed a culture of cooperation between arbitral tribunals and courts that did not exist in all countries. It was pointed out that, where it was foreseen that court enforcement of a preliminary order would be necessary (i.e. where a degree of surprise was required to prevent frustration of the purpose of the interim measure), it would be more logical and practical for the requesting party to address a request to the same effect directly to the competent State court rather than prolong the unilateral phase before the arbitral tribunal. Against that view, it was stated that, in certain complex arbitrations, it would be more efficient for parties to request a preliminary order from the arbitral tribunal that already had knowledge of the case. It was also stated that, in any event, the choice of whether to go to court or an arbitral tribunal to request a preliminary order should be left to the parties.

49. It was noted that paragraph 7 (i), currently contained in a footnote to subparagraph (d), set out a detailed procedure for the deferral of notification to allow court enforcement of the preliminary order. It was pointed out by a number of delegations that the provision delved into too much procedural details. Such details, it was said, did not easily lend themselves to harmonization by way of uniform legislation, were unnecessarily complex, risked burdening arbitrators with a procedural framework that was too rigidly inspired from procedural rules followed by certain State courts, and might insufficiently cover the broad range of practical circumstances that might arise in the context of interaction between State courts and arbitral tribunals. The prevailing view was that the procedure for deferral of notice should be simplified. To that end, it was agreed that the reference to paragraph 7 (i) in subparagraph (d) and subparagraph (i) itself should be deleted.

50. As a matter of drafting, it was suggested that the words “until court enforcement or expiry of the preliminary order” at the end of the bracketed part of subparagraph (d) should be replaced by the words “until the court decides whether or not to enforce the preliminary order or the order expires”. Another drafting suggestion was that, to clarify that the deferral should be as short as possible, words along the lines of “whichever be the earlier” should be added to the end of subparagraph (d). The Working Group took note of those suggestions.

51. After discussion, the Working Group failed to reach consensus as to whether the issue of court enforcement of preliminary orders should be dealt with in the revised draft of article 17. It was decided that the bracketed text at the end of subparagraph (d), subject

to the deletion of the reference to subparagraph (i), should remain in square brackets for continuation of the discussion at a future session. The Secretariat was requested to prepare a revised draft of subparagraph (d), taking into account the deliberations of the Working Group. At the close of its deliberations, the Working Group was reminded that the deletion of all provisions dealing with the court enforcement of preliminary orders might make the entire text of paragraph (7), including the opting-out clause, more acceptable to a number of delegations.

### **Subparagraph (e)**

52. It was recalled that subparagraph (e) dealt with the opportunity for the responding party to present its case after it had received notice from the arbitral tribunal and established a corresponding time period. That period was specified to be the earliest possible time and, in any event, no later than forty-eight hours after notice was given to the responding party.

53. It was suggested that, in order to clarify that the arbitral tribunal had an obligation to give the responding party an opportunity to present its case, the opening words of the subparagraph should be redrafted in the active voice, along the following lines: “The arbitral tribunal shall give an opportunity to the party against whom the preliminary order is directed to present its case ...”. The Working Group adopted that suggestion.

54. A concern was raised that the reference to the time limit of forty-eight hours might not be appropriate given that a responding party might require a longer period to prepare and present its case. It was explained, in response, that the reference to “the party against whom the preliminary order is directed” being given “an opportunity to present its case” was intended to establish the right of that party to be heard but not to burden that party with an obligation to react within forty-eight hours.

55. With a view to introducing further clarity and to avoid the risk that the provision could be misinterpreted as creating an obligation for the responding party to react within forty-eight hours, various proposals were made. One proposal was that the time period for the responding party to present its case should be more flexible and refer simply to “the earliest possible time”. A related proposal was that the words “at the earliest possible time” should be replaced by the words “at the earliest practicable time”. Another proposal was that the reference to forty-eight hours or other short time period should be redrafted to delimit the period during which the arbitral tribunal should decide on the measure after having heard from the responding party. Under those combined proposals, subparagraph (e) would read along the following lines: “The arbitral tribunal shall give to the party against whom the preliminary order is directed an opportunity to present its case before the arbitral tribunal at the earliest practicable time. Within forty-eight hours or such other short time period, following the expiration of the time for the other party to present its case, the arbitral tribunal shall decide whether to confirm, extend or modify a preliminary order.”

56. As a matter of drafting, it was suggested that the words “to confirm, extend or modify a preliminary order” in the proposed redraft of subparagraph (e) should be replaced by the words “to confirm, extend or modify the preliminary order as an interim measure, or to terminate the order” so that all occurrences could be covered. Yet another drafting suggestion was that, with a view to avoiding possible confusion between a hearing on the preliminary order and a hearing on the merits of the underlying application for the interim

measure, the words “to present its case” should be replaced by the words “to present its case for termination of the preliminary order”.

57. While it was observed that that proposed redraft of subparagraph (e) provided greater flexibility for the time period during which the responding party should present its case, concern was expressed that the deletion of the forty-eight-hour period during which the responding party should present its case removed a fundamental safeguard for that party. To meet that concern, it was suggested that the words “, normally within forty-eight hours” could be added at the end of the first sentence of the proposed redraft. While the concern was widely shared, the view was also expressed that the term “normally” was not generally used in legislative texts and that alternative wording should be sought, possibly inspired from the original text of subparagraph (e) or otherwise referring to the time appropriate “in the light of the circumstances”.

58. Another concern in relation to the proposed redraft of subparagraph (e) was that, once the arbitral tribunal had heard from the responding party, the preliminary order became obsolete and the regime of interim measures should then be applied. After discussion, the second sentence of the proposed redraft was withdrawn by its proponents. However, it was pointed out that the deletion of the second sentence might create a gap in that it was not clear what happened to the preliminary order after the party had been given an opportunity to present its case.

59. A further proposal was made to redraft subparagraph (e) as follows: “The arbitral tribunal shall give to the party against whom the preliminary order is directed an opportunity to present its case no later than forty-eight hours after notice is given or a longer period of time if it is so required by that party.” It was explained that the purpose of that proposal was to expressly provide for a longer period for the responding party to present its case and, as well, to expressly allow that party to request that longer period rather than leave that matter entirely to the judgement of the arbitral tribunal based on the circumstances.

60. A comment was made that subparagraph (e) did not address the consequences of the situation where a party intentionally sought to delay the presentation of its case to the arbitral tribunal with the intention of taking advantage of the twenty-day time limit on preliminary orders to frustrate the request for an interim measure of protection. In response, it was pointed out that that issue should not be over regulated and the provision should seek to provide a flexible procedure for the arbitral tribunal to deal with such a case.

61. After discussion, the Working Group requested the Secretariat to prepare a revised draft of subparagraph (e) taking into account the above concerns, proposals and suggestions.

#### **Subparagraph (f)**

62. It was suggested that the second sentence of subparagraph (f) should be deleted, as its content was already reflected in paragraph (6), which applied to a preliminary order by virtue of paragraph (7)(b). It was agreed that the second sentence could be deleted on that basis. However, it was pointed out that it might be important to keep a reference to the “extension” of the preliminary order, as that term was not expressly contained in paragraph (6). In response, it was suggested that the word “modification” implicitly included the right for the arbitral tribunal to extend the preliminary order. The view was

expressed, however, that further clarification would need to be introduced in paragraph (6) with respect to the possibility of an extension of an interim measure.

63. In respect of the first sentence of subparagraph (f), it was proposed that the phrase starting with the word “unless” should be deleted. It was suggested that that provision was not necessary, created a risk of confusion between the interim measure and the preliminary order, and could contradict the principle that a preliminary order had a fixed life span of twenty days. However, it was noted that the removal of those words posed the risk that there could be a gap between the time when the preliminary order expired and the time when the interim measure took effect. It was suggested that such a gap could arise, for example, if the enforcement of a preliminary order took longer than twenty days. In response, it was said that it might be necessary to clarify in subparagraph (f) that the extension of a preliminary order would imply its conversion into an interim measure. To achieve such clarification, it was proposed to replace the words “unless it has been confirmed, extended or modified by the arbitral tribunal in the form of an interim measure of protection [or in any other form]” by a new sentence along the following lines: “The arbitral tribunal may convert the preliminary order into an interim measure.” While some support was expressed for that view, it was suggested that it might be simpler to state that an interim measure could be issued which contained all or part of the contents of a preliminary order.

64. To strengthen the principle that an arbitral tribunal could not extend the *ex parte* phase of the proceedings beyond the twenty-day limit (which was referred to as the “drop dead date” to illustrate the view that a preliminary order could only be extended beyond that limit in the form of an *inter partes* interim measure), it was proposed that subparagraph (f) could be redrafted as follows: “In any event, a preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal.” Some support was expressed for that suggestion. The Secretariat was requested to take account of the above proposals and suggestions when preparing a revised draft of subparagraph (f) for further consideration by the Working Group.

#### **Subparagraph (g)**

65. The Working Group agreed that, as discussed above in relation to subparagraph (b) (see above, paras. 35-38), subparagraph (g) should be modified by including wording along the following lines at the end of subparagraph (g): “unless the arbitral tribunal considers it inappropriate or unnecessary to do so”.

#### **Subparagraph (h)**

66. It was recalled that subparagraph (h) was inspired from the rule in existence in certain jurisdictions that counsel had a special obligation to inform the court of all matters, including those that spoke against its position and that it was considered as a fundamental safeguard and an essential condition to the acceptability of *ex parte* interim measures (for earlier discussions, see A/CN.9/545, para. 88). However, it was suggested that subparagraph (h) duplicated an obligation that was already provided for under paragraph (5) and was included, pursuant to paragraph (7) (b), in the list of provisions that applied to paragraph (7).

67. The view was expressed that a possible difference between the two provisions might be the existence of a continuing obligation of disclosure under subparagraph (h) that was not reflected under paragraph (5). Accordingly, a proposal was made in respect of



paragraph (5) to replace the words “The requesting party shall promptly make disclosure of” by the words “The requesting party shall have a continuing obligation to disclose”. In response, it was explained that, as currently drafted, paragraph (5) already established a continuing obligation.

68. It was stated that subparagraph (h) established a broader obligation by requiring the disclosure of all circumstances that the arbitral tribunal was likely to find relevant to its determination, whether or not related to the application, as compared to paragraph (5), which referred only to any material changes in the circumstances on the basis of which the request was made or the interim measure was granted. In addition, it was said that while paragraph (5) addressed material changes in the circumstances after the interim measure had been granted, subparagraph (h) covered the obligation to inform until the responding party had presented its case. Given those differences between the two provisions, the Working Group agreed that subparagraph (h) should be retained to ensure that the requesting party was under a strong obligation for full disclosure until the other party had been heard. However, bearing in mind that, under many national laws, the obligation for a party to present arguments against its position was unknown and contrary to general principles of procedural law, it was suggested that further consideration might need to be given to the possibility of adding a footnote inspired from the approach taken under article 35 (2) of the Model Law. The Secretariat was invited to take note of that suggestion when preparing a revised draft of subparagraph (h) for further consideration by the Working Group.

#### **General discussion and future course of action by the Working Group**

69. Due to the lack of sufficient time, the Working Group did not discuss paragraphs (1) to (6 bis) of draft article 17 (see above, para. 12). It was noted that discussion of those draft provisions, including proposals for alternative formulations (see above, para. 22) would need to be reopened at a future session. At the close of its review of the individual provisions contained in paragraph (7), the Working Group reverted to the general debate as to whether a revised version of article 17 should seek to establish a legal regime for interim measures issued *ex parte* by an arbitral tribunal and, if so, what form might be given to such a legal regime. The view was reiterated that, in the absence of a consensus to recognize such *ex parte* interim measures through model provisions that were described by some delegations as potentially damaging to the Model Law and to commercial arbitration in general, the option not to deal with *ex parte* measures at all should be kept open. As an additional reason for refusing to recognize *ex parte* measures in commercial arbitration, it was stated that a regime along the lines of paragraph (7) might be particularly difficult to apply for non-lawyers (also described as “lay arbitrators”). The hope was expressed that, even if no consensus could be found in respect of a legal regime for *ex parte* interim measures, at least a number of options could be outlined in the revised text of the Model Law for the benefit of national legislators and other users of that instrument. The prevailing view, however, was that every effort should be made to preserve the benefit of the progress achieved at the current session towards a consensus on a limited recognition of *ex parte* interim measures in the form of preliminary orders.

70. The Secretariat was requested to prepare a revised draft of paragraph (7) outlining various options that might need to be considered in finalizing a set of model statutory provisions aimed at providing such limited recognition of *ex parte* measures. In particular, it was agreed that variants of the text might need to be considered in respect of the following four possible approaches that might be taken in respect of paragraph (7): opting-

in by the parties; opting-out by the parties; opting-in by the enacting State; opting-out by the enacting State (see above, paras. 18-21). In that connection, it was pointed out that, when preparing a revised draft, the following issues might need to be borne in mind: an opting-in provision inserted in a set of rules along the lines of paragraph (7) should seek to preserve the freedom of the parties to enter agreements containing other legal rules governing *ex parte* interim measures; an opting-in regime should clarify whether it created possibilities for the parties to derogate from the provisions of the Model Law in respect of equality of the parties and the parties' right to be heard; the implications of such derogations in respect of articles 34 and 36 of the Model Law should also be clarified; in cases where an opting-in situation would be created for national legislators, explanations might need to be provided as to whether, in the absence of any specific provision regarding *ex parte* interim measures, the text should be interpreted as permitting or not permitting arbitral tribunals to issue such measures.

71. It was also agreed that the Working Group would need to further consider options as to whether or not court enforcement of preliminary orders might be sought and, if so, whether detailed rules in that respect should be provided in draft article 17 bis.

72. The Working Group noted that, at its forthcoming session scheduled to be held in New York from 10 to 14 January 2005, it would need to make a decision as to whether at least some of the draft articles of the Model Law currently on its work programme (i.e. draft articles 7, 17, 17 bis and 17 ter), as well as the results of its work on the interpretation of the form requirement in respect of the arbitration agreement under the New York Convention could be referred to the Commission for its final review and adoption at its thirty-eighth session (Vienna, 4-22 July 2005).

#### **IV. Possible inclusion of the New York Convention in the list of international instruments to which the draft convention on the use of electronic communications in international contracts applies**

73. The Working Group heard a brief introduction to the draft convention currently being prepared by Working Group IV, its relationship to the UNCITRAL Model Law on Electronic Commerce and its intended purpose to provide a uniform regime for the use of electronic communications in the formation and performance of international contracts.

74. Overall support was expressed in favour of the inclusion of a reference to the New York Convention in the draft convention, which was expected to provide welcome clarity to the writing requirement contained in article II(2) and other requirements for written communications in the text of the New York Convention. A widely shared view was that another compelling reason to address the New York Convention in the draft convention would be to avoid some of the difficulties that could be foreseen if an amendment of the New York Convention itself had to be undertaken.

75. A general concern was expressed that the reference to the New York Convention in the draft convention might result in two groups of States, depending on whether or not State parties to the New York Convention had also ratified the draft convention. It was observed in response that, although the relationship between the two instruments might need to be further considered, the wide use of the UNCITRAL Model Law on Electronic Commerce, on which the draft convention was based, had already created a situation

where a distinction might be made among State parties to the New York Convention depending on their possible enactment of the UNCITRAL Model Law on Electronic Commerce and the impact of such enactment under article VII of the New York Convention.

76. It was understood that the introduction of a reference to the New York Convention in the draft instrument would not provide a solution to all of the issues raised by the interpretation of article II (2) of the New York Convention. It was also understood that the possible insertion of a reference to the New York Convention in the draft convention would not negatively impact any future deliberation that the Working Group might need to take in that respect.

77. As to the detailed formulation of the provisions of the draft convention that would affect the interpretation of the New York Convention, a number of proposals were made. One proposal was that the scope of the draft convention as set forth in its article 1(4) would need to be carefully considered in the light of Variants A and B. Another proposal was that the exclusions provided under, *inter alia*, draft article 2 (c) and (g) might be too broadly worded to adequately accommodate the New York Convention. Yet another proposal was that clarity should be provided as to whether the notion of “contract” as used in the draft convention included an arbitration agreement. Further clarification might also be needed in respect of the application of the draft convention not only to the formation but also to the execution of the contract. The view was expressed that, while article IV (1) (a) of the New York Convention permitted the use of a “duly certified copy” in seeking recognition and enforcement of an arbitral award, that notion might not be adequately dealt with in the draft convention.

78. A question was raised as to whether the rule set forth in article 10 (2) of the draft convention under which an electronic communication was deemed to be received when the communication entered “an information system of the addressee” adequately covered the type of communications exchanged for the purposes of an arbitration agreement.

79. The Working Group agreed that close coordination was required between the two Working Groups and that the above-mentioned issues might be further discussed at its forthcoming session. Delegations were encouraged to consult and provide their comments to the Secretariat for the preparation of the future deliberations of both Working Groups.

## **V. Other business**

80. The Working Group took note of a proposal that, when planning its future work, it might give priority consideration to the issues of online dispute resolution and to the possible revision of the UNCITRAL Arbitration Rules.

**B. Note by the Secretariat on settlement of commercial disputes -  
Interim measures of protection, submitted to the Working Group  
on Arbitration at its forty-first session**

**(A/CN.9/WG.II/WP.131) [Original: English]**

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## Introduction

1. At its fortieth session (New York, 23-27 February 2004), the Working Group considered a newly revised draft of article 17 of the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) regarding the power of an arbitral tribunal to grant interim measures of protection (see A/CN.9/547, paras. 68-116).<sup>1</sup>

2. At that session, the Working Group discussed as well a newly revised draft of the provision on recognition and enforcement of interim measures of protection (for insertion as a new article of the Model Law, tentatively numbered 17 bis) (see A/CN.9/547, paras. 12-67).<sup>2</sup>

<sup>1</sup> A/CN.9/545, paras. 19-92; A/CN.9/523, paras. 15-76; A/CN.9/508, paras. 51-94; A/CN.9/487, paras. 64-75; A/CN.9/468, paras. 80-84.

<sup>2</sup> A/CN.9/545, paras. 93-112; A/CN.9/524, paras. 16-75; A/CN.9/523, paras. 78-80; A/CN.9/487, paras. 76-87; A/CN.9/485, paras. 78-103; A/CN.9/468, paras. 60-79.

3. This note contains two revised provisions based on the discussions and decisions made by the Working Group at its fortieth session, one relating to article 17 of the Model Law regarding the power of an arbitral tribunal to grant interim measures of protection (Part I), the other relating to recognition and enforcement of interim measures of protection (Part II).

## **I. Draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration regarding the power of an arbitral tribunal to grant interim measures of protection**

### **A. Text of draft article 17**

4. To facilitate the resumption of discussions, the following text sets out a newly revised version of article 17 of the Model Law based on the discussions and decisions made by the Working Group at its fortieth session (A/CN.9/547, paras. 68-116), (hereinafter referred to as “draft article 17”):

“(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection.

“(2) An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

“(a) Maintain or restore the status quo pending determination of the dispute;

“(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm [, or to prejudice the arbitral process itself];

“(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

“(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

“(3) The party requesting the interim measure of protection shall satisfy the arbitral tribunal that:

“(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

“(b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

“(4) The arbitral tribunal may require the requesting party or any other party to provide appropriate security in connection with such interim measure of protection.

“(5) The requesting party shall promptly make disclosure of any material change in the circumstances on the basis of which the party made the request for, or the arbitral tribunal granted, the interim measure of protection.

“(6) The arbitral tribunal may modify, suspend or terminate an interim measure of protection it has granted, at any time, upon application of any party or, in exceptional circumstances, on the tribunal’s own initiative, upon prior notice to the parties.

“(6 bis) The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed, if the arbitral tribunal later determines that, in the circumstances, the interim measure should not have been granted. The arbitral tribunal may order an award of costs and damages at any point during the proceedings.

“(7) (a) [Unless otherwise agreed by the parties,] where prior disclosure of an interim measure to the party against whom it is directed risks frustrating the purpose of the measure, the requesting party may file its application without notice to that party and request a preliminary order [directing that party to preserve the status quo until the tribunal has heard from that party and ruled on the application].

“(b) The provisions of paragraphs [(2),] (3), (5), (6) and (6 bis) of this article apply to any preliminary order that the arbitral tribunal may grant pursuant to this paragraph.

“(c) [The arbitral tribunal may grant a preliminary order if it concludes that the purpose of the requested interim measure may otherwise be frustrated before all parties can be heard.]

“(d) After the arbitral tribunal has made a determination in respect of a preliminary order, it shall give immediate notice to the party against whom the preliminary order is directed of the application, the preliminary order, if any, and all other communications between any party and the arbitral tribunal relating to the application [unless the arbitral tribunal determines [pursuant to paragraph 7 (i)<sup>3</sup>] that such notification should be deferred until court enforcement or expiry of the preliminary order].

“(e) The party against whom the preliminary order is directed shall be given an opportunity to present its case before the arbitral tribunal at the earliest possible time, and [in any event] no later than forty-eight hours after notice is given, or on such [earlier] [other] date and time as is appropriate in the circumstances.

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<sup>3</sup> Proposed subparagraph relating to deferral of notification for the purpose of allowing court enforcement:

“[(i) If notification by the arbitral tribunal risks prejudicing court enforcement of the preliminary order, the arbitral tribunal may defer notification to the party against whom the preliminary order is directed of the application, the preliminary order and all other communications between any party and the arbitral tribunal relating to the application. The duration of such deferral shall be indicated in the order and shall not exceed the maximum duration of the preliminary order. At the expiration of the period fixed for the deferral of notification, the arbitral tribunal shall give immediate notice to the party concerned of the application, the preliminary order and all other communications between any party and the arbitral tribunal relating to the application. The party against whom the preliminary order is directed shall be given an opportunity to present its case before the arbitral tribunal at the earliest possible time, and [in any event] no later than forty-eight hours after notice is given, or on such [earlier] [other] date and time as is appropriate in the circumstances.]”

“(f) A preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal, unless it has been confirmed, extended or modified by the arbitral tribunal in the form of an interim measure of protection [or in any other form]. Such confirmation, extension or modification shall take place only after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

“(g) The arbitral tribunal shall require the requesting party to provide appropriate security in connection with such preliminary order.

“(h) Until the party against whom the preliminary order is directed has presented its case under subparagraph (7) (e), the requesting party shall have a continuing obligation to inform the arbitral tribunal of all circumstances that the arbitral tribunal is likely to find relevant to its determination whether to grant a preliminary order under subparagraph (7) (c).”

## **B. Matters for further consideration**

5. At its fortieth session, the Working Group agreed that the following matters of substance might need further consideration.

### *Subparagraph (b) of paragraph (2)—Anti-suit injunctions*

6. At its fortieth session, the Working Group heard diverging views on the question of whether paragraph (2) of article 17 could be interpreted as encompassing the power of an arbitral tribunal to order an anti-suit injunction (A/CN.9/547, paras. 75-83). After discussion, the Working Group agreed to amend subparagraph (b) of paragraph (2) to clarify that anti-suit injunctions were included in the definition of interim measures of protection (see below, paragraph 12). Nevertheless, noting that the implications of the proposed amendment have not been fully considered, the Working Group agreed to further discuss that proposal at a future session (A/CN.9/547, para. 83).

### *Subparagraph (a) of paragraph (3)—interplay with paragraph (2)*

7. The Working Group might wish to further consider whether or not the general requirements set forth in paragraph (3) adequately apply to all types of interim measures listed under paragraph (2). It is recalled that, at the fortieth session of the Working Group, it was stated, for example, that it would not be appropriate to require in all circumstances that a party applying for an interim measure to preserve evidence under paragraph (2) (d) should necessarily demonstrate that exceptional harm would be caused if the interim measure was not ordered, or to require that requesting party to otherwise meet the very high threshold established in paragraph (3) (A/CN.9/547, para. 91).

### *Paragraph (7)—Ex parte interim measures*

8. At the fortieth session of the Working Group, there remained strongly opposing opinions on the question of including a provision granting the arbitral tribunal the power to issue ex parte interim measures (A/CN.9/547, paras. 109-112), and this matter is further discussed below under paragraphs 27 to 45.

## C. Notes on draft article 17

### Paragraph (1)

9. Paragraph (1) has been adopted without modification from the previous draft as contained in document A/CN.9/547, para. 68 (A/CN.9/547, para. 69).<sup>4</sup>

### Paragraph (2)<sup>5</sup>

*Chapeau—“whether in the form of an award or in another form”*

10. It is recalled that, after discussing the form in which an interim measure might be issued by an arbitral tribunal, the Working Group reiterated its decision not to modify the chapeau of paragraph (2) (A/CN.9/547, paras. 70-72). On that matter, the Working Group agreed that any explanatory material to be prepared at a later stage, possibly in the form of a guide to enactment of draft article 17, should make it clear that the wording adopted regarding the form in which an interim measure might be issued should not be misinterpreted as taking a stand in respect of the controversial issue as to whether or not an interim measure issued in the form of an award would qualify for enforcement under the New York Convention (A/CN.9/547, para. 72).<sup>6</sup>

### Subparagraph (a)

11. Subparagraph (a) is reproduced without modification from the previous draft as contained in document A/CN.9/547, para. 68.

### Subparagraph (b)—*Anti-suit injunction*

12. The draft of subparagraph (b) reflects the decision of the Working Group that, for the sake of clarity, the power to issue anti-suit injunctions should expressly be conferred upon arbitral tribunals and that, for that purpose, the words “or to prejudice the arbitral process itself” should be added at the end of subparagraph (b). However, for the reasons mentioned under paragraph 6 above, that proposal has been inserted in square brackets, for further consideration by the Working Group at a future session (A/CN.9/547, para. 83).

### Subparagraph (c)—*[preliminary]; [securing]—[preserving]*

13. The word “preliminary” has been deleted on the basis that it was confusing and added nothing to the meaning of the provision (A/CN.9/547, para. 73; for earlier discussion on that matter, see A/CN.9/545, para. 26) and the word “preserving” has been retained rather than “securing” because the latter term could be interpreted as a particular method for protecting assets (A/CN.9/547, para. 74).<sup>7</sup>

### Subparagraph (d)

14. Subparagraph (d) is reproduced without modification from the previous draft as contained in document A/CN.9/547, para. 68.

<sup>4</sup> A/CN.9/545, para. 20; A/CN.9/523, para. 34; A/CN.9/508, paras. 52-54.

<sup>5</sup> A/CN.9/545, paras. 21-27; A/CN.9/523, paras. 35-38; A/CN.9/508, paras. 64-76.

<sup>6</sup> A/CN.9/523, para. 36; A/CN.9/508, paras. 65-68.

<sup>7</sup> A/CN.9/545, para. 26.



**Paragraph (3)**<sup>8</sup>*Subparagraph (a)—“Irreparable harm”*

15. The draft subparagraph (a) follows the proposal made by the Working Group to replace the words “irreparable harm” by the words: “harm not adequately reparable by an award of damages” (A/CN.9/547, para. 89). It was stated that that proposal addressed the concerns that irreparable harm might present too high a threshold and would more clearly establish the discretion of the arbitral tribunal in deciding upon the issuance of an interim measure (A/CN.9/547, paras. 84-89).<sup>9</sup>

*Subparagraph (a)—interplay with paragraph (2)*

16. At the fortieth session of the Working Group, a view was expressed that the reference to “harm” in subparagraph (a) of paragraph (3) might lend itself to confusion with the words “current or imminent harm” in subparagraph (b) of paragraph (2), thus creating the risk that the criteria set forth in paragraph (3) might be read as applying only to those measures granted for the purposes of subparagraph (b) of paragraph (2) (A/CN.9/547, para. 90). It is however submitted that the broad definition of interim measures under paragraph (2) does not conflict with the need for the party requesting the interim measure to show evidence of “harm not adequately reparable by an award of damages” (see A/CN.9/WG.II/WP.123, para. 15).<sup>10</sup>

*Subparagraph (b)*

17. Subparagraph (b) is reproduced without modification from the previous draft as contained in document A/CN.9/547, para. 68.<sup>11</sup>

**Paragraph (4)**<sup>12</sup>

18. The draft paragraph (4) takes account of the proposal made by the Working Group at its fortieth session to amend paragraph (4) in such a manner that the provision of security should not be considered as a condition precedent to the granting of an interim measure (A/CN.9/547, para. 92), and interpreted as a free-standing provision allowing the tribunal to order security at any time during the procedure, or as limiting the ordering of security only at the time that the application was brought (A/CN.9/547, para. 94).

*“in connection with”*

19. The Working Group clarified its understanding that, in draft paragraph (4), as adopted, the term “in connection with” should be interpreted in a narrow manner to ensure that the fate of the interim measure was linked to the provision of security (A/CN.9/547, para. 94).

*“or”*

20. As a matter of drafting, it was stated that the use of the word “or” was more appropriate than the word “and” to indicate that the arbitral tribunal could require either

<sup>8</sup> A/CN.9/545, paras. 28-32; A/CN.9/523, paras. 39-44; A/CN.9/508, paras. 55-58.

<sup>9</sup> A/CN.9/545, para. 29 and A/CN.9/508, para. 56.

<sup>10</sup> A/CN.9/523, para. 42.

<sup>11</sup> A/CN.9/545, paras. 31 and 32.

<sup>12</sup> A/CN.9/545, paras. 33-34; A/CN.9/523, paras. 45-48; A/CN.9/508, paras. 59-63.

the requesting party or any other party to provide appropriate security (A/CN.9/547, para. 95).

**Paragraph (5)<sup>13</sup>**

*Obligation to inform*

21. The draft paragraph (5) reflects the decision of the Working Group that the obligation to inform be expressed in a more neutral way and avoided any inference being drawn that the paragraph excluded the obligation under article 24 (3) of the Model Law (A/CN.9/547, paras. 97-98).<sup>14</sup>

*Sanction for non-compliance*

22. It is recalled that the Working Group agreed that the express inclusion of a sanction under paragraph (5) in case of non-compliance with the obligation to disclose any material change in the circumstances or paragraph (6) was not necessary, as in any case the usual sanction for non-compliance with that obligation was either the suspension or termination of the measure, or the award of damages (A/CN.9/547, paras. 99-100).<sup>15</sup>

**Paragraph (6)<sup>16</sup>**

*“it has granted”*

23. The words “it has granted” have been retained without square brackets, to reflect that the arbitral tribunal may only modify or terminate the interim measure issued by that arbitral tribunal (A/CN.9/547, paras. 102-104).

**Paragraph (6 bis)**

24. It is recalled that, in order to assist deliberations on paragraph (6 bis), the Secretariat had prepared a note (A/CN.9/WG.II/WP.127) containing information received from States on the liability regimes that applied under their national laws in respect of interim measures of protection. It was observed that, of the legislation contained therein, the national laws did not distinguish between inter partes and ex parte measures in relation to the liability regimes that applied. It was suggested that, for that reason, the square brackets around that paragraph should be deleted and the Working Group should consider possible improvements to the text (A/CN.9/547, para. 105).<sup>17</sup>

25. Draft paragraph (6 bis) contains the proposal which was adopted by the Working Group at its fortieth session (A/CN.9/547, paras. 106-108) and reflects the agreement of the Working Group that the final decision on the merits should not be an essential element in determining whether the interim measure was justified or not.

26. It was also agreed that any explanatory material accompanying paragraph (6 bis) should clarify that the reference to “proceedings” therein referred to the arbitral proceedings and not to the proceedings relating to the interim measure (A/CN.9/547, para. 108).

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<sup>13</sup> A/CN.9/545, paras. 44-48; A/CN.9/523, para. 49.

<sup>14</sup> A/CN.9/454, para. 45.

<sup>15</sup> A/CN.9/523, para. 49.

<sup>16</sup> A/CN.9/454, paras. 35-43; A/CN.9/523, paras. 50-52

<sup>17</sup> A/CN.9/545, paras. 48, 60-61, 64-66.

## Paragraph (7)

### *Ex parte measures*

27. At its thirty-ninth session, the Working Group proceeded with a detailed review of paragraph (7), and agreed that discussions as to whether, as a matter of general policy, a provision on interim measures granted ex parte should be retained in draft article 17 should be held at its next session (A/CN.9/547, para. 110). The draft paragraph (7) reflecting the discussions of the Working Group at its thirty-ninth session is reproduced in documents A/CN.9/547, para. 68 and A/CN.9/WG.II/WP.128 (“the Secretariat draft”).

28. At the fortieth session of the Working Group, a number of alternative proposals were made in respect of the Secretariat draft (A/CN.9/547, para. 68 and A/CN.9/WG.II/WP.128). These proposals are reflected in the report of the fortieth session of the Working Group (A/CN.9/547, paras. 114 and 115).

29. At the thirty-seventh session of the Commission (New York, 14–25 June 2004), the view was reiterated that the issue of ex parte interim measures, which the Commission agreed remained an important issue and a point of controversy, should not delay progress on the revision of the Model Law, and the hope was expressed that consensus could be reached on that issue by the Working Group at its forthcoming session, based on a revised draft to be prepared by the Secretariat.

30. Taking into account the various proposals made at the fortieth session of the Working Group, a revised draft of paragraph (7) has been prepared by the Secretariat with a view to finding a consensus (“the revised draft”).

### *Subparagraph (a) of the revised draft*

31. Subparagraph (a) of the revised draft defines ex parte interim measures. The main modifications of the revised draft are as follows:

*“[Unless otherwise agreed by the parties]”*

32. The wording in square brackets “[Unless otherwise agreed by the parties]” reflects the principle that ex parte interim measures should be available by default, an approach which is consistent with that taken in the Model Law. The opt-in approach, which was discussed by the Working Group at its thirty-ninth session and resulted in the inclusion in the Secretariat draft (A/CN.9/547, para. 68 and A/CN.9/WG.II/WP.128) of the bracketed words “[if expressly agreed by the parties]”, would be unusual for a legislative instrument and has not been included in the revised draft. That matter nevertheless remains an open issue that is to be further considered by the Working Group (A/CN.9/545, para. 52).

### *“Preliminary order”*

33. The term “preliminary order” is used, instead of “interim measure”, to describe an interim measure made on an ex parte basis. This term emphasizes the temporary and extraordinary nature of the order.

34. The Working Group will need to decide whether or not “preliminary order” should be defined and, if so, whether it should be limited to a measure that is both strictly limited in its duration (see below paragraph 39) and exclusively aimed at preserving the status quo until the tribunal has heard from the other party and ruled on the application as provided for in square brackets in subparagraph (a) of the revised draft (see below paragraph 36).

*“in exceptional circumstances”—“Urgent need for the measure”*

35. The revised draft does not include a reference to “exceptional circumstances” and “urgency”. The Working Group may wish to further discuss whether these are conditions specific for the granting of an ex parte interim measure.

*Subparagraph (b) of the revised draft*

*“Conditions under paragraph (3)”*

36. Instead of retaining a reference to the application of the conditions set out under paragraph (3), which was considered ambiguous and which could be misinterpreted as excluding the application of paragraphs (5) and (6) to ex parte interim measures, subparagraph (b) of the revised draft includes a wider reference to the application of article 17, by providing that: “the provisions of paragraphs [(2),] (3), (5), (6) and (6 bis) of this article apply to any preliminary order that the arbitral tribunal may grant pursuant to this paragraph” (see also, A/CN.9/545, para. 56). The Working Group may wish to further confirm which of the general provisions applicable to interim measures also apply to preliminary orders. Depending on the definition of “preliminary order” under paragraph 7 (a), the reference to paragraph (2) in paragraph 7 (b) would only need to be retained if the Working Group decided that the definition of a preliminary order and an interim measure should be the same. If a preliminary order is defined under paragraph 7 (a) as a subset category of interim measures, the reference to paragraph (2) would be deleted. It is submitted that paragraph (4) would not apply to a preliminary order, as the requirement for the provision of security in the context of a preliminary order is set forth under paragraph 7 (g).

*Subparagraph (c) of the revised draft*

37. Subparagraph (c) has been inserted in order to provide some additional certainty regarding the power of the arbitral tribunal to grant a preliminary order. The Working Group may wish to decide whether or not such a provision is needed.

*Subparagraph (d) of the revised draft*

38. Subparagraph (d) of the revised draft deals with the issue of notice to the other party of both the ex parte application and the preliminary order, if any. It partly mirrors subparagraph (e) of the Secretariat draft (A/CN.9/547, para. 68 and A/CN.9/WG.II/WP.128), with the following differences:

- The revised draft refers to notice of the application and all other communications, and not only to notice of the measure;
- While providing some flexibility for the arbitral tribunal in respect of when the responding party should be heard, the proposal clarifies the point of time at which notice should be given;
- The second part of subparagraph (d) of the revised draft in square brackets deals with the sensitive issue of enforcement of ex parte interim measures, and seeks to address the view that giving notice immediately after the interim measure is ordered may not satisfy the requirement of surprise needed to give efficacy to ex parte measures, including time to seek enforcement in court (A/CN.9/545, para. 78). Subparagraph (d) refers to subparagraph (i), which is included as a footnote to the text. Subparagraph (i) relates to deferral of notification for the purpose of court

enforcement. The Working Group has not yet discussed in detail the question whether or not to include a provision allowing court enforcement of an ex parte interim measure. The Working Group may need to consider the proposed paragraph (i) in tandem with its discussion on whether or not a regime for court enforcement of an ex parte interim measure should be included in the Model Law.

*Subparagraph (e) of the revised draft*

39. Subparagraph (e) of the revised draft deals with the issue of the responding party's opportunity to present its case, and the corresponding time period. In that respect, it is recalled that, at the thirty-ninth session of the Working Group, some reservations were expressed as to the inclusion of a time period of forty-eight hours or any other specific time period, which might prove too rigid and inadequate, depending on the circumstances. It was also pointed out that introducing wording to allow the arbitral tribunal to consider another time and date as was appropriate in the circumstances might provide flexibility but might also make it illogical to maintain a reference to a fixed period of time within that same provision. A widely shared view, however, was that the inclusion of a specific time period served the purpose of underscoring that the opportunity to be heard was urgent and also of putting the arbitral tribunal on notice that it should be ready to reconvene to allow an opportunity for the responding party to be heard (A/CN.9/545, para. 79).

40. It is recalled that, at its thirty-ninth session, the Working Group agreed that the words "opportunity to be heard" should be replaced by "opportunity to present its case", in order to encompass both a hearing of the responding party and a written submission from that party (A/CN.9/545, para. 80).

41. The drafting of subparagraph (e) will need to be revisited after the Working Group has examined the question whether enforcement of an ex parte interim measure should be permitted.

*Subparagraph (f) of the revised draft*

42. The revised draft, which mirrors subparagraph (f) of the Secretariat draft (A/CN.9/547, para. 68 and A/CN.9/WG.II/WP.128), reflects the decision of the Working Group to simplify this subparagraph (A/CN.9/545, paras. 83 and 84).

*Subparagraph (g) of the revised draft*

43. The drafting of subparagraph (g) reflects the decision of the Working Group that, as a matter of consistency, it should be aligned with the wording used in draft paragraph (4) relating to the provision of security in the context of inter partes interim measures, except for the word "may" which could be replaced by the word "shall" (A/CN.9/545, para. 69), and that subparagraph (g) be a mandatory condition for the granting of an ex parte interim measure (A/CN.9/545, para. 70).

44. The revised draft takes account of the decision of the Working Group that the granting of security should not be a condition precedent for the granting of an interim measure (A/CN.9/547, paras. 92-94, see also above, paragraph 18).

*Subparagraph (h) of the revised draft*

45. Subparagraph (h) of the revised draft paragraph takes account of the proposals made by the Working Group at its thirty-ninth session (A/CN.9/545, paras. 91 and 92).

## **II. Draft provision on the recognition and enforcement of interim measures of protection (for insertion as a new article of the UNCITRAL Model Law on International Commercial Arbitration, tentatively numbered 17 bis)**

### **A. Text of draft article 17 bis**

46. To facilitate the resumption of discussions, the following text sets out a newly revised version of the provision on the recognition and enforcement of interim measures of protection, based on the discussions and decisions made by the Working Group at its fortieth session (A/CN.9/547, paras. 12-67), (hereinafter referred to as “draft article 17 bis”):

“(1) An interim measure of protection issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of this article.\*

“(2) The court may refuse to recognize or enforce an interim measure of protection, only:

“(a) At the request of the party against whom it is invoked, if the court is satisfied that:

“(i) [There is a substantial question relating to any grounds for refusal] [Such refusal is warranted on the grounds] set forth in article 36, paragraphs (1) (a) (i), (iii) or (iv); or

“(ii) Such refusal is warranted on the grounds set forth in article 36, paragraph (1) (a) (ii); or

“(iii) The requirement to provide appropriate security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

“(iv) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which, [or under the law of which, that interim measure was granted] [the arbitration takes place]; or

“(b) if the court finds that:

“(i) The interim measure is incompatible with the powers conferred upon the court by the law, unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

“(ii) Any of the grounds set forth in article 36, paragraphs (1) (b) (i) or (ii) apply to the recognition and enforcement of the interim measure.

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\* The conditions set forth in this article are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure of protection. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

“(3) Any determination made by the court on any ground in paragraph (2) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure of protection. The court where recognition or enforcement is sought shall not, in exercising that power, undertake a review of the substance of the interim measure.

“(4) The party who is seeking or has obtained recognition or enforcement of an interim measure of protection shall promptly inform the court of any termination, suspension or modification of that interim measure.

“(5) The court where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security, unless the arbitral tribunal has already made a determination with respect to security, or where such an order is necessary to protect the rights of third parties.

“(6) [An interim measure issued by an arbitral tribunal under standards substantially equivalent to those set forth in paragraph (7) of article 17 shall not be denied enforcement pursuant to paragraph 2 (a) (ii) of this article because of the measure’s *ex parte* status, provided that any court action to enforce such measure must be issued within twenty (20) days after the date on which the arbitral tribunal issued the measure.]”

## B. Matters for further consideration

47. At its fortieth session, the Working Group agreed to give further consideration to the following matters of substance relating to draft article 17 bis.

### **Relationship between draft article 17 bis and articles 34-36 of the Model Law**

#### *Subparagraph (a) of paragraph (2) and burden of proof under articles 34 and 36 of the Model Law*

48. The draft paragraph (2) reflects the decision of the Working Group that no provision should be made regarding the allocation of the burden of proof and that that matter should be left to applicable law (A/CN.9/524, paras. 35-36, 42, 58 and 60). The current text, which omits any reference to the burden of proof, appears to be inconsistent with the approach taken in articles 34 and 36 of the Model Law. If so, this might lead to different interpretations such as imposing a burden of proof on the party asking for enforcement or implying that it was for the arbitral tribunal to verify these requirements *ex officio*. If the Working Group agrees that this different wording is justified given the different objectives of draft article 17 bis as compared to articles 34 and 36 of the Model Law, the Working Group should seek to elaborate the reasons for this difference in drafting to avoid uncertainty in interpretation.

#### *Paragraph (2) of article 17 bis and use of the term “awards” under articles 34, 35 (2) and 36 (1)*

49. It is recalled that, in paragraph (2), the Working Group had maintained reference to article 36 (1) of the Model Law and that that article spoke in terms of awards. Given that the Working Group had taken the decision not to define the form in which an interim measure should be made (see above, paragraph 10), the Working Group may wish to further consider whether it is necessary to clarify that the term “award” under article 36 (1)

should be interpreted as covering all types of interim measures, with no implied restriction that the grounds in article 36 (1) applied only to those interim measures issued in the form of an award (A/CN.9/547, para. 43). The Working Group may wish to consider whether it is appropriate to proceed with the same clarification in relation to articles 34 and 35 (2) of the Model Law (see also below, paragraphs 50 and 51).

*Effect of subparagraph (a) (iv) of paragraph (2) and article 34*

50. For the sake of uniform interpretation of the interplay between draft article 17 bis and article 34 of the Model Law, the Working Group may wish to clarify the issue of whether an interim measure issued in the form of an award could be set aside under article 34 of the Model Law (A/CN.9/547, para. 26). It is recalled that that question was raised at the fortieth session of the Working Group in the context of a discussion on whether the effect of subparagraph (iv) would be to allow the court to set aside an interim measure issued by the arbitral tribunal. In response, it was recalled that, at its thirty-ninth session, the Working Group had decided to delete the general reference to the requirements of article 17 from paragraph (1), precisely to avoid creating an additional and hidden ground for the refusal to recognize and enforce an interim measure (A/CN.9/545, paras. 101-102). The Working Group agreed that subparagraph (iv) should not be misinterpreted as creating a ground for the court to set aside the interim measure issued by the arbitral tribunal. It was recalled that the general purpose of article 17 bis was to establish rules for the recognition and enforcement of interim measures, but not to parallel article 34 of the Model Law with provisions on setting aside such interim measures.

*Article 35 (2)*

51. Article 35 (2) of the Model Law provides that “the party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement ... or a duly certified copy thereof”. As well, the article provides that if “the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.” At its thirty-eighth session, the Working Group generally agreed that “unnecessary deviation from the text of articles 35 and 36 should be avoided” (A/CN.9/524, para. 57). On that basis, the Working Group may wish to consider whether language along the lines of article 35 (2) should be included in the current text.

**Provision of security and 1954 Hague Convention on Civil Procedure**

*Paragraph (5)*

52. The Working Group may wish to further consider the issue of security, which includes security for costs ordered by courts, in the light of the Hague Conventions on Civil Procedure of 1905 and 1954, which prohibit security for costs being required from nationals of signatory States. Article 17 of the 1954 Hague Convention on Civil Procedure provides as follows:

“No bond, nor deposit, under any denomination whatsoever, may be imposed on the ground, whether of their foreign character or of absence of domicile or residence in the country, upon nationals of one of the contracting States, having their domicile within one of such States, who are plaintiffs or intervene in the tribunals of another of such States.



“The same rule applies to payments, which may be required of plaintiffs or interveners to guarantee judicial costs.

“Conventions by which contracting States may have stipulated on behalf of their nationals exemption from security for costs and damages in proceedings or from payment of judicial costs irrespective of domicile, shall continue to apply.”

### Paragraph (6)

53. Given the potential adverse impact of an ex parte measure against the affected party, the Working Group agreed that empowering an arbitral tribunal to issue such an order would only be acceptable if strict conditions were imposed to ensure that the power was not subject to abuse (A/CN.9/547, para. 62; for earlier discussion on that matter, see A/CN.9/523, para. 17). Bearing that concern in mind, a proposed draft for paragraph (6) was made and, as decided by the Working Group, placed in square brackets for further consideration, after the review of draft article 17 had been completed (A/CN.9/547, paras. 62-67).

## C. Notes on draft article 17 bis

### Paragraph (1)<sup>18</sup>

54. The draft paragraph (1) reflects the decision of the Working Group (A/CN.9/547, paras. 13 and 17) to delete the bracketed text “in writing” (for earlier discussion on that matter, see A/CN.9/545, para. 96), and the reference to the words “that satisfies the requirements of article 17”.<sup>19</sup>

55. It is recalled that the Working Group had found the substance of the footnote to paragraph 1 to be generally acceptable (A/CN.9/547, para. 13).

### Paragraph (2)

*Chapeau*—“[and][or]”—“only”

56. For the sake of consistency with article 36 of the Model Law, and also to better reflect the options available to the court, the word “or”, instead of “and”, has been retained; in addition, the word “only” has been placed at the end of the chapeau. The Working Group may wish to confirm whether it agrees with these modifications.

*Subparagraph (a)(i)—Reference to article 36 of the Model Law*

57. As agreed by the Working Group, subparagraph (a)(i) contains a straightforward reference to article 36, instead of replicating the contents of article 36 (A/CN.9/547, paras. 18-19).<sup>20</sup>

<sup>18</sup> A/CN.9/545, paras. 95-102; A/CN.9/524, paras. 24-29, 32-33, 64-66; A/CN.9/487, paras. 77-82; A/CN.9/485, paras. 80-83.

<sup>19</sup> A/CN.9/545, para. 102 and also paras. 107-110.

<sup>20</sup> A/CN.9/545, paras. 105-106; A/CN.9/524, para. 57; A/CN.9/468, paras. 72-74.

*“such refusal”*

58. The word “such”, which appeared in the previous draft (as contained in document A/CN.9/547, para. 12) before the word “refusal”, has been deleted to indicate more clearly that the reference to refusal was to the refusal to recognize or enforce an interim measure, and does not refer to the refusal to recognize or enforce a final award under article 36 (A/CN.9/547, para. 19).

*“[there is a substantial question]—[such refusal is warranted on the grounds]”*

59. The Working Group may wish to further consider whether the words “there is a substantial question” should be replaced by the words “Such refusal is warranted on the grounds” for the sake of consistency with the language used elsewhere in draft paragraph 17 bis or whether they should be maintained as these words indicate the importance of the principle that courts should not pre-empt a determination by the arbitral tribunal as to its competence in the first instance (A/CN.9/547, para. 20).

*Subparagraph (a) (ii)*

60. As the Working Group agreed to retain Variant 2, without modification (A/CN.9/547, para. 22), subparagraphs (ii) and (iii) have been merged (A/CN.9/547, para. 24).

*Subparagraph (a) (iii)*

61. The Working Group may wish to consider whether subparagraph (a) (iii), which is a new subparagraph, addresses the concern of the Working Group that, if an order for security made by the arbitral tribunal had not been complied with, such non-compliance should be a ground for the court to refuse enforcement of the interim measure (A/CN.9/547, paras. 21, 45-48).

*Subparagraph (a) (iv)<sup>21</sup>—“or by order of a competent court”*

62. It is recalled that, after considering whether the reference to a situation where an interim measure had been set aside “by a competent court” was necessary, the Working Group agreed that courts of a State that has enacted the Model Law shall be allowed to refuse recognition and enforcement of an interim measure set aside by a court in another country (A/CN.9/547, paras. 28-33). The draft reflects:

- The decision of the Working Group to retain the revised wording proposed during the fortieth session of the Working Group for continuation of the discussion at a later stage (A/CN.9/547, para. 33); the word “country” in the phrase “by the court of the country in which,” has been replaced by the word “State” for the sake of consistency with the language used in the Model Law; and
- The observation that the words “or under the law of which, that interim measure was granted” might need to be replaced by a reference to the country of the seat of the arbitral tribunal (A/CN.9/547, para. 33).

<sup>21</sup> A/CN.9/524, para. 47.

*Subparagraph (b) (i)*<sup>22</sup>

63. It is recalled that the Working Group found the substance of subparagraph (b) (i) to be generally acceptable (A/CN.9/547, para. 36). As a matter of drafting, the word “requested” appearing after the opening words “the interim measure” and before the words “is incompatible” in the previous draft contained in document A/CN.9/547, paragraph 12 has been deleted, and the Working Group may wish to confirm whether it agrees with that deletion.

64. As a matter of drafting, the reference to “by its law” has been replaced by a reference to “the law” (A/CN.9/547, para. 44).

*Subparagraph (b) (ii)*<sup>23</sup>

65. The draft subparagraph (b) (ii) reflects the decision of the Working Group to retain Variant 2 of the previous draft (as contained in document A/CN.9/547, para. 12), without modification, subject to further consideration of the wording used in relation to references to article 36 (1) (a) and (b) of the Model Law in paragraphs (2) (a) and (b) after the Working Group had completed its review of article 17 bis (A/CN.9/547, para. 41, and also paras. 37-42).

**Paragraph (3)**<sup>24</sup>

66. The first sentence of paragraph (3) has been adopted by the Working Group without modification from the previous draft as contained in document A/CN.9/547, paragraph 12 (A/CN.9/547, para. 49).

67. The second sentence of this paragraph reflects the suggestion that Variant C of paragraph (5) of the previous draft as contained in document A/CN.9/547, paragraph 12, which expressed the important principle that the court, where enforcement of the interim measure was sought, should not review the substance of the interim measure, should be included in paragraph (3) (A/CN.9/547, paras. 50 and 60).

**Paragraph (4)**<sup>25</sup>

68. For the sake of consistency with the language used in articles 17 and 17 bis, the word “amendment” has been replaced by the word “modification” (A/CN.9/547, paras. 53 and 101; for earlier discussion on these words, see A/CN.9/545, para. 35) and the words “recognition or” have been added before the word “enforcement” (A/CN.9/547, para. 53).

**Paragraph (5)**<sup>26</sup>

69. It is recalled that, of the four variants proposed in the previous draft as contained in document A/CN.9/547, paragraph 12, which reflected the differing views expressed by the Working Group at its thirty-eighth session on that question, the Working Group expressed its preference for the retention of Variant A and the first bracketed text namely, “unless the

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<sup>22</sup> A/CN.9/524, para. 48-49.

<sup>23</sup> A/CN.9/545, paras. 103-111; A/CN.9/524, paras. 35-39, 42-52; A/CN.9/487, paras. 83-86; A/CN.9/485, paras. 84-89, 95-101.

<sup>24</sup> A/CN.9/524, paras. 40 and 56.

<sup>25</sup> A/CN.9/524, paras. 67-71.

<sup>26</sup> A/CN.9/524, paras. 72-75.

tribunal had already made an order with respect to security for costs” (A/CN.9/547, para. 55).

*“determination”*

70. To clarify that the possibility of a court undertaking a review of a tribunal’s decision to grant or not grant security was entirely excluded, the words “an order”, which were contained in Variant A have been replaced by the words “a determination” (A/CN.9/547, para. 56).

*“security for costs”*

71. The Working Group agreed that the term “security for costs” was considered as too narrow and it has therefore been replaced by a reference to “appropriate security” as provided in paragraph (4) of draft article 17 (A/CN.9/547, para. 58).

*“the other party”*

72. In accordance with the decision of the Working Group, the words “the other party” have been replaced by the words “the requesting party”, in order to clarify that, in most conceivable cases, the party ordered to provide security would be the party requesting the interim measure (A/CN.9/547, para. 59).

*“or where such an order is necessary to protect the rights of third parties”*

73. The words “or where such an order is necessary to protect the rights of third parties” have been added at the end of paragraph (5) in accordance with the decision of the Working Group that Variant D of the previous draft as contained in document A/CN.9/547, paragraph 12, which dealt with an important issue of third party protection, could be built into Variant A (A/CN.9/547, para. 61).

**C. Note by the Secretariat on inclusion of a reference  
to the 1958 New York Convention on the Recognition and  
Enforcement of Foreign Arbitral Awards in the draft convention  
on the use of electronic communications in international contracts,  
submitted to the Working Group on Arbitration  
at its forty-first session  
(A/CN.9/WG.II/WP.132) [Original: English]**

1. At its thirty-seventh session (New York, 14-25 June 2004), the Commission noted that the Working Group had yet to complete its work in relation to the “writing requirement” contained in article 7 (2) of the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) and article II (2) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”). In respect of the New York Convention, the Commission was informed that the Working Group would be invited to consider whether the New York Convention should be included in a list of international instruments to which the draft convention on the use of electronic communications in international contracts (“the draft convention”), currently being prepared by Working Group IV (Electronic Commerce) would apply.<sup>1</sup>
2. The Working Group on Arbitration is asked to consider whether or not the New York Convention should be listed under article 19 of the draft convention in the interests of achieving some progress towards the objective of uniform interpretation of the written form requirement contained in article II (2) of the New York Convention. A full text of the draft convention is reproduced in document A/CN.9/WG.IV/WP.110.
3. The draft convention applies to the exchange of electronic communications relating to the formation or performance of a contract between parties whose places of business are in different States and either, those States are Contracting States, the rules of private international law lead to the application of the law of a Contracting State, or the parties have agreed that the draft convention applies (draft article 1). The draft convention currently contains a provision intended to clarify that electronic communications may also be used in connection with the formation or performance of contracts that are subject to certain UNCITRAL Conventions (draft article 19). The reference to the New York Convention appears in square brackets in article 19 of the draft convention because neither the Working Group on Arbitration, nor the Working Group on Electronic Commerce have had an opportunity to consider that matter.
4. It will be recalled that the Working Group, at its thirty-second, thirty-third, thirty-fourth and thirty-sixth sessions, considered a draft model legislative provision

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<sup>1</sup> *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 59.

revising article 7 (2) of the Model Law<sup>2</sup> and a draft interpretative instrument regarding article II (2) of the New York Convention.<sup>3</sup>

5. According to the revised draft of article 7 (2) of the UNCITRAL Model Law (contained in A/CN.9/508, paragraph 18), “‘writing’ includes any form that provides a [tangible] record of the agreement or is [otherwise] accessible as a data message so as to be usable for subsequent reference”. The revised draft defines “data message” as “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”. That definition of “data message” is consistent with the definition contained in the draft convention (paragraph 4 (c) of the draft convention).

6. The draft interpretative instrument regarding article II (2) of the New York Convention provides that “the definition of ‘agreement in writing’ contained in article II (2) of the New York Convention should be interpreted to include [wording inspired from the revised text of article 7 of the UNCITRAL Model Law on International Commercial Arbitration]” (A/CN.9/508, para. 18). The Working Group will recall that it has not yet reached any consensus as to the effectiveness of an interpretative declaration to address the practical problems and existing disharmony in the application of article II (2) of the New York Convention given that a declaration would have no binding effect in international law (A/CN.9/508, paras. 42-50).

7. The most important aspect of the draft convention is to provide legal recognition to electronic communications. Any requirement under law that a contract be in writing will be met by an electronic communication “if the information contained therein is accessible so as to be usable for subsequent reference” (draft article 8). This language reflects the approach adopted in the revised draft of article 7 (2) of the UNCITRAL Model Law (see paragraph 5, above).

8. The provision of the draft convention listing the international instruments to which the draft convention could apply currently reads as follows:

*“Article 19 [Y]. Communications exchanged under other  
international conventions*

Except as otherwise stated in a declaration made in accordance with paragraph 3 of this article, [each Contracting State declares that it shall apply the provisions of this Convention][the provisions of this Convention shall apply] to the use of electronic communications in connection with the [negotiation][formation] or performance of a contract [or agreement] to which any of the following international conventions, to which the State is or may become a Contracting State, apply...”

Currently, the following conventions are listed thereunder:

[Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)]

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<sup>2</sup> With respect to the draft model legislative provision revising article 7, paragraph 2, see A/CN.9/468, paras. 88-99; A/CN.9/485, paras. 21-59; A/CN.9/487, paras. 22-41; A/CN.9/508, paras. 18-39.

<sup>3</sup> With respect to the draft interpretative instrument regarding article II, paragraph 2 of the 1958 New York Convention, see A/CN.9/485, paras. 60-77; A/CN.9/487, paras. 42-63; A/CN.9/508, paras. 40-50.

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, 19 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).

9. Article 19 of the draft convention is intended to clarify the relationship between the rules contained in the draft convention and the rules contained in other international conventions. It is not the purpose of draft article 19 to amend any international convention (for further information regarding article 19 of the draft convention, see footnote 55 in A/CN.9/WG.IV/WP.110). The draft convention appears to apply only to the interpretation of the definition of the written form of an arbitration agreement, and a reference in the draft convention to the New York Convention should not be understood as addressing the broad range of issues arising in respect of on-line arbitrations (i.e. arbitrations in which significant parts or even all of the arbitral proceedings were conducted by using electronic means of communication). The Working Group will recall that the Commission already decided that the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce on this matter, which will be dealt with separately.<sup>4</sup>

10. If the reference to the New York Convention is maintained in the draft convention, it may also be necessary to include a provision on electronic equivalents to “original” documents since article IV, paragraph (1) (b) of the New York Convention requires that the party seeking recognition and enforcement of a foreign arbitral award must supply, inter alia, an original or a duly authenticated copy of the arbitration agreement. To address that matter, article 9 of the draft convention contains two paragraphs, as follows:

“[4. Where the law requires that a contract or any other communication should be presented or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

[(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and

[(b) Where it is required that the information it contains be presented, that information is capable of being displayed to the person to whom it is to be presented.

[5. For the purposes of paragraph 4 (a):

[(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and

<sup>4</sup> *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 396.

[(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.]”

11. Article 9 of the draft convention refers to the definition of “a contract or any other communication to be presented or retained in its original form”, and the word “communication” is defined, under article 4 of the draft convention, as meaning “any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the [negotiation][formation] or performance of a contract”. Therefore, the definition of “original” appears to apply only to the requirement for an original arbitration agreement under article IV, paragraph (1) (b) of the New York Convention and not to the requirement for an original arbitral award under article IV, paragraph (1) (a) of the New York Convention.

12. The inclusion of a reference to the New York Convention under article 19 of the draft convention would provide a uniform definition of “writing”, a definition that is more consistent with developing technological practices in international commercial arbitration, and thereby would contribute positively to uniformity in the interpretation and application of article II (2) of the New York Convention. It would also provide a solution to the requirement under article IV, paragraph 1 (b) of the New York Convention that an original agreement be supplied.

13. However, similarly to an amending protocol, it would create two groups of States parties, those that had adhered to the New York Convention in its original form only and those who, in addition, had adhered to the draft convention.<sup>5</sup> At least, in so far as States that were party to both the New York Convention and the draft convention, the New York Convention would be read as subject to the latter convention.

14. In discussing this matter, the Working Group should be aware of the progress accomplished in respect of the draft convention and that the Working Group on Electronic Commerce (Working Group IV) intends to complete its work on the draft convention to enable its review and approval at the forthcoming session of the Commission (to be held in Vienna, from 4 to 22 July 2005).

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<sup>5</sup> Article 30 of the Vienna Convention on the Law of Treaties which represents customary international law provides in part in respect of the application of successive treaties relating to the same subject-matter that:

“3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

“4. When the parties to the later treaty do not include all the parties to the earlier one:

“(a) As between States parties to both treaties the same rule applies as in paragraph 3;

“(b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”



**D. Report of the Working Group on Arbitration on the work of its  
forty-second session (New York, 10 – 14 January 2005)**

**(A/CN.9/573) [Original: English]**

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## I. Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission considered that the time had come to, inter alia, evaluate in the universal forum of the Commission the acceptability of ideas and proposals for the improvement of arbitration laws, rules and practices. The Commission entrusted the work to Working Group II (Arbitration and Conciliation) and decided that the priority items for the Working Group should include, among other matters, enforceability of interim measures of protection.

2. The most recent summary of the discussions of the Working Group on, inter alia, a revised draft of article 17 of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as “the Model Law”) relating to the power of an arbitral tribunal to order interim measures of protection and a proposal for a new article to the Model Law relating to the enforcement of interim measures of protection (tentatively numbered article 17 bis) can be found in document A/CN.9/WG.II/WP.130, paragraphs 5 to 17.

3. The Working Group, which was composed of all States members of the Commission, held its forty-second session in New York, from 10 to 14 January 2004. The session was attended by the following States members of the Working Group: Algeria, Argentina, Austria, Belarus, Belgium, Brazil, Cameroon, Canada, China, Colombia, Croatia, Czech Republic, France, Germany, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Jordan, Kenya, Lebanon, Madagascar, Mexico, Morocco, Nigeria, Pakistan, Paraguay, Poland, Qatar, Republic of Korea, Russian Federation, Rwanda, Serbia and Montenegro, Sierra Leone, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela (Bolivarian Republic of) and Zimbabwe.

4. The session was attended by observers from the following States: Afghanistan, Bolivia, Cape Verde, Congo, Costa Rica, Cuba, El Salvador, Finland, Holy See, Ireland, Malaysia, Myanmar, Netherlands, New Zealand, Nicaragua, Philippines, Senegal, Syrian Arab Republic and Ukraine.

5. The session was also attended by observers from the following international intergovernmental organizations invited by the Commission: African Union, Council of the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (IPA CIS), International Cotton Advisory Committee (ICAC), NAFTA Article 2022 Advisory Committee (NAFTA) and Permanent Court of Arbitration (PCA).

6. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Arbitration Association (AAA), American Bar Association (ABA), Arab Association for International Arbitration, Association Suisse de l'Arbitrage (ASA), Association of the Bar of the City of New York (ABCNY), Cairo Regional Centre for International Commercial Arbitration, Center for International Legal Studies, Chartered Institute of Arbitrators, Club of Arbitrators of the Milan Chamber of Arbitration, Forum for International Commercial Arbitration (FICA), Global Center for Dispute Resolution Research, International Chamber of Commerce (ICC), International Law Institute (ILI), Inter-Pacific Bar Association (IPBA), Kuala Lumpur Regional Centre for Arbitration (KLRCA), London Court of International Arbitration (LCIA), Regional Centre for International Commercial Arbitration (Lagos), School of International Arbitration, the European Law Students' Association (ELSA) and Union International des Avocats (UIA).

7. The Working Group elected the following officers:

*Chairman:* Mr. José María ABASCAL ZAMORA (Mexico);

*Rapporteur:* Mr. Lawrence BOO (Singapore).

8. The Working Group had before it the following documents: (a) the provisional agenda (A/CN.9/WG.II/WP.133); (b) a note by the Secretariat containing a newly revised text of paragraph (7) of draft article 17 on the power of an arbitral tribunal to order interim relief on an ex parte basis, pursuant to the decisions made by the Working Group at its forty-first session (A/CN.9/WG.II/WP.134); (c) a note by the Secretariat containing a revised version of a draft provision on the recognition and enforcement of interim measures of protection (for insertion as a new article of the Model Law, tentatively numbered 17 bis) (A/CN.9/WG.II/WP.131); (d) a note by the Secretariat containing a proposal for a draft provision on the power of courts to order interim measures of protection in support of arbitration (for insertion as a new article of the Model Law, tentatively numbered 17 ter) (A/CN.9/WG.II/WP.125); (e) a note by the Secretariat regarding the inclusion of a reference to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in the draft convention on the use of electronic communications in international contracts (A/CN.9/WG.II/WP.132); and (f) the report of the Working Group on its forty-first session (A/CN.9/569).

9. The Working Group adopted the following agenda:

1. Opening of the session;
2. Election of officers;
3. Adoption of the agenda;
4. Preparation of uniform provisions on interim measures of protection for inclusion in the UNCITRAL Model Law on International Commercial Arbitration;
5. Possible inclusion of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") in the list of international instruments to which the draft convention on the use of electronic communications in international contracts would apply;
6. Other business;

7. Adoption of the report.

## II. Deliberations and decisions

10. The Working Group discussed agenda item 4 on the basis of the text contained in notes prepared by the Secretariat (A/CN.9/WG.II/WP.125, A/CN.9/WG.II/WP.131 and A/CN.9/WG.II/WP.134). The deliberations and conclusions of the Working Group with respect to that item are reflected in chapters III, IV and V. The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. The Working Group discussed agenda item 5 on the basis of proposals contained in the note prepared by the Secretariat (A/CN.9/WG.II/WP.132), and agenda item 6. The deliberations and conclusions of the Working Group with respect to those items are reflected in chapters VI and VII, respectively.

## III. Draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration regarding the power of an arbitral tribunal to grant interim measures of protection

11. The Working Group recalled that, at its forty-first session (Vienna, 13-17 September 2004), it had undertaken a detailed review of the text of paragraph (7) of the revised version of article 17 regarding the power of an arbitral tribunal to grant interim relief on an ex parte basis, before coming to a decision as to whether a specific mention of preliminary orders should appear in draft article 17 (in draft article 17 and in this report, the notion of interim relief being granted on an ex parte basis is generally reflected through use of the term “preliminary order(s)”). The Working Group resumed discussions on paragraph (7) of draft article 17, on the basis of the text prepared by the Secretariat to reflect the discussions of the Working Group and set out in A/CN.9/WG.II/WP.134.

### Paragraph 7

12. There remained division in the Working Group as to whether or not to include a provision on preliminary orders in draft article 17.

13. It was said that international arbitration practice would benefit from allowing the possibility for arbitral tribunals to grant preliminary orders, for a number of reasons, including that:

- The parties to an arbitral proceeding might prefer to obtain preliminary orders from the arbitral tribunal instead of requesting a State court to issue such an order;
- The power to grant ex parte interim relief already vested with State courts, and arbitral tribunals should enjoy the same level of powers as State courts in that respect;
- The absence of regulation regarding preliminary orders had the consequence of leaving open the possibility that an arbitral tribunal might order and enforce a preliminary order and the inclusion of paragraph 7 was important as it provided for valuable safeguards and useful guidance for those States that were willing to adopt legislation on preliminary orders.

14. However, opposition was expressed to its inclusion on a number of grounds, including that:

- Paragraph (7) was contrary to the principle of equality of treatment of the parties as provided for under article 18 of the Model Law and contrary to the provision of article 36 (1)(a)(ii) of the Model Law;
- There was no consensus as to whether, as a matter of general policy, the Model Law should seek to establish full parity between the powers of the arbitral tribunals and those of the State courts, as illustrated by the divergence of opinions in respect of the issue of preliminary orders.

15. After discussion, the Working Group agreed to further consider the principles of whether paragraph 7 should be drafted as an opt-in or opt-out for States and/or for the parties to an arbitral proceeding and whether a court enforcement regime should apply to preliminary orders.

*Opt-in or opt-out for States*

16. The view was expressed that it was illogical and unnecessary to include either an opt-in or opt-out clause for States given that the draft instrument was in the form of a Model Law and therefore States were free to enact or not, or to modify, any of its provisions.

17. However, the view was also expressed that the inclusion of an opt-out option for the States should be given consideration in order to provide guidance to States that had doubts about the usefulness of preliminary orders. That option could be reflected by adding a footnote to paragraph (7), modelled on the approach taken in article 35 (2) of the Model Law, along the lines that “paragraph (7) is intended to define the procedure applicable to preliminary orders. It would not be contrary to the harmonization to be achieved by the model law if a State decided not to include this paragraph”.

*Opt-in or opt-out for the parties*

18. The opt-in option was viewed as an advisable solution and, in particular, was strongly supported by those delegations opposing preliminary orders. It was also pointed out that an opt-in approach provided a legal foundation for preliminary orders as an expression of the will of the parties. In addition, to answer concerns that an opt-in solution would result in preliminary orders never being issued in practice, it was stated that there existed examples of arbitration rules applied by arbitration institutions which contained such a right to order ex parte interim relief and those rules could be incorporated in arbitration clauses concluded by commercial parties. However, it was stated that where no such rules were incorporated, the opt-in approach would result in preliminary orders being unavailable in most cases.

19. Support was expressed for the opt-out option for the parties. The opt-out option was described as more in line with the current structure of the Model Law, which contained several instances of such default rules subject to contrary agreement by the parties. It was further observed that while opt-out provisions were commonly used in codes and other legislation of civil law countries, that was not the case for opt-in provisions. The opt-out option was also thought to be more in line with efforts by the Working Group at previous sessions to recognize preliminary orders provided that appropriate safeguards were in place to prevent abuse of such orders.

*Enforcement*

20. It was recalled that draft article 17 bis (see A/CN.9/WG.II/WP.131) contained in its paragraph (6) a provision on court enforcement of preliminary orders. It was widely felt that the inclusion of paragraph (7) in draft article 17 could be more acceptable to those opposing preliminary orders if no provision was made for the court enforcement of such orders. It was understood that parties to an arbitration typically complied with orders of the arbitral tribunal.

*Proposals*

21. A number of proposals were made for the structuring of paragraph (7).

22. One proposal was that the revised draft could be acceptable provided that it combined an opt-in approach for the parties and the deletion of paragraph (6) of article 17 bis, which dealt with enforcement of preliminary orders. However, it was pointed out that providing an enforcement regime for preliminary orders under paragraph (6) of article 17 bis would be more acceptable if the opt-in option was retained, and the parties authorized the arbitral tribunal to apply preliminary orders.

23. To overcome the wide divergence of views between the opt-in approach and those opposing that approach, another proposal was made that the words “unless otherwise agreed by the parties” and “if expressly agreed by the parties” would be deleted and explanations along the following terms be included as footnotes to paragraph (7):

- Arbitral institutions were free to set up their own rules and the parties were free to agree on other provisions;
- Paragraph 7 was intended to define the procedure applicable to preliminary orders and it was not contrary to harmonization to be achieved by the Model Law if a State decided either:
  - Not to include paragraph 7;
  - Only to apply such a provision where the parties so agreed;
  - Not to apply such a provision if the parties have agreed otherwise; or
  - To establish less onerous conditions than those contained in paragraph 7.

24. With the same objective of overcoming the wide divergence in opinions regarding the opt-in or opt-out solutions, yet another proposal was that, if the Working Group agreed to retain the opt-out option for the parties, a footnote to paragraph 7 (a) could be added, providing that it would not be contrary to the harmonization to be achieved by the Model Law if a State decided to retain the opt-in approach for the parties.

25. Some support was expressed for the proposals that would leave open various possibilities in a footnote. However, it was pointed out that spelling out all possible options in a footnote to paragraph (7) would run contrary to the purpose of achieving harmonization of legislation, and would deprive States from receiving clear guidance on that issue.

26. A further proposal was that paragraph 7 should provide that a preliminary order was in the nature of a procedural order (as opposed to an award). It was said that that clarification would distinguish preliminary orders from interim measures of protection, which according to article 17 (2) could be issued in the form of an award or in another

form. Thus, the enforcement regime provided for under article 17 bis would apply only to interim measures of protection.

27. After discussion, the Working Group, notwithstanding the wide divergence of views, agreed to include the revised draft of paragraph (7) in draft article 17, on the basis of the principles that that paragraph would apply unless otherwise agreed by the parties, that it should be made clear that preliminary orders had the nature of procedural orders and not of awards, that no enforcement procedure would be provided for preliminary orders in article 17 bis, and that no footnote would be added.

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

##### *Opt-out option*

28. In order to reflect the decision made by the Working Group concerning the retention of the opt-out option for the parties (see above, paragraph 27), the Working Group agreed to retain the words “unless otherwise agreed by the parties” and to delete the words “if expressly agreed by the parties”.

##### *“take no action”*

29. A proposal was made to substitute the words “take no action” with the word “not” in order to clarify that a preliminary order might be aimed not only at preventing a party from taking an action but also at requiring a party to take an action such as, for instance, to protect goods from deterioration or some other threat. It was said that that proposal might render the distinction between preliminary orders and interim measures more difficult to establish. After discussion, that proposal was adopted.

30. It was said that paragraph (7) (a) could be misunderstood as providing that the arbitral tribunal could only direct the parties in general terms not to frustrate the purpose of the interim measure. It was agreed that the arbitral tribunal had discretion to issue a preliminary order that was appropriate and was in keeping with the circumstances of the case and that such an understanding should be made clear in any explanatory material relating to that provision.

#### **Subparagraph (b)**

31. A proposal to include the words “relating to interim measures also” after the word “article” was agreed to on the basis that those words clarified that the intention of subparagraph (b) was to make the obligations set out in paragraphs (3), (4), (5) (6) and (6 bis) applicable to preliminary orders.

#### **Subparagraph (c)**

##### *Power of the arbitral tribunal to grant preliminary order*

32. As a general remark concerning the structure of paragraph (7), it was pointed out that, whereas the arbitral tribunal was expressly empowered to grant interim measures under paragraph (1) of draft article 17, no equivalent provision was included regarding the power of the arbitral tribunal to grant preliminary orders. It was therefore proposed to modify subparagraph (c) so that the arbitral tribunal be expressly granted that right, and for that purpose, to delete the words “only” appearing before the word “grant” and to replace the word “if” by the word “provided”. That proposal was adopted by the Working Group.

*“reasonable basis for concern”*

33. A suggestion was made that subparagraph (c) should be redrafted to emphasize the exceptional nature of a preliminary order by only permitting such an order where there were compelling reasons for concern that the requested interim measure would be frustrated before all the parties could be heard.

34. The Working Group was reminded that the formulation of the standard that an arbitral tribunal should apply in determining whether or not to grant a preliminary order had been discussed at a previous session (see A/CN.9/569, paras. 39-43) and that concerns had been expressed against using imprecise standards. It was stated that a requirement that the arbitral tribunal should find compelling reasons to grant a preliminary order could create a situation where it would be difficult for an arbitral tribunal to either issue or lift the requested preliminary order. After discussion, the Working Group agreed to retain the existing language, which would be simplified by deleting the words “basis for”.

*definition of the risk*

35. It was suggested that the risk defined under subparagraph (c) that the measure be frustrated before all the parties could be heard did not include the risk that the preliminary order be disclosed to the party against whom it was made, and it was therefore proposed to amend subparagraph (c) to better reflect that risk. Accordingly, it was suggested that the words “before all parties can be heard” should be deleted. In that connection, it was said that the formulation contained in a previous draft of paragraph 7 (a), reproduced in A/CN.9/WG.II/WP.131, para. 4 and A/CN.9/569, para. 12, stating that “where prior disclosure of an interim measure to the party against whom it is directed risks frustrating the purpose of the measure”, was preferable. The Secretariat was requested to take that suggestion into account when preparing a revised draft of that provision.

36. To reflect the decision that a preliminary order could only be issued as a procedural order and not as an award (see above, paragraph 27), the Working Group agreed that wording along the lines of “in the form of a procedural order” should be inserted after the words “a preliminary order”. However, it was pointed out that the distinction between a procedural order and an interim measure was not only a matter of form but also a matter of substance, since procedural decisions were not enforceable under the New York Convention or article 36 of the Model Law. The Secretariat was requested to consider whether appropriate wording could be found to reflect the procedural nature of a preliminary order, without suggesting that preliminary orders should be issued according to any specific procedural form.

**Subparagraph (d)***Communication of information*

37. It was stated that the requirement to give notice to the party against whom the preliminary order was directed of all communications between the requesting party and the arbitral tribunal in relation to the request might be easily discharged in respect of written communications. However, a concern was expressed that it was less clear how to discharge that duty in respect of oral communications. To address that concern, it was suggested that words along the lines of “including a verbatim transcription of any oral communication” or “including a record of any verbal discussion” should be added at the end of subparagraph (d). In response, it was stated that the suggested additional words might create an excessively burdensome requirement, particularly in circumstances where a



preliminary order was sought in urgent circumstances and arrangements for verbatim records were not practicable. With a view to achieving greater flexibility, it was suggested that it should be clarified that the arbitral tribunal was obliged to disclose not only the existence of the oral communications but also to indicate their contents. It was said that that approach provided flexibility for the arbitral tribunal to determine how best to meet its obligation of disclosure under subparagraph (d). The Secretariat was requested to implement that approach through appropriate wording.

*“A determination in respect of a preliminary order”*

38. A suggestion was made to add the words “in respect of an application for” after the words “a determination” for the sake of providing consistency with paragraph 7 (a), which referred to “an application for a preliminary order”. The Secretariat was requested to take account of that suggestion in revising the draft.

*“the party against whom the preliminary order is directed”*

39. It was stated that, because a determination might be for or against the granting of a preliminary order, it might be more appropriate to refer to “the party against whom the preliminary order is requested” or “is sought”, rather than to “the party against whom the preliminary order is directed”. That proposal was adopted.

*Notice*

40. The Working Group recalled that, at its forty-first session (see A.CN.9/569, para. 44), there had been a strong preference to leave open the question as to who should bear the obligation to communicate the documents and information referred to under subparagraph (d). However, after discussion, the Working Group found that, as drafted, subparagraph (d) was ambiguous, and that it was preferable to state that the arbitral tribunal in receipt of the request was under an obligation to give notice of the documents and information to the other party. That proposal was adopted.

41. It was suggested that it should be clarified that the obligation of the arbitral tribunal to communicate documents and information to the party against whom the order was sought applied whether the arbitral tribunal accepted or refused to issue the preliminary order. The Working Group confirmed that obligation and the view was expressed that the current wording adequately expressed it. However, the Working Group took note of the suggestion that additional clarification might be further considered in the context of any explanatory material that might be prepared at a later stage in respect of article 17.

*[“unless the arbitral tribunal...whichever occurs earlier”]*

42. The Working Group agreed to delete the bracketed text appearing at the end of subparagraph (d) to reflect its earlier decision (see above, paragraph 27) that no judicial enforcement regime should be provided for in the Model Law for preliminary orders.

**Subparagraph (e)**

*Variants A and B*

43. The Working Group considered Variants A and B and the question of the appropriateness of defining a time limit for the responding party to present its case. Support was expressed in respect of both Variants.

44. Variant A, which provided for a forty-eight hour period during which the responding party should present its case was seen by certain delegations as presenting the fundamental safeguard of delimiting a time frame, thus emphasizing for the benefit of the arbitral tribunal that prompt action was required. Variant A was also considered to be flexible, as it included the possibility for the party against whom the order was directed to request another time period. A drafting suggestion was made that, in keeping with the approach taken in the Model Law, it would be more appropriate to refer to “two days” rather than “forty-eight hours”.

45. Variant B, which did not include any time limitation expressed in hours or days, received support on the basis that the determination of a time limit was unnecessary, as the party affected by the order would in most cases seek to be heard by the arbitral tribunal as soon as was practicable. In addition, the definition of such a time limit was considered as presenting the risk that the arbitral tribunal might not be able to grant a preliminary order only because it was not able, for practical reasons, to hear the party affected by the order within the strict time frame of forty-eight hours.

46. A proposal was made that Variants A and B could be merged along the following lines: “at the earliest possible opportunity and, if at all practicable, within forty-eight hours after notice is received or such longer period of time as is requested by the party against whom the preliminary order has been made”. A concern was expressed that the draft proposal was overly detailed and might result in over-regulating the matter.

47. Another proposal was that subparagraph (e) should be redrafted so that it was not left to the party to determine a longer period but rather that the discretion remained with the arbitral tribunal to provide such longer period as the arbitral tribunal might deem appropriate. However, it was stated that the reference to “the earliest possible opportunity” already afforded the arbitral tribunal discretion to fix a longer period even in the absence of a request from the opposing party.

48. Yet another proposal was that a distinction should be made between the obligation of the arbitral tribunal and the obligation of the party affected by the order. Under that proposal, the party against whom the order was directed should be given an opportunity to present its case “at the earliest practicable time” and wording should be added along the lines of “the arbitral tribunal must decide as promptly as possible under the circumstances”.

49. A concern was expressed that even in cases where a preliminary order was not granted, the party against whom that order had been sought might still wish to be heard by the arbitral tribunal and that possibility should be left open in subparagraph (e), by replacing the word “the preliminary order is directed” by the words “the preliminary order is sought”. It was stated in response that if an arbitral tribunal decided not to grant a preliminary order against the party concerned, that party might still have recourse to the arbitral tribunal at any later stage of the procedure, including in any inter partes hearing relating to an interim measure.

50. After discussion, it was decided that subparagraph (e) should read along the following lines: “The arbitral tribunal shall give an opportunity to the party against whom the preliminary order is directed to present its case at the earliest practicable time. The arbitral tribunal shall decide as promptly as required under the circumstances”. A commentary or explanatory note that might be prepared at a later stage in respect of article 17 could refer to two days as an illustration to indicate the intention of the provision.

*Notice*

51. A question was raised as to whether the notice referred to under Variants A and B was the notice to be given by the arbitral tribunal under subparagraph (d), or whether it referred to another notice, occurring at another point in time, given by the arbitral tribunal to the party affected by the preliminary order in order for that party to present its case. It was suggested that greater clarity could be brought as to when the notice should be given, by providing that the arbitral tribunal should give the opportunity to the party against whom the order was directed to present its case at the same time as the notification under subparagraph (d) occurred. It was proposed to add as the opening words of subparagraph (e) the words “at the same time”. That proposal was accepted.

**Subparagraph (f)***Twenty-day period*

52. In response to a question, it was clarified that the twenty-day period referred to in subparagraph (f) should be understood as running from the date when the preliminary order was granted, and not from the date when that preliminary order was requested. It was further explained that the purpose of subparagraph (f) was to define a time limit for the validity of the preliminary order. When twenty days had lapsed, the preliminary order would be automatically terminated. However, within those twenty days, the preliminary order could be converted into an interim measure of protection issued inter partes after the party against whom the preliminary order was directed had been given an opportunity to be heard, and the arbitral tribunal had decided to confirm, extend or modify the preliminary order in the form of an inter partes interim measure of protection, which would not be affected by the twenty-day limit.

53. In order to reinforce the obligation of the arbitral tribunal to deal promptly with the application for a preliminary order in the shortest possible time, a proposal was made to modify subparagraph (f) as follows: “The arbitral tribunal shall confirm, extend, modify, or terminate the preliminary order, within forty-eight hours if at all practicable, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.” The proposed wording was found insufficiently flexible.

*Structure of subparagraph (f)*

54. Questions were raised as to whether the reference to the notion of an interim measure of protection in the first sentence of paragraph 7 (f) could create confusion, as paragraph 7 was aimed solely at defining the regime of preliminary orders. A comment was made that the time limit of twenty days referred to under subparagraph (f) might, in most cases, be too short to allow an arbitral tribunal to issue an interim measure of protection, whether confirming, extending or modifying the preliminary order granted.

55. With a view to alleviating any confusion as to the purpose of subparagraph (f), a proposal was made to clarify that, as a matter of principle, a preliminary order should not have a life span beyond twenty days, but that certain relief granted under the preliminary order might be included in an inter partes interim measure of protection. A proposal was therefore made to reverse the order of the two sentences of paragraph (f), so that paragraph (f) would read as follows: “A preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure of protection confirming, extending or modifying the preliminary order, after the party against whom the preliminary

order is directed has been given notice and an opportunity to present its case.” Support was expressed in favour of that proposal.

56. The Working Group was cautioned that any revised wording should not be interpreted as allowing arbitral tribunals to grant a preliminary order extending beyond the time limit of twenty days, unless that preliminary order was converted into an inter partes interim measure. It was suggested that the word “however”, used in the second sentence of that proposal, might be understood as a derogation from the principle contained in the first sentence of the proposed draft that a preliminary order could not last longer than twenty days.

57. In order to reinforce the obligation of the arbitral tribunal, it was proposed to replace the word “may” appearing after the words “the arbitral tribunal” by the word “shall”. It was also proposed to replace the words “confirming, extending” by the word “adopting”, on the basis that that term better expressed the fact that the preliminary order had to be converted into an inter partes interim measure.

58. After discussion, the Working Group adopted the following revised version of subparagraph (f): “A preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure of protection adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.”

#### **Subparagraph (g)**

##### *Security as a condition precedent*

59. It was suggested that subparagraph (g) should be redrafted to provide that the arbitral tribunal should condition the granting of a preliminary order upon the requesting party’s providing appropriate security.

60. However, concern was expressed at creating such a rigid rule, which could create difficulties in practice. The Working Group recalled that the issue of the provision of security by the party requesting a preliminary order had previously been discussed by the Working Group (see A/CN.9/569, paras. 35-38 and A/CN.9/545, paras. 69-70) and that the Working Group had agreed that, in order to enhance the safeguards necessary in the context of preliminary orders, subparagraph (g) should reflect that the arbitral tribunal had an obligation to consider the issue of security, but that the decision on whether to require such security should be left to the discretion of the arbitral tribunal.

##### *Time when security might be required*

61. The Working Group recalled that, at its forty-first session, concern had been expressed that the point in time when security might be required was not clearly defined (see A/CN.9/569, para. 38). It was suggested that such lack of precision was appropriate as it allowed the arbitral tribunal flexibility in respect of the question of security, for example in situations where a party might require and be given more time to arrange security but the need for the preliminary order was immediate.

*“appropriate security”*

62. It was stated that the use of the words “appropriate security” and “inappropriate” in subparagraph (g) was confusing. In response, it was suggested that the word “appropriate” could be deleted or replaced by the word “adequate”.

*“unless the arbitral tribunal considers it inappropriate or unnecessary to do so”*

63. It was suggested that the closing words “unless the arbitral tribunal considers it inappropriate or unnecessary to do so” could also be deleted as they expressly permitted an arbitral tribunal to decide not to ask for security. However, that proposal was objected to given that, in some exceptional circumstances, requiring security would not be appropriate, for example, where a claimant was deprived of assets enabling it to provide security because of action taken by the respondent.

64. The Working Group agreed to retain the text of subparagraph (g), with the deletion of the term “appropriate”.

### **Subparagraph (h)**

*Cross references to subparagraphs (c) and (e)*

65. It was proposed and accepted by the Working Group to delete the cross-references to subparagraphs (c) and (e) for the reason that these references were no longer necessary.

*Interplay between subparagraph (h) and paragraph (5) of article 17*

66. A question was raised as to whether the obligation contained under subparagraph (h) was redundant given the obligation of disclosure as contained in draft article 17 (5). In response, it was explained that the obligation contained in subparagraph (h) differed from the obligation in draft article 17 (5) in that the latter referred to disclosure of any material changes in the circumstances while subparagraph (h) referred to full disclosure even of those facts that did not support the application for the preliminary order. It was explained that the reason for the latter disclosure was that, in the context of a preliminary order, the arbitral tribunal did not have the opportunity to hear from both parties, and therefore an additional burden should be placed on the applicant party to disclose facts that might not help its case but that were relevant to the arbitral tribunal’s determination.

*“is directed”*

67. A proposal was made and agreed to replace the words “is directed” appearing after the words “the preliminary order is” by the words “has been requested” to clarify that the obligation of disclosure of the requesting party applied from the moment that the request for a preliminary order was lodged by the requesting party, and not from the moment the arbitral tribunal made a determination thereon.

*Footnote to subparagraph (h)*

68. It was noted that the footnote to subparagraph (h) had been included to take account of the fact that, under many national laws, the obligation for the party to present information against its position was not recognized and was contrary to general principles of procedural law (A/CN.9/569, para. 68). The Working Group agreed that the footnote should be deleted for the reason that it was unnecessary and that the reference to “less onerous conditions” was awkward to apply in respect of an obligation to disclose.

**Explanatory materials**

69. At the close of the discussion of draft article 17 (7), views were exchanged as to whether the new provisions being prepared by the Working Group for addition to the Model Law should be accompanied by explanatory materials and, if so, what form such materials might take. The Working Group tentatively agreed that explanations should be provided to facilitate the enactment and use of those new provisions. In view of the fact that the new provisions might become part of the Model Law, which was accompanied by an “Explanatory note by the UNCITRAL secretariat” currently appearing in the United Nations publication reproducing the Model Law (Sales No. E.95.V.18), it was also agreed that the explanations covering the new model provisions could appear in a revised version of that explanatory note or in another form.

**IV. Draft provision on the recognition and enforcement of interim measures of protection (for insertion as a new article of the UNCITRAL Model Law on International Commercial Arbitration, tentatively numbered 17 bis)**

70. The Working Group considered the text of draft article 17 bis, as reproduced in document A/CN.9/WG.II/WP.131, para. 46.

**Paragraph 1**

71. The Working Group adopted paragraph 1 without change.

**Paragraph 2 (a)—Chapeau**

72. A proposal was made that the chapeau of paragraph 2 (a) should be modified to allow both the party against whom the measure was invoked and interested third parties to request a State court to refuse to recognize or enforce an interim measure. To that effect, it was proposed that the words “or on behalf” should be added in the chapeau of paragraph 2 (a) after the phrase “At the request”. With a view to alleviating a concern raised that the term “on behalf of” could be interpreted as applying only to representatives of the parties rather than to third parties and that it might not fully address the question of protection of third party rights, another proposal was that the following language could be inserted in paragraph (2): “Nothing in this provision shall diminish the right of any affected third party to raise any defences, available to it under the law of the State court”. Those proposals were objected to on the grounds that draft articles 17 and 17 bis dealt only with parties to arbitration, and not with third parties and that the proposed modification would add an unnecessary level of complexity into the provision. Nevertheless, taking account of the fact that, in practice, third parties (e.g., the custodian of assets of a party against whom an interim measure was directed) might be involved in the execution of an interim measure, it was decided that the issue might be revisited at the time of the discussion on draft article 17 ter.

*Burden of proof*

73. A concern was expressed that paragraph 2 (a) did not specify who should bear the burden of proof in satisfying the arbitral tribunal that either there was a substantial question relating to a ground for refusal or refusal was warranted. It was stated that the

approach to the issue of burden of proof was different from that taken in article 36 (1) (a) of the Model Law. It was further stated that, if the Working Group decided not to modify the chapeau of paragraph 2 (a) to restore consistency with article 36 (1) (a), appropriate explanations should be provided to avoid confusion or diverging interpretations as to who should bear the burden of proof. It was pointed out, in response, that the chapeau of paragraph 2 (a) reflected a decision made by the Working Group at its previous sessions that no provision should be made regarding the allocation of the burden of proof and that that matter should be left to applicable domestic law (A/CN.9/524, paras. 35-36, 42, 58 and 60).

#### **Subparagraphs (a) (i) and (a) (ii)**

*“[There is a substantial question relating to any grounds for refusal] [Such refusal is warranted on the grounds]”*

74. It was recalled that the first bracketed text had been included to meet the view that the grounds listed in subparagraph (2) (a) (i) were difficult to assess in any definitive way at the preliminary point when an interim measure would be issued. It was pointed out that the formulation contained in the first bracketed text did provide a level of flexibility, taking account of the fact that the decision of the State court regarding enforcement of the interim measure might need to be reconsidered at the final stage of the proceeding. By contrast, the phrase in the second bracketed text was stated to provide a higher threshold to be met in order to justify refusal and more clearly emphasized that recognition and enforcement should be the rule rather than the exception. On that basis, the Working Group agreed to retain the language contained in the second bracket and to combine subparagraphs (i) and (ii) as follows: “such refusal is warranted on the grounds set forth in article 36, paragraphs (1) (a) (i), (ii), (iii) or (iv); or”.

#### **Subparagraph (a) (iii)**

75. A proposal was made to delete subparagraph (iii) on the basis of an earlier decision of the Working Group that the provision of security under draft article 17 (4) would not in all cases be a condition precedent to the granting of an interim measure and that draft article 17 bis (5) already permitted State courts to order the requesting party to provide appropriate security. However, it was widely felt that that provision should be retained, as it constituted an important safeguard for the party against whom the measure was directed. It was further noted that subparagraph (iii) remained necessary in light of the fact that draft article 17 bis (5) only applied if the arbitral tribunal had not made a determination on the provision of security, whereas subparagraph (iii) dealt with the circumstances where an arbitral tribunal had made such a determination, but the determination had not been complied with.

76. It was pointed out that subparagraph (iii) only referred to the case of non-compliance with the requirement to provide appropriate security and did not fully reflect the fact that the arbitral tribunal had discretion not to require any security or that the security might have been ordered and its provision deferred. In order to better encompass those situations, a proposal was made to amend subparagraph (iii) either by replacing the words “The requirement” with “Any requirement” or by replacing the words “The requirement to provide appropriate security” with “The arbitral tribunal’s order with respect to the provision of security”. It was suggested that the term “order” in that proposal should be changed to refer to “decision” to reflect the possibility that security could be dealt with in

an award. After discussion, the substance of those proposals was adopted and the Secretariat was requested to prepare revised wording.

#### **Subparagraph (a) (iv)**

77. It was proposed that subparagraph (iv) should be deleted because it was unnecessary to deal with the suspension or termination of an interim measure by an arbitral tribunal, since no ground could be invoked for the recognition or enforcement of such a measure. In addition, it was stated that there was no need for a specific provision on the suspension or termination of an interim measure by a State court since such suspension or termination might not be permitted under many legal systems. No support was expressed for the proposed deletion.

*[or under the law of which, that interim measure was granted] [the arbitration takes place]*

78. The Working Group considered the bracketed texts proposed under subparagraph (iv). It was observed that the first bracketed text contained language similar to article 36 (1) (a) (v) and article V of the New York Convention and that language had raised diverging interpretations by State courts, in particular as to whether the “law” referred to was the procedural or substantive law of the State concerned. However, it was considered preferable to retain consistent language.

79. To achieve consistency between draft article 17 bis (2) (iv) and article 36 (1) (a) (v) of the Model Law, an alternative proposal was made to keep the two bracketed texts, but reverse their order. After discussion, that proposal was adopted.

#### *Setting aside*

80. In keeping with the language of article 36, it was proposed to add, after the word “suspended”, the term “set aside”, on the basis that, in some jurisdictions, that term had a different meaning than the term “termination”. In response, it was recalled that the purpose of draft article 17 bis was to establish rules for the recognition and enforcement of interim measures but not to parallel article 34 of the Model Law. With a view to avoiding such a reference to “setting aside”, it was proposed that the words “or, where so empowered, by the court of the State in which, [or under the law of which, that interim measure was granted] [the arbitration takes place]” should be deleted. Those two proposals were noted by the Working Group.

#### *Additional provision*

81. A proposal was made to add a provision to expressly deal with cases where the law of the place of arbitration, or the law under which the interim measure was granted did not permit an interim measure to be granted by an arbitral tribunal, or the parties had excluded the right for the arbitral tribunal to grant an interim measure. In that respect, the following text was proposed: “the arbitral tribunal did not have jurisdiction to grant interim measures of protection”. It was said, however, that those cases were already dealt with by the reference to article 36 (1) (iii) under draft article 17 bis (2) (a) (i). That proposal was not adopted.



**Subparagraph (b) (i)**

82. A suggestion was made that the words “by the law” should be deleted, since they could be misinterpreted to mean that a court could operate on a law other than that for which it drew its powers. The Working Group agreed with that proposal.

**Subparagraph (b) (ii)**

83. The Working Group adopted the substance of subparagraph (b) (ii) without change.

**Paragraph (3)**

84. A proposal was made to add the following sentence to paragraph (3): “If any of the defences in paragraph 2 are raised against the enforcement of an interim measure of protection granted by an arbitral tribunal, neither the court where enforcement is sought nor any other court shall be prevented from granting pursuant to powers under its own law measures substantially identical to those ordered by the arbitral tribunal”. It was stated that an addition along the lines of the proposed wording was necessary to preserve the situation where, under existing law, a court could issue its own interim measure instead of enforcing the interim measure issued by the arbitral tribunal, and avoid that court being faced with the more restrictive conditions resulting from the second sentence of paragraph (3). An alternative proposal was that, in order to prevent a party from requesting a court to grant an interim measure that it could not obtain from the arbitral tribunal, the following should be added at the end of paragraph (3): “A court shall not be prevented from granting, subject to its own laws, measures that were substantially identical to those ordered by the arbitral tribunal”. An alternative to both proposals was that the proposed wording could be included in a commentary to draft article 17 bis. The Working Group took note of the proposal and decided that it should be further discussed in the context of draft article 17 ter.

**Paragraph (4)**

85. The Working Group adopted the substance of paragraph (4) without change.

**Paragraph (5)**

86. To clarify the intention that the court might order a requesting party to provide security if the court was of the opinion that it was appropriate and the tribunal had not already made such an order or such an order was necessary to protect the rights of third parties, a suggestion was made to redraft paragraph (5) along the following lines: “The court of the state where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security, if the arbitral tribunal has not already made a determination with respect to security or if such an order is necessary to protect the rights of third parties.” It was also suggested that the reference to “determination” should be modified to refer to an “express determination” to direct the tribunal to expressly address the situation even if it ultimately decided not to grant security. It was proposed that the reference to “order”, which appeared twice in paragraph (5), should be replaced by the verb “require” or by the substantive “decision” to avoid limiting the effect of the provision to procedural decisions. The Secretariat was requested to take those proposals into account in preparing a revised draft of paragraph (5).

**Paragraph (6)***Preliminary orders and enforcement*

87. Consistent with its earlier decision that a preliminary order would not be judicially enforceable, the Working Group agreed to delete draft paragraph (6). The Working Group then proceeded to consider whether or not draft article 17 bis should include an express statement that it did not apply to preliminary orders. A concern was expressed that inclusion of an express statement that preliminary orders were not enforceable might have a negative impact on such orders (in that it might call into question their binding nature) and, for that reason, it might be preferable to simply state that article 17 bis only applied to inter partes interim measures.

88. It was suggested that such an express statement was unnecessary given that draft article 17 bis (2) (a) (ii) already allowed refusal of enforcement based on the grounds set forth in article 36 (1) (b) (ii) which referred to the situation where the party against whom the measure was made was, inter alia, “unable to present his case”. It was stated in response that the fact that a preliminary order would not be enforceable ought to be expressly stated rather than found in a cryptic application of the draft provisions. In addition, it was noted that both article 36 and draft article 17 bis provided discretion to refuse enforcement and that therefore it would still be possible for a court to grant an order enforcing a preliminary order.

89. It was noted that such a risk was enhanced given that the footnote to article 17 bis (1) permitted a State to include fewer circumstances in which enforcement might be refused. For that reason, it was generally agreed that it would be preferable to expressly put that matter beyond doubt. To that effect, it was decided that the Secretariat should prepare a draft paragraph for inclusion in article 17 bis, spelling out the principle that preliminary orders were not enforceable by State courts, keeping in mind those formulations that would not undercut the binding nature of preliminary orders.

## **V. Draft provision on the power of courts to order interim measures of protection in support of arbitration (for insertion as a new article of the UNCITRAL Model Law on International Commercial Arbitration, tentatively numbered 17 ter)**

90. The Working Group proceeded to consider two variant texts, which expressed the power of a court to order interim measures of protection in support of arbitration (as contained in A/CN.9/WG.II/WP.125, para. 42).

*Variants 1 and 2*

91. A view was expressed that Variant 1 provided a more flexible power for a court to order interim measures by permitting it to refer to its own rules of procedures and standards, whereas Variant 2 required that that power be exercised “in accordance with the requirements set out under article 17”. For that reason, preference was expressed for Variant 1.

*Interplay between draft articles 17 bis and 17 ter*

92. A proposal was made that the opening words of Variant 1 should be redrafted so as to provide “Except as provided in article 17 bis, the court shall have” in order to clarify that a court should not deal with a request for an interim measure of protection where the requested measure had already been refused by an arbitral tribunal. However, it was stated that a State court could not be prevented from reviewing a case *de novo* when so requested by a party even if the State court had already made a determination under draft article 17 bis.

*Interplay between draft article 17 ter and article 9 of the Model Law*

93. On the question of the relationship between article 9 and article 17 ter, it was noted that the scope of article 9 and article 17 ter were different, as article 9 dealt with the right of third parties to request an interim measure of protection from a court, whereas article 17 ter expressly empowered courts to grant such measures in support of an arbitration.

*Third parties*

94. It was suggested that words along the following lines be included at the end of the second sentence of Variant 1: “provided that the restrictions of article 17 bis do not apply to objections of third parties to interim measures of protection.” While the Working Group agreed that the issue of third parties might warrant further analysis, the suggestion did not receive support. In any case, it was generally felt that the question of third party protection would be better addressed in draft article 17 bis than in draft article 17 ter (see above, paragraph 72).

95. After discussion, the Working Group agreed to adopt the Variant 1 of article 17 ter as it appeared in the document referenced A/CN.9/WG.II/WP.125, para. 42.

## **VI. Possible inclusion of the New York Convention in the list of international instruments to which the draft convention on the use of electronic communications in international contracts would apply**

96. The Working Group recalled its earlier discussions regarding the draft convention currently being prepared by Working Group IV, its relationship to the UNCITRAL Model Law on Electronic Commerce and its intended purpose to provide a uniform regime for the use of electronic communications in the formation and performance of international contracts (A/CN.9/569, para. 73). Overall support was expressed in favour of the inclusion of a reference to the New York Convention in the draft convention, which was expected to provide welcome clarity to the writing requirement contained in article II(2) and other requirements for written communications in the text of the New York Convention. Views, concerns and questions expressed at the previous session of the Working Group were reiterated (A/CN.9/569, paras. 75, 76 and 78). It was emphasized that the inclusion of a reference to the New York Convention in the draft convention should not negatively impact any future deliberation that the Working Group might need to take in respect of the issues raised by the interpretation of article II(2) of the New York Convention.

97. As to the detailed formulation of the provisions of the draft convention that would affect the interpretation of the New York Convention, proposals made at the previous

session were also reiterated (A/CN.9/569, para. 77). In particular, it was suggested that clarity should be provided as to whether the notion of “contract” as used in the draft convention included an arbitration agreement. The view was also expressed that clarification might be required as to how the functional equivalent of a “duly authenticated original award” or a “duly certified copy” under article IV(1)(a) of the New York Convention would be provided under the draft convention. Delegations were encouraged to consult and provide their comments to the Secretariat for the preparation of the future deliberations of the Commission at its thirty-eighth session (to be held in Vienna from 4 to 15 July 2005), during which the draft convention would be finalized.

## VII. Other business

98. As to the future course of its deliberations, the Working Group recalled that, in addition to the issues identified at the current session in respect of draft article 17 bis (see above, paras. 70-89), it should consider proposals made at its previous session in respect of paragraphs 1 to 6 bis of draft article 17 (see A/CN.9/569, para. 22). It was also recalled that some of the questions raised with respect to draft article 17 bis in the note by the Secretariat, and in particular in paragraph 51 of document A/CN.9/WG.II/WP.131 remained open. With a view to finalizing its review of draft articles 17, 17 bis and 17 ter, and also its work on draft article 7 of the Model Law and the interpretation of article II(2) of the New York Convention, the Working Group agreed to request the Commission to allocate time for two additional sessions to be held before the thirty-ninth session of the Commission (2006), at which the Commission would be expected to review and adopt those draft provisions. It was noted that, subject to approval by the commission, the forty-third session of the Working Group was scheduled to be held at Vienna from 3 to 7 October 2005

99. As to the relationship between the existing text of the Model Law and the draft revised articles, the Secretariat was requested to consider the issue of the form in which the current and the revised provisions could be presented, with possible variants to be considered by the Working Group at a future session.

100. The Working Group took note of suggestions that, when planning its future work, it might give priority consideration to the issues of arbitrability of intra-corporate disputes and other issues relating to arbitrability, e.g., arbitrability in the fields of immovable property, insolvency or unfair competition. Another suggestion was that issues arising from online dispute resolution and the possible revision of the UNCITRAL Arbitration Rules might also need to be considered. Further suggestions might also be made at future sessions. The Secretariat was invited to consider whether some of these issues could form the basis for specific proposals to be considered by the Working Group at a future session.

**E. Note by the Secretariat on settlement of commercial disputes -  
Interim measures of protection, submitted to the Working Group  
on Arbitration at its forty-second session**

**(A/CN.9/WG.II/WP.134) [Original: English]**

1. At its forty-first session (Vienna, 13-17 September 2004), the Working Group discussed the text of paragraph (7) of draft article 17, based on a draft prepared by the Secretariat, as reproduced in document A/CN.9/WG.II/WP.131 and on a proposal made by one delegation, as reproduced in the report of the Working Group on the work of its forty-first session (A/CN.9/569, para. 22). It was noted that the Commission, at its thirty-seventh session (New York, 14-25 June 2004), had reiterated that the issue of ex parte interim measures, which the Commission agreed remained an important issue and a point of controversy, should not delay progress on the revision of the Model Law. The Commission, however, noted that the Working Group had not spent much time discussing that issue at its recent sessions and expressed the hope that consensus could be reached on that issue by the Working Group at its forthcoming session (A/59/17, para. 58).
2. The Working Group recalled that the issue of including ex parte interim measures had been the subject of earlier discussions in the Working Group (see A/CN.9/468, para. 70; A/CN.9/485, paras. 89-94; A/CN.9/487, paras. 69-76; A/CN.9/508, paras. 77-79; A/CN.9/523, paras. 15-76; A/CN.9/545, paras. 49-92 and A/CN.9/547, paras. 109-116; A/CN.9/569, paras. 12-72).
3. To facilitate the resumption of discussions, this note sets out a newly revised version of paragraph (7) of draft article 17 of the UNCITRAL Model Law ("the revised draft"), taking account of discussions and decisions made at the forty-first session of the Working Group.

**Revised draft of paragraph (7) of draft article 17 of the UNCITRAL  
Model Law on International Commercial Arbitration regarding the  
power of an arbitral tribunal to grant interim measures of protection**

"(7) (a) [Unless otherwise agreed by the parties,][If expressly agreed by the parties,] a party may file, without notice to the other party, a request for an interim measure of protection together with an application for a preliminary order directing the other party to take no action to frustrate the purpose of the interim measure requested.

"(b) The provisions of paragraphs (3), (5), (6) and (6 bis) of this article apply to any preliminary order that the arbitral tribunal may grant pursuant to this paragraph.

"(c) The arbitral tribunal may only grant a preliminary order if it considers that there is a reasonable basis for concern that the purpose of the requested interim measure will be frustrated before all parties can be heard.

"(d) Immediately after the arbitral tribunal has made a determination in respect of a preliminary order, the party against whom the preliminary order is directed shall be given notice of the request for the interim measure, the application

for the preliminary order, the preliminary order, if any, and all other communications between any party and the arbitral tribunal in relation thereto [, unless the arbitral tribunal determines that such notification should be deferred until either the court decides whether to enforce the preliminary order or the order expires, whichever occurs earlier].

“(e) The arbitral tribunal shall give an opportunity to the party against whom the preliminary order is directed to present its case

*Variant A:* no later than forty-eight hours after notice is given, or a longer period of time if so requested by that party [in light of the circumstances].

*Variant B:* at the earliest practicable time after notice is given [in light of the circumstances].

“(f) The arbitral tribunal may issue an interim measure of protection confirming, extending or modifying the preliminary order, or terminate the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case. In any event, a preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal.

“(g) The arbitral tribunal shall require the requesting party to provide appropriate security in connection with such preliminary order, unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

“(h) Until the party against whom the preliminary order is directed has presented its case under subparagraph (7) (e), the requesting party shall have a continuing obligation to disclose to the arbitral tribunal all circumstances that the arbitral tribunal is likely to find relevant to its determination whether to grant a preliminary order under subparagraph (7) (c).”

## Options

4. At its forty-first session, the Working Group agreed that various options might need to be considered before finalizing a set of model statutory provisions aimed at providing a limited recognition of ex parte measures. In particular, it is recalled that the following options were considered as possible approaches in respect of paragraph (7) (A/CN.9/569, paras. 18-21 and para. 70):

- opting-in or opting-out by the parties:
  - If the opting-in solution is adopted by the Working Group, the words “[If expressly agreed by the parties,]” should then be retained in the text. In addition, in order to preserve the freedom of the parties to enter into agreements containing other legal rules governing ex parte interim measures, the following words could be added for that option under subparagraph (b): “Subject to the provisions of paragraphs (3), (5), (6) and (6 bis) of this article, the parties are free to agree on a procedure to allow

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\* The conditions set forth in this subparagraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

the arbitral tribunal to grant a preliminary order. Failing such agreement, the provisions of paragraph (7) of this article shall apply.”.

- If the Working Group adopts the opting-out solution, the words “[Unless otherwise agreed by the parties,]” should then be retained in the text.
- opting-in or opting-out by the enacting State:
  - An opt-in approach could be reflected by including paragraph (7) as a footnote to the revised article 17 with the following sentence to introduce paragraph (7) (inspired by article 4 of the UNCITRAL Model Law on International Commercial Conciliation):
 

“The following text is suggested for States that might wish to adopt a provision on preliminary orders:”
  - An opt-out approach could be reflected by retaining paragraph (7) within the main body of the revised article 17, but including a footnote (modelled on the approach taken in article 35(2) of the Model Law) along the lines that:
 

“Paragraph 7 is intended to define the procedure applicable to preliminary orders. It would not be contrary to the harmonization to be achieved by the Model Law if a State decided not to include this paragraph.”.

5. If the Working Group decides to adopt an opt-in or opt-out option for national legislators then explanations might need to be provided as to whether, in the absence of any specific provision regarding ex parte interim measures, the text should be interpreted as permitting or not permitting arbitral tribunals to issue such measures.

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

6. The revised draft reflects the decision made by the Working Group at its forty-first session to clarify the distinction between interim measures and preliminary orders, and to further restrict the functions served by a preliminary order (A/CN.9/569, paras. 30 and 31).

#### **Subparagraph (b)**

*References to paragraphs (3), (5), (6) and (6 bis)*

7. The revised draft reflects the decision of the Working Group to maintain the reference to paragraphs (3), (5), (6) and (6 bis) in subparagraph (b) (A/CN.9/569, para. 34).

#### **Subparagraph (c)**

8. The revised draft of subparagraph (c) reflects the following decisions of the Working Group (A/CN.9/569, paras. 39-43):

- To draft that provision in an affirmative rather than negative way;
- To emphasize the exceptional nature of preliminary orders and to ensure that subparagraph (c) complements rather than duplicates subparagraph (a). Whilst subparagraph (a) deals with the procedure to be followed by a party when applying for a preliminary order, subparagraph (c) deals with that issue from the perspective

of the arbitral tribunal's powers and provides guidance as to the considerations to be taken into account by an arbitral tribunal when granting such an order;

- To ensure that the draft provision concerns itself with the risk of frustration of the measure and with the appropriateness of the measure.

### **Subparagraph (d)**

#### *Notice*

9. In line with the approach taken in other articles of the Model Law (as for instance under article 24(2)), the revised draft of subparagraph (d) leaves open the question of who shall give notice (A/CN.9/569, para. 44). In addition, as agreed by the Working Group, the term “, the request for an interim measure” has been added to put beyond doubt that subparagraph (d) requires that notice of the application for a preliminary order be given (A/CN.9/569, para. 45).

#### *Deferral of notification and court enforcement*

10. It is recalled that the Working Group failed to reach consensus as to whether the issue of court enforcement of preliminary orders should be dealt with in the revised draft of article 17. It was decided that the bracketed text at the end of subparagraph (d) should remain in square brackets for continuation of the discussion at a future session (A/CN.9/569, para. 51).

### **Subparagraph (e)**

11. As agreed by the Working Group, in order to clarify that the arbitral tribunal has an obligation to give the responding party an opportunity to present its case, the opening words of the subparagraph have been redrafted in the active voice (A/CN.9/569, para. 53).

12. The Working Group expressed concern that, whatever approach is taken with respect to the requirement that the responding party be given an opportunity to present its case, the approach should avoid the risk that the provision could be misinterpreted as creating an obligation for the responding party to react within forty-eight hours (A/CN.9/569, paras. 54 and 55). Variants A and B proposed in the revised draft of paragraph (7) reflect the discussions of the Working Group on the appropriateness of defining a time limit for the responding party to present its case.

13. Variant A provides for a forty-eight-hour period during which the responding party should present its case. This limitation was regarded by some delegations in the Working Group as a fundamental safeguard. The purpose of this Variant is to expressly provide a longer period for the responding party to present its case and to allow that party to request such longer period rather than leave that matter entirely to the judgement of the arbitral tribunal based on the circumstances (A/CN.9/569, para. 57).

14. Variant B does not include any time limitation or refers to the possibility that the responding party might request a longer period in which to present its case.

15. The Working Group may wish to consider merging Variants A and B so that the provision would read as follows: “at the earliest practicable time, but no later than forty-eight hours, after notice is given, or a longer period of time if so requested by that party [in light of the circumstances].”



**Subparagraph (f)**

16. As agreed by the Working Group, the new draft of paragraph (7) includes a reference to the notion of a preliminary order being modified by the arbitral tribunal (A/CN.9/569, para. 62).

17. The revised draft reflects the decision of the Working Group that subparagraph (f) should unambiguously clarify that a preliminary order has a limited life span of twenty days and strengthens the principle that an arbitral tribunal could not extend the *ex parte* phase of the proceedings beyond the twenty-day limit. To that end, the sentence “In any event, a preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal” has been added (A/CN.9/569, paras. 63 and 64).

**Subparagraph (g)**

18. The revised draft of subparagraph (g) reflects the decision of the Working Group to grant to the arbitral tribunal more flexibility on the question of the provision of security by the requesting party. The following words have been added at the end of subparagraph (g): “unless the arbitral tribunal considers it inappropriate or unnecessary to do so”. (A/CN.9/569, para. 65).

**Subparagraph (h)**

19. As decided by the Working Group, a footnote, inspired from the approach taken under article 35 (2) of the Model Law, has been added to subparagraph (h) to take account of the fact that, under many national laws, the obligation for a party to present arguments against its position is unknown and contrary to general principles of procedural law. The Working Group might wish to further consider that proposal (A/CN.9/569, para. 68), taking account of the decision which will be made by the Working Group on whether paragraph (7) in its entirety, should appear as an opt-in or opt-out provision for the national legislators (see above, paragraph 4).

## IV. TRANSPORT LAW

### A. Report of the Working Group on Transport Law on the work of its fourteenth session (Vienna, 29 November – 10 December 2004)

(A/CN.9/572) [Original: English]

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## Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.<sup>1</sup> The Working Group commenced its deliberations on a draft instrument on the carriage of goods [wholly or partly] [by sea] at its ninth session in 2002. The most recent compilation of historical references regarding the legislative history of the draft instrument can be found in document A/CN.9/WG.III/WP.38.

2. Working Group III (Transport Law), which was composed of all States members of the Commission, held its fourteenth session in Vienna from 29 November to 10 December 2004. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Cameroon, Canada, China, Croatia, Czech Republic, France, Germany, India, Italy, Japan, Lithuania, Mexico, Nigeria, Republic of Korea, Russian Federation, Rwanda, Singapore, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United States of America and Venezuela (Bolivarian Republic of).

3. The session was also attended by observers from the following States: Antigua and Barbuda, Cuba, Democratic Republic of Congo, Denmark, Finland, Greece, Indonesia, Kuwait, Latvia, Netherlands, New Zealand, Norway, Peru, Romania, Saudi Arabia, Senegal, Slovakia, Slovenia and Yemen.

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

(a) **United Nations system:** United Nations Conference on Trade and Development (UNCTAD), United Nations Economic Commission for Europe (UNECE);

(b) **Intergovernmental organizations invited by the Commission:** European Commission (EC);

<sup>1</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr.3)*, para. 345.

(c) **International non-governmental organizations invited by the Commission:** Association of American Railroads (AAR), Comité Maritime International (CMI), International Chamber of Commerce (ICC), International Chamber of Shipping (ICS), International Federation of Freight Forwarders Associations (FIATA), International Group of Protection and Indemnity (P&I) Clubs, International Multimodal Transport Association (IMMTA), International Union of Marine Insurance (IUMI), and The Baltic and International Maritime Council (BIMCO).

5. The Working Group elected the following officers:

*Chairman:* Mr. Rafael Illescas (Spain)

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

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

(a) Provisional agenda (A/CN.9/WG.III/WP.38);

(b) A note prepared by the Secretariat containing a first revision of the draft instrument (A/CN.9/WG.III/WP.32);

(c) A provisional redraft of the articles of the draft instrument considered in the Report of Working Group III on the work of its twelfth session (A/CN.9/WG.III/WP.36) and its thirteenth session (A/CN.9/WG.III/WP.39);

(d) Comments from Denmark, Finland, Norway and Sweden (the Nordic countries) on the freedom of contract (A/CN.9/WG.III/WP.40);

(e) Comments from the UNCTAD Secretariat (A/CN.9/WG.III/WP.41);

(f) A proposal by the United States of America (A/CN.9/WG.III/WP.42).

7. 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 [wholly or partly] [by sea].

4. Other business.

5. Adoption of the report.

## I. Deliberations and decisions

8. The Working Group continued its review of the draft instrument on the carriage of goods [wholly or partly] [by sea] ("the draft instrument") on the basis of:

- The text contained in the annex to a note by the Secretariat (A/CN.9/WG.III/WP.32);

- A proposed interim redraft of the articles considered by the Working Group at its twelfth (A/CN.9/WG.III/WP.36) and thirteenth sessions (A/CN.9/WG.III/WP.39).

9. The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. Those deliberations and conclusions are reflected in section II below.

## **II. Preparation of a draft instrument on the carriage of goods [wholly or partly][by sea]**

### **Draft article 14. Basis of liability**

#### **General discussion**

10. The Working Group was reminded that it had most recently considered draft article 14 at its twelfth session (see A/CN.9/544, paras. 85-144), and articles related thereto at its thirteenth session, namely article 22 relating to liability of the carrier with respect to the carriage by sea and article 23 on deviation (see A/CN.9/552, paras. 92-99 and 100-102 respectively).

11. The Working Group heard a short report from the informal consultation group (see A/CN.9/552, para. 167) established for continuation of the discussion between sessions of the Working Group, with a view to accelerating the exchange of views, the formulation of proposals and the emergence of consensus in the preparation of the draft instrument. The Working Group heard that an exchange of views had taken place within the informal consultation group with respect to draft article 14 in an effort to consider improvements to the drafting of the provision.

#### **Draft paragraph 14 (1)**

12. The Working Group considered the text of paragraph 1 of draft article 14 as contained in paragraphs 7 and 8 of document A/CN.9/WG.III/WP.36. A proposal was made to maintain the general principle in the draft paragraph that unexplained losses should be the responsibility of the carrier, but suggesting certain improvements to the drafting of the paragraph. It was proposed that the phrase “the nature and amount of the loss and” could be inserted in square brackets between the words “proves” and “that” at the end of the opening phrase of the draft paragraph. In addition, it was suggested that square brackets be placed around the phrase “neither its fault nor the fault of any person mentioned in article 14 bis caused or contributed to the loss, damage or delay” and that the following phrase be inserted as alternative text within square brackets immediately thereafter, “the occurrence that caused or contributed to the loss, damage or delay is not attributable to its fault nor to the fault of any person mentioned in article 14 bis”.

13. There was a suggestion that both the text of draft paragraph 14 (1) in A/CN.9/WG.III/WP.36, and the text proposed in the paragraph above were overly complex and should be simplified and clarified. A further alternative text was proposed as follows:

“1. The carrier shall be liable for loss of or damage to the goods as well as for delay in delivery that took place during the period of the carrier’s responsibility as defined in Chapter 3, unless the carrier proves, and in absence of proof to the contrary, that neither its fault or neglect nor the fault or neglect of any person mentioned in article 14 bis caused or contributed to the loss of or damage to the goods or delay in the delivery. The burden of proof of the nature and amount of the loss shall rest upon the claimant.”

14. Some reservations were expressed that the proposed text set out in the paragraph above might not deal effectively and clearly with complex but important matters such as the question of the allocation of the burden of proof in determining liability. The Working Group decided to proceed with its consideration of draft paragraph 14 (1) on the basis of

the text in A/CN.9/WG.III/WP.36, but to consider proposed changes to that text as they were raised.

*“the nature and amount of the loss and”*

15. It was suggested that, as presently drafted, paragraph 14 (1) could imply that the claimant must prove the physical loss, damage or delay in delivery, but not the amount of the loss resulting therefrom. To address that issue, the inclusion of the phrase, “the nature and amount of its loss”, was suggested as noted in paragraph 12 above. Whilst this proposal received some support, the proposal was withdrawn as it raised questions of measure of damages which were not considered appropriate in the context of the liability regime set out in draft paragraph 14 (1).

*“claimant”*

16. The Working Group confirmed its agreement (see A/CN.9/544, paras. 105 and 133) that the term “claimant” was more appropriate than the term “shipper” to reflect the identity of the party who would be seeking redress against the carrier. Notwithstanding the suggestion contained in footnote 26 of A/CN.9/WG.III/WP.36 that the Working Group may wish to consider whether a definition of “claimant” should be included in draft article 63, under rights of suit, a proposal was made to include such a definition in draft article 1. Caution was expressed that, as the term “claimant” appeared in other provisions of the draft instrument, for example, in draft articles 19, 65, 68, 75 and 78 of the draft text, the Working Group should ensure that any definition was consistent with the intended meaning of the term when used elsewhere in the draft instrument.

*“or contributed to”*

17. It was agreed by the Working Group that the square brackets be removed from the term “or contributed to” in both instances in which it appeared in the draft paragraph. It was said that this phrase was necessary to include the case of concurring causes for loss, damage or delay, as considered in draft paragraph 14 (4). It was noted that these words might be problematic in some languages and should be reviewed with that in mind.

*“and to the extent”*

18. It was proposed that the words in square brackets “and to the extent” could be deleted on the basis that they could be in conflict with draft paragraph 4 on concurring causes for loss, damage or delay if the Working Group decided that all matters relating to the determination of the extent to which the carrier was liable in case of concurring causes should be decided by the court in which the claim was brought. However, it was suggested that the words should be retained in order to clarify that it was the carrier who bore the burden of proof in the case of concurring causes. The Working Group agreed to delete the words “and to the extent”, bearing in mind the concern expressed regarding the burden of proof in cases of concurring causes.

*Conclusions reached by the Working Group on paragraph 1*

19. After discussion, the Working Group agreed to refer to an informal drafting group the following conclusions to be taken into account in preparing a revised text (see paras. 27 to 28 and 31 to 33 below):

- The term “claimant” should be included in paragraph 14 (1) but any definition of that term should be consistent with the use of that term in other provisions of the draft instrument;
- The square brackets around the phrase “or contributed to” should be deleted in both instances;
- The phrase “and to the extent” should be deleted.

#### **Draft paragraph 14 (2)**

20. The Working Group heard that the text of draft paragraph 14 (2) as contained in paragraph 7 of document A/CN.9/WG.III/WP.36 was considered to reflect accurately the views of the Working Group with respect to the shifting burden of proof following the claimant’s initial establishment of its claim pursuant to paragraph 14 (1). However, it was suggested that the drafting of paragraph 14 (2) in document A/CN.9/WG.III/WP.36 was cumbersome and difficult to read. In an effort to preserve the general approach set out in that document, but to remedy the perceived problems, alternative text was proposed as follows:

“2. If the carrier, alternatively to proving the absence of fault as provided in paragraph 1, proves that the loss, damage or delay was caused by one of the events enumerated in paragraph 3, then the carrier shall be liable for such loss, damage or delay only if the claimant proves that:

“(a) the event on which the carrier relies under this paragraph was caused by the fault of the carrier or of a person mentioned in article 14 bis [whereupon liability shall be determined in accordance with paragraph 1];

“(b) an event other than those listed in paragraph 3 contributed to the loss, damage or delay, [whereupon liability shall be determined in accordance with paragraph 4]; or

“[(c) the ship was unseaworthy, or improperly manned, equipped or supplied, or the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for the reception, carriage, and preservation of the goods, [whereupon the carrier shall not be liable if it proves that it complied with its obligation to exercise due diligence as required by article 13 (1) or that its failure to exercise due diligence did not contribute to the loss, damage or delay]; or]

“[(c) the loss, damage or delay was caused by:

“(i) the unseaworthiness of the ship;

“(ii) the improper manning, equipping, and supplying of the ship; or

“(iii) the fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods,

“whereupon the carrier shall be liable under paragraph 1 unless it proves that it complied with its obligation to exercise due diligence as required under article 13 (1).”

### General discussion

21. The Working Group heard that subparagraphs (i) and (ii) of draft paragraph 14 (2) in document A/CN.9/WG.III/WP.36 had been redrafted to become subparagraphs 14 (2) (a) and (b) of the proposed text, and that draft paragraph 14 (3) as set out in document A/CN.9/WG.III/WP.36 had been redrafted to reflect the two alternatives set out in draft subparagraph 14 (2) (c). The two alternatives proposed in that subparagraph concerned the burden of proof on the claimant in the event of unseaworthiness, and are further discussed below (see paras. 23 to 25). The Working Group agreed to use the proposed text for subparagraph 14 (2) as set out in paragraph 20 above as the basis for further consideration of that draft provision.

### Subparagraphs 14 (2) (a) and (b)

22. There was general agreement in the Working Group with the proposed text for subparagraphs 14 (2) (a) and (b). It was suggested that the text in square brackets at the end of subparagraph 14 (2) (a) was unnecessary and should be deleted, particularly in light of the qualification in the opening phrase of draft paragraph 14 (2) that the carrier's proof under this provision was made "alternatively to proving the absence of fault as provided in paragraph 1". A further suggestion was made that the bracketed text at the end of subparagraph 14 (2) (b) should be deleted on the basis that it was unnecessary, and that, in any event, the reference made in that phrase ought to have been to draft paragraph 14 (1) for assessment of liability for the additional event, rather than to paragraph 14 (4) regarding concurring causes. Support was expressed in the Working Group for both of these suggestions, while some support was also expressed for the retention of the language at the end of subparagraph 14 (2) (b) and the deletion of the square brackets around it. The Working Group agreed to request an informal drafting group to consider the text of subparagraph 14 (2) (a) and (b) in light of those suggestions, with a view to preparing a new draft to clarify the text.

### Subparagraph 14 (2) (c)

#### *The two proposed alternatives*

23. The Working Group considered the two alternatives with respect to the burden of proof on the claimant in the event of unseaworthiness set out in the proposed text of subparagraph 14 (2) (c). It was observed that the first alternative text of subparagraph 14 (2) (c) required the claimant to prove only the unseaworthiness of the ship or the failure of the carrier to properly man, equip and supply the vessel or the unfitness of the holds in order to shift the burden of proof back to the carrier, while the second alternative required the claimant to prove that the loss, damage or delay was actually caused by one of those failings on the part of the carrier. Concerns were raised regarding the burden that would be placed on the claimant in having to prove the causation further to the second alternative approach. Concerns were also raised with respect to the burden that the first alternative would place on the carrier, by requiring it to prove both the seaworthiness of the ship and the cause of the loss. The view was expressed that the first alternative would return the regime to the pre-Hague Rules era, with an overriding obligation of seaworthiness, such that unseaworthiness need not have caused the loss in order for the claim to succeed. Support was expressed in the Working Group for each of the two alternatives set out in subparagraph 14 (2) (c).



*Possible compromise positions*

24. The Working Group heard a proposal that a compromise position between the two alternatives being considered in subparagraph 14 (2) (c) could be achieved by reducing the burden on the claimant to prove causation. In this regard, it was suggested that the claimant should be required to prove both the unseaworthiness and that it caused or could reasonably have caused the loss or damage. Support was expressed in the Working Group for the adoption of such a compromise position. Concern was expressed that this compromise position could be seen negatively by domestic courts as an attempt to regulate procedure with respect to how the burden of proof should be evaluated. Concern was also expressed that the adoption of conditional language in this regard could give rise to ambiguities and thus result in increased litigation. Further, the view was expressed that, should this compromise position be adopted, it should be kept in mind when considering the overall balance of rights and liabilities in the draft instrument.

25. A second possible compromise was suggested. It was noted that paragraph 20 (4) of the draft instrument required the parties to the claim to give all reasonable facilities to each other for inspection and access to records and documents relevant to the carriage of goods in the context of providing notice of loss, damage or delay. It was suggested that a similar provision could be adopted with respect to the second alternative, in order to assist the claimant who could have practical difficulties in gaining access to the information necessary to prove that unseaworthiness was the cause of the loss or damage. Support was expressed in the Working Group for that position.

*Conclusions reached by the Working Group on paragraph 14 (2)*

26. After discussion, the Working Group decided that an informal drafting group should be requested to prepare a redraft of paragraph 14 (2) (see paras. 29 to 33 below), taking into account:

- The desire to clarify the text in subparagraphs 14 (2) (a) and (b);
- The goal of seeking a compromise position with respect to subparagraph 14 (2) (c), in keeping with those views suggested above in paragraphs 24 and 25.

**First proposed redraft of paragraphs 14 (1) and (2)**

27. An informal drafting group composed of a number of delegations prepared a redraft of draft paragraphs 14 (1) and (2), based upon the discussion in the Working Group (see paras. 12 to 26 above).

*General discussion of paragraph 14 (1)*

28. The Working Group heard that paragraph 14 (1) had been revised only with respect to its last four lines, in which the text had been clarified and split into two sentences as follows: “took place during the period of the carrier’s responsibility as defined in chapter 3. The carrier is relieved of its liability if it proves that the occurrence that caused or contributed to the loss, damage, or delay is not attributable to its fault or to the fault of any person mentioned in article 14 bis.” Further, the phrase “shall be liable” had been changed to “is liable” to reflect modern usage.

*General discussion of paragraph 14 (2)*

29. The Working Group heard that, with respect to draft subparagraphs 14 (2) (a) and

(b), the bracketed text at the end of each had been deleted. Draft subparagraph 14 (2) (b) was clarified by inserting after the phrase “loss, damage or delay” the following text based on paragraph (1), “unless the carrier proves that this event is not attributable to its fault or to the fault of any person mentioned in article 14 bis”. Further, the informal drafting group had selected the second alternative for subparagraph 14 (2) (c) set out in paragraph 20 above as instructed by the Working Group, and, in fulfilment of the goal of seeking a compromise position, the phrase “or was probably” was inserted between the words “was” and “caused”. In addition, the phrase “or contributed to by” was inserted at the end of the opening phrase of the subparagraph before the beginning of subparagraph (c) (i).

30. While general support was expressed for this revised text, some concerns were raised. Some doubts were expressed regarding the impact of the phrase “or contributed to by” in the second line of the chapeau of subparagraph 14 (2), since it was thought that if the carrier proved that the loss or damage was merely contributed to by one of the list of excepted perils, it could avoid liability altogether, or at least shift the burden of proof back to the claimant, and it was questioned whether that was consistent with the intended effect of paragraph 14 (4). Further, the view was reiterated that the carrier should not be held responsible for unexplained losses, however, the opposite view was also expressed, along with the view that this draft of paragraphs 14 (1) and (2) represented a clarification of the existing law that carriers were liable for unexplained losses. Some preference was expressed for the use of the phrase “could have reasonably caused or contributed to” rather than “was probably caused by or contributed to by” in the first line of subparagraph 14 (2) (c), since the latter seemed to demand a higher burden of proof and was thought to potentially be confusing in jurisdictions where the standard of proof was “on the balance of probabilities”. However, the Working Group was reminded that the phrase chosen was intended to be compromise language in order to render acceptable the whole of article 14.

### **Second proposed redraft of paragraphs 14 (1) and (2)**

31. Based on the discussion in the Working Group of the first proposed redraft of paragraphs 14 (1) and (2) (see paras. 27 to 30 above), an informal drafting group composed of a number of delegations prepared a second redraft. The text of the second redraft of draft paragraphs 14 (1) and (2) that was proposed to the Working Group for its consideration was as follows:

“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 claimant proves that

“(a) the loss, damage, or delay; or

“(b) the occurrence that caused or contributed to the loss, damage, or delay

took place during the period of the carrier’s responsibility as defined in chapter 3. The carrier is relieved of all or part of its liability if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person mentioned in article 14 bis.

“2. If the carrier, alternatively to proving the absence of fault as provided in paragraph 1, proves that an event listed in paragraph 3 caused or contributed to the loss, damage, or delay, then the carrier is relieved of all or part of its liability except in the following situations:

“(a) if the claimant proves that the fault of the carrier or of a person mentioned in article 14 bis caused or contributed to the event on which the carrier relies, then the carrier is liable for all or part of the loss, damage, or delay.

“(b) if the claimant proves that an event other than those listed in paragraph 3 contributed to the loss, damage, or delay, and the carrier cannot prove that this event is not attributable to its fault or to the fault of any person mentioned in article 14 bis, then the carrier is liable for part of the loss, damage, or delay.

“(c) if the claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by

“(i) the unseaworthiness of the ship;

“(ii) the improper manning, equipping, and supplying of the ship; or

“(iii) the fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods,

and the carrier cannot prove that;

“(A) it complied with its obligation to exercise due diligence as required under article 13 (1); or

“(B) the loss, damage, or delay was not caused by any of the circumstances mentioned in (i), (ii), and (iii) above,

then the carrier is liable for part or all of the loss, damage, or delay.”

32. Concern was raised that this second proposed redraft of paragraphs 14 (1) and (2) would allow the carrier to escape “all or part of its liability” by proving that there was at least one cause, however incidental, of the loss, damage or delay that was not the fault of the carrier, even where the loss, damage or delay in its entirety would not have occurred without the carrier’s fault. In response, there was support for the view that the provisions were to be interpreted as referring to causes that were legally significant, and that national courts could be relied upon to interpret the provisions in that fashion and to apportion liability for those legally significant events accordingly.

*Conclusions reached by the Working Group on paragraphs 14 (1) and (2)*

33. The Working Group agreed that the text of the second proposed redraft of paragraphs 14 (1) and (2) as set out in paragraph 31 above was broadly acceptable.

**Draft paragraph 14 (3)**

*General discussion*

34. The Working Group considered the text of paragraph 2 of draft article 14 as contained in document A/CN.9/WG.III/WP.36. It was proposed that the drafting and readability of article 14 would be improved if the list of excepted perils, previously in draft paragraph 2, were to become a new draft paragraph 14 (3). A further alternative was suggested that, in the interest of consistency, the list of excepted perils should be limited to perils which exemplify the lack of fault of the carrier, while other perils, such as the fire exception, should be contained in separate provisions. The Working Group took note of

these proposals, and it decided to consider the substance of each of the perils on the basis of the text set out in paragraph 8 of A/CN.9/WG.III/WP.36. The Working Group decided to refer general drafting issues resulting from its consideration of the list of excepted perils to an informal drafting group (see paras. 75 to 80 below).

*Retention of the list of “excepted perils” and placement of specific perils*

35. Throughout the discussion of the list of excepted perils, there were suggestions that some of the perils should be deleted, as being events already covered pursuant to the general liability rule in draft paragraph 14 (1). That issue was raised particularly with respect to subparagraphs (a), (b), (g) and the fire exception. However, the Working Group was reminded that it had already decided (see A/CN.9/525, paras. 38 and 39, and A/CN.9/544, paras. 117 and 118) that maintaining the list of excepted perils, particularly in language close to that of the Hague-Visby language, was valuable for the purposes of legal certainty, even if it could be argued that it was logically unnecessary. Alternatively, there was some suggestion that certain of the perils listed might not be consistent with the intention in draft article 14 that the list of perils set out clear situations where the carrier was not at fault. That issue was raised particularly with respect to subparagraphs (a), (i), and the fire exception. The Working Group decided also to refer to an informal drafting group those issues regarding where those perils listed should best be placed in the text.

*“(a) [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions”*

36. It was suggested that the phrase “Act of God” in subparagraph (a) should be deleted in an effort to further the goal of modernization of transport law, and be consistent with the logic of draft article 14. However, it was observed that due to its traditional importance, it would be useful to retain the Act of God peril, particularly since its deletion could be misinterpreted as having substantive meaning. There was some support for retaining the brackets around “Act of God”, and it was proposed that the phrase should be moved, either with or without brackets, to a separate subparagraph, as, it was suggested, it did not match the logic underlying draft article 14. It was further suggested that alternative wording could be used, for example, “natural phenomena”. However, support was expressed for keeping the phrase “Act of God” and removing the brackets.

37. After discussion, the Working Group agreed to refer to an informal drafting group the decision that:

- The brackets should be removed from around the words “Act of God”;
- The phrase could be placed on its own in a new draft subparagraph.

*“(b) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers or people [including interference by or pursuant to legal process]”*

38. Some support was expressed for retaining the wording in brackets, but concern was raised that the bracketed text represented a departure from the text of article IV.2.g of the Hague-Visby Rules, “seizure under legal process”, which, it was suggested, should be retained to preserve case law. It was further suggested that the word “detention” could be added to the Hague-Visby wording after “seizure”, if the intention of the bracketed text was to broaden the meaning of the Hague-Visby text beyond arrest. It was noted that the Hague-Visby text was considered by some to be difficult to understand, and that situations

might arise when the ship was detained as a result of the fault of the carrier, who should not, therefore, be relieved of responsibility. It was observed that detention could also occur through no fault of the carrier. The suggestion was made that such situations could be avoided by linking the interference to actions of governments or to authorities, however some doubts were raised regarding this approach, as magistrates enforcing claims against the carrier could be considered authorities.

39. It was noted that the Working Group was in general agreement with the principle intended in the subparagraph that the carrier should receive the benefit of an exemption when the arrest or detention was through no fault of its own, but that the exemption should not be available when it resulted from the carrier's fault.

40. After discussion, the Working Group agreed to refer to an informal drafting group the decision that:

- There was general agreement with the principle that the carrier should receive the benefit of the excepted peril when the arrest or detention was through no fault of its own, but that the wording needed to be clarified.

*“(c) Act or omission of the shipper, the controlling party or the consignee”*

41. It was proposed that, in addition to the “shipper”, this subparagraph should include a reference to the persons acting on behalf of the shipper, particularly those set out in article 32 of the draft instrument, in order to ensure that the carrier would not be held liable for acts performed by parties not under its control. It was also suggested that the provision should be coordinated with draft subparagraph (h) (see paras. 57 to 58 below).

42. After discussion, the Working Group decided that:

- The issue of adding parties acting on behalf of the shipper would be left to the consideration of the informal drafting group.

*“(d) Strikes, lockouts, stoppages or restraints of labour”*

43. While the phrase “restraint of labour” had appeared in article IV.2.j of the Hague-Visby Rules, concerns were expressed regarding its meaning and, in particular, its application to the various forms of strike, which could include strikes arising from the fault of the carrier. It was also stated that while the precise meaning of the phrase was not entirely clear, it was preferable to retain it, since it was clearly broader than strikes and lockouts. It was further proposed that the words “restraints of labour” could be replaced by the more modern labour law term, “labour actions”. However, it was suggested that in order to obtain the benefit of existing case law, the language of the Hague-Visby Rules should be retained unless it had created an ambiguity.

44. The Working Group agreed to retain the text of subparagraph (d) with no changes.

*“(e) Wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods”*

45. The Working Group agreed that the text of subparagraph (e) reflected established commercial practice and retained it with no changes.

*“(f) Insufficiency or defective condition of packing or marking”*

46. It was suggested that this subparagraph should be deleted as redundant in light of subparagraph (c) considered above, or, in the alternative, that the words “by the shipper” should be added at the end of subparagraph (f) (see A/CN.9/WG.III/WP.36, footnote 39). In response, it was stated that the text of the Hague-Visby Rules should not be revised to address an issue which did not seem to have posed a problem. It was also observed that the draft instrument made clear that it was the obligation of the shipper to offer the cargo to the carrier in a condition ready for shipping, which entailed appropriate packing and marking. It was suggested that modernization of the text of the convention required acknowledgement of modern shipping practices, including increasing recourse to logistics companies.

47. It was suggested that the subparagraph should be clarified through the addition of the phrase, “except when this is done by or on behalf of the carrier” at the end of the provision.

48. After discussion, the Working Group agreed to refer to an informal drafting group the decision that:

- The phrase, “except when this is done by or on behalf of the carrier”, should be added to the end of the subparagraph.

*“(g) Latent defects in the ship not discoverable by due diligence”*

49. The question was raised whether the phrase “not discoverable by due diligence” was redundant with respect to a latent defect. Further, some support was expressed for the view that the words “in the ship” represented a departure from the text of article IV.2.p of the Hague-Visby Rules, and should therefore be deleted to maintain uniformity of interpretation. It was suggested that latent defects for which the carrier should not be held liable could also occur outside the vessel, for example, in machinery such as cranes. The suggestion was also made that the entire subparagraph (g) should be deleted in favour of the application of the general rule of exemption from liability absent fault as set out in paragraph 14 (1).

50. The Working Group agreed to retain the current text since alternative drafting proposals failed to gather sufficient support.

*“(h) Handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee”*

51. Concern was expressed that the expression “on behalf of the shipper” made the provision too broad, and it was suggested that the subparagraph should be limited to situations where the shipper had some actual control over the operation being performed on its behalf. The Working Group was reminded that this subparagraph should be considered in light of draft article 11 (2) regarding FIO (free in and out) and FIOS (free in and out, stowed) clauses, where certain of the carrier’s obligations, including stowage, could be performed on behalf of the shipper. It was also noted that draft article 32 and subparagraph (c) (see paras. 41 and 42 above) should be considered in any clarification of subparagraph (g).

52. After discussion, the Working Group agreed to refer to an informal drafting group the decision:

- To delete the words “on behalf of the shipper”;

- To place square brackets around the word “stowage” pending the outcome of deliberations on draft paragraph 11 (2).

*“(i) Acts of the carrier or a performing party in pursuance of the powers conferred by articles 12 and 13 (2) when the goods have become a danger to persons, property or the environment or have been sacrificed”*

*Relationship to articles 12 and 13 (2)*

53. It was suggested that consideration of subparagraph (i) regarding dangerous goods should be deferred until after both articles 12 and 13 (2) had been discussed and finalized. In that respect, it was suggested that the language used in subparagraph (i) was not entirely aligned with that used in draft articles 12 and 13 (2).

*Placement of subparagraph (i)*

54. It was suggested that subparagraph (i) was of an entirely different nature from the preceding subparagraphs (a) to (h). It was said that those subparagraphs contained presumptions as to the absence of fault on the part of the carrier, whereas subparagraph (i) could be seen as a justification for the carrier’s actions to allow goods to be destroyed and thus did not sit well with provisions setting out a basis for the absence of fault. As well, it was said that while paragraphs (a) to (h) were appropriately placed in article 14 in that they were linked to the burden of proof of fault, subparagraph (i) was an exception to paragraph 14 altogether in that it excluded liability *a priori*. For that reason it was suggested that the subparagraph could be redrafted so as to expressly provide that it was subject to articles 12 and 13 (2). It was also suggested that the subparagraph should be moved from article 14.

*General average*

55. In response to a suggestion that subparagraph (i) might affect the law on general average, the Working Group was reminded that the question of general average was dealt with in Chapter 17 of the draft instrument and provided that the draft instrument did not prevent the application of provisions in the contract of carriage or national law regarding the adjustment of general average. The Working Group heard that it was not intended to allow the carrier to exercise its discretion to render harmless dangerous goods without being subject to possible liability under article 14. In that respect it was noted that articles 12 and 13 (2) were also subject to article 14.

*Conclusions reached by the Working Group on draft subparagraph (i)*

56. After discussion, the Working Group agreed to refer to an informal drafting group the decision that:

- The subparagraph should be kept in square brackets to highlight that the content of the provision and its location in the draft instrument would need to be revisited once the content of articles 12 and 13 (2) had been settled;
- The subparagraph should not be interpreted as affecting the rules on average;
- The placement of subparagraph (i) must be considered.

*“(j) Any other cause arising without the actual fault or privity of the carrier, or without the actual 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.”*

57. After discussion, the Working Group decided that this subparagraph should be deleted as redundant, since its substance had been moved to paragraph 14 (1) (see paras. 12 to 18 above).

*“fire on the ship, unless caused by the fault or privity of the carrier”*

58. The Working Group recalled that the inclusion of a specific fire exception in the list of excepted perils had been subject to a discussion most recently at its thirteenth session (A/CN.9/552, paras. 94-95), where a decision was made to retain the exception for further consideration in the context of draft article 14. The text of the exception on which the Working Group based its discussions was as follows: “fire on the ship, unless caused by the fault or privity of the carrier” (see draft article 22, in A/CN.9/WG.III/WP.32, reiterated in para. 9, A/CN.9/WG.III/WP.36, and in para. 11, A/CN.9/WG.III/WP.39). It was noted that the exact placement of this exception was yet to be determined but that, in accordance with a decision taken at the thirteenth session of the Working Group (A/CN.9/552, para. 99), it would be further considered in the context of draft article 14, and that it was possible that it could be included as a subparagraph in the list of “excepted perils”.

59. Three options were proposed in respect of the fire exception:

- Delete the specific exception and deal with the risk of fire through the general rule set forth in draft article 14 on the basis that the carrier was best placed to identify the causes of fire;
- As a fallback position to the first option, retain the fire exception in the list of excepted perils but limit it to “fire on the ship” and delete the remainder of the proposed text;
- Include the proposed text in its entirety and place it outside the list as an exoneration, thereby following more closely the approach taken in the Hague-Visby Rules.

60. Support was expressed in favour of both the deletion and retention of the fire exception for the reasons stated previously in the Working Group (see, generally, A/CN.9/552, paras. 94-95). A further reason in favour of its deletion was said to be that including the exception for ships in a multimodal instrument could produce inequity, and was inappropriate given that in other modes of transport the exception did not apply. Further reasons in support of retention of the full Hague-Visby text of the fire exception were expressed on the basis that it represented a well-established rule both in jurisprudence and in practice.

61. While strong preference was generally expressed in the discussion for either the deletion or retention of the fire exception, several views were expressed that a compromise position could also be acceptable. That compromise position consisted of the fallback position set out in paragraph 59 above.



*Conclusions reached by the Working Group on the fire exception*

62. After discussion, the Working Group agreed to refer to an informal drafting group the decision that:

- As an acceptable compromise, the fire exception should be retained, possibly as subparagraph (j) of the list of excepted perils in draft article 14, and the text following the phrase “fire on the ship” should be deleted.

*Other excepted perils*

63. The Working Group considered proposed draft subparagraphs (k), (l), (m) and (n) for the list of excepted perils. The text on which these subparagraphs were based was taken from draft article 22 (see A/CN.9/WG.III/WP.39, para. 11), for reincorporation into draft article 14, following the decision of the Working Group (see A/CN.9/552, paras. 93 and 99).

64. After discussion, the Working Group agreed to refer to an informal drafting group the decision that the following text be taken into account in preparing a revised text of the list of excepted perils in draft article 14:

“(k) Saving or attempting to save life at sea;

“(l) Reasonable measures to save or attempt to save property at sea;

“(m) Reasonable measures to avoid or attempt to avoid damage to the environment;

“(n) Perils, dangers and accidents of the sea or other navigable waters.”

*Pilot error*

65. It was suggested that, notwithstanding the decision of the Working Group to delete error in navigation as a ground for exception to the carrier’s liability (A/CN.9/525, para. 36), pilot error should be reintroduced to the list of excepted perils by inserting the following new draft subparagraph: “act, neglect or default of the pilot in the navigation of the ship”. Three reasons were given for this proposal: pilot error was not necessarily the pure navigational fault of the carrier or its servants; it was not covered by the general liability rule in draft paragraph 14 (1); and it was not covered by the “perils of the sea” exception. Views for and against this inclusion were expressed similar to those raised in the Working Group during consideration of the issue of pilot error and compulsory pilotage in previous sessions (see A/CN.9/525, para. 43). It was also suggested that pilot error was already covered in the draft instrument: in the case of compulsory pilotage, the carrier could prove absence of fault under draft article 14, while in case of non-obligatory pilotage, the pilot was acting as agent of the carrier and therefore the carrier should bear responsibility for the pilot’s acts. However, some hesitation was expressed whether draft article 14 could be interpreted to cover pilot error in this fashion.

66. After discussion, the Working Group decided that:

- Pilot error would not be reintroduced into the draft instrument as an exception to carrier liability.

**Draft paragraph 14 (4) “concurring causes”**

67. The Working Group proceeded to consider draft paragraph 14 (4) as contained in document A/CN.9/WG.III/WP.36, which dealt with the question of concurrent causes of loss, damage or delay. It was recalled that this paragraph had already been the subject of discussion in the Working Group (A/CN.9/525, paras. 46-56 and A/CN.9/544, paras. 135-144).

*Scope of paragraph and relationship to remainder of draft article 14*

68. The view was expressed that there could be three types of concurring causes, each of which should be subject to an allocation of liability by the court pursuant to paragraph (4):

- Those whereby each event could have caused the entire loss, damage or delay, irrespective of the other causes;
- Those whereby each event caused only a portion of the damage;
- And those whereby each event was insufficient to have independently caused the damage, but the combined result created the loss, damage or delay.

69. The Working Group was reminded of its agreement that the guiding principle of paragraph (4) should be that it not deal with the question of liability as that question was dealt with in paragraphs 14 (1) and (2) (A/CN.9/544, para. 142), and that paragraph (4) was intended to be confined to the distribution of loss amongst multiple parties, covering all types of concurring causes. Further, it was recalled that in earlier discussions, the Working Group had agreed in principle that when there were multiple causes for loss, damage or delay, it should be left to the court to allocate liability for the loss based upon causation.

70. A doubt was raised regarding how draft paragraph 14 (4) would ever come into operation given that draft paragraph 14 (1) appeared to relieve the carrier from liability if it proved an occurrence that contributed to the loss. A minority view was that paragraph 14 (4) covered only those situations where each cause was responsible for part of the damage; otherwise, the carrier appeared to be fully liable under paragraph 14 (1). The addition of a provision on comparative negligence was suggested. Some concern was also raised regarding how resort would be had to paragraph (4) in cases of unseaworthiness. In clarification, it was said that paragraph (4) was intended to apply in situations where an event for which the carrier was responsible contributed to the loss, including one of the paragraph 14 (3) events or unseaworthiness, and where an event for which the carrier was not responsible also contributed to the loss.

*Burden of proof*

71. It was suggested that draft paragraph 14 (4) was unclear with respect to which party bore the burden of proving the existence and the extent of concurring causes, and that it did not adequately clarify this issue with respect to each of the possible types of concurring causes. A proposal was made to reintroduce the phrase “to the extent” in draft paragraph 14 (1) in order to clarify that the carrier should bear this burden. A further concern was raised regarding how the burden of proof would operate with respect to the issue of unseaworthiness.

72. In response, it was suggested that the intention of paragraph (4) was that the burden of proof of concurring causes would be dealt with in every conceivable situation in draft

paragraphs 14 (1) and (2). In this regard, the burden of proof fell first to the claimant to prove its prima facie case in paragraph 14 (1), and pursuant to paragraph 14 (2), the burden was on the carrier to prove a cause relieving it of its liability, and on the claimant to prove a concurring cause for which the carrier was liable. At this stage, it was suggested, resort would be had to paragraph (4) to allow the court to determine the allocation of liability based on causation. In the case of unseaworthiness, the view was expressed that the draft article would operate such that where unseaworthiness was proved responsible for part of the loss, resort would be had to paragraph (4) and the carrier would be liable for that portion of the loss attributable to unseaworthiness, but not for that portion of the loss that was not caused by its fault.

*“[The court may only apportion liability on an equal basis if it is unable to determine the actual apportionment or if it determines that the actual apportionment is on an equal basis]”*

73. It was recalled that when the draft paragraph had been discussed by the Working Group at an earlier session, the bracketed sentence had received support as a basis on which to continue further discussion (see A/CN.9/544, para. 143). It was suggested that, in keeping with the earlier discussions that had taken place in the Working Group regarding its agreement that this paragraph should only concern the distribution of the loss amongst more than one person, the provision should be kept as simple as possible to cover all types of concurring causes and that the courts should be given significant freedom to determine allocation. For that reason, it was suggested that the bracketed sentence in draft paragraph 14 (4) was not appropriate, as it could be seen either to encourage courts, as a matter of course, to equally apportion liability, or as unnecessary interference with judicial discretion. An alternative view presented was that the purpose of the final sentence was to encourage courts accurately to apportion liability, and to apply a fifty-fifty apportionment only as a last resort.

*Conclusions reached by the Working Group on paragraph (4)*

74. After discussion, the Working Group agreed that further drafting (see paras. 75 to 80 below) should take into account the following conclusions:

- The intention of the draft paragraph was to grant courts the responsibility to allocate liability where there existed concurrent causes leading to the loss, damage or delay, some of which the carrier was responsible for and some for which it was not responsible;
- To consider and clarify any existing ambiguity in the intended operation of paragraphs 14 (1), (2) and (4);
- The bracketed text at the end of the subparagraph (4) should be deleted.

**Proposed redraft of paragraphs 14 (3) and (4)**

75. An informal drafting group composed of a number of delegations prepared a redraft of draft paragraphs 14 (3) and (4), based upon the discussion in the Working Group (see paras. 34 to 74 above). The text of the redraft that was proposed to the Working Group for its consideration was as follows:

“3. The events mentioned in paragraph 2 are:

“(a) Act of God;

“(b) Perils, dangers, and accidents of the sea or other navigable waters;

“(c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;

“(d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person mentioned in article 14 bis;<sup>2</sup>

“(e) Strikes, lockouts, stoppages, or restraints of labour;

“(f) Fire on the ship;

“(g) Latent defects in the ship not discoverable by due diligence;

“(h) Act or omission of the shipper or any person mentioned in article 32,<sup>3</sup> the controlling party, or the consignee;

“(i) Handling, loading, [stowage,] or unloading of the goods [actually performed] by the shipper or any person mentioned in article 32,<sup>4</sup> the controlling party, or the consignee;

“(j) Wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;

“(k) Insufficiency or defective condition of packing or marking not performed by [or on behalf of] the carrier;

“(l) Saving or attempting to save life at sea;

“(m) Reasonable measures to save or attempt to save property at sea;

“(n) Reasonable measures to avoid or attempt to avoid damage to the environment;

“[(o) Acts of the carrier or a performing party in pursuance of the powers conferred by articles 12 and 13 (2) when the goods have become a danger to persons, property, or the environment or have been sacrificed.]

“4. When the carrier is relieved of part of its liability pursuant to the previous paragraphs of this article, then the carrier is liable only for that part of the loss, damage, or delay that is attributable to the event or occurrence for which it is liable under the previous paragraphs, and liability shall be apportioned on the basis established in the previous paragraphs.”

76. The Working Group heard that the informal drafting group had incorporated into this revised text the decisions made by the Working Group with respect to draft paragraph 14 (3), as discussed in paragraphs 34 to 66 above. Views were expressed that subparagraph (h) and (i) were repetitive, such that subparagraph (i) could be deleted and its content would be adequately covered by subparagraph (h). However, the view was also expressed that subparagraph (i) referred to physical events which were not necessarily covered by subparagraph (h). The Working Group was reminded that it had agreed to postpone a final decision with respect to subparagraph (i) until the Working Group had

<sup>2</sup> Further examination is needed whether the reference to article 14 bis is necessary.

<sup>3</sup> Further examination is needed whether the reference to article 32 is necessary.

<sup>4</sup> Further examination is needed whether the reference to article 32 is necessary.

further considered draft article 11 (2), and it was agreed to add a footnote to subparagraph (i) noting that the final text of subparagraph 3 (i) would depend upon the outcome of the discussion of the Working Group on draft article 11 (2).

77. It was pointed out that the new language in draft paragraph 14 (4) was not meant to be a deviation from the Working Group's decision to leave the determination of apportionment to the court.

78. The Working Group considered the revised text of draft paragraph 14 (4) as set out in paragraph 75 above, and found it acceptable.

79. The Working Group expressed its appreciation to Professor Berlingieri of Italy for his leadership on this issue.

*Conclusions reached by the Working Group on paragraphs 14 (3) and (4)*

80. The Working Group decided that:

- The text of paragraphs 14 (3) and (4) was broadly acceptable, with the addition of a footnote to subparagraph 14 (3) (i) that its final text would depend upon the outcome of the discussion on draft article 11 (2).

**Freedom of contract (draft articles 1, 2, 88 and 89)**

81. The Working Group was reminded that it had most recently considered draft articles 1 and 2 at its twelfth session (see A/CN.9/544, paras. 51-84), and draft articles 88 and 89 at its eleventh session (see A/CN.9/526, paras. 203-218).

82. The Working Group heard a short report from the informal consultation group established for continuation of the discussion between sessions of the Working Group (see A/CN.9/552, para. 167, and paragraph 11 above). The Working Group heard that an exchange of views had taken place within the informal consultation group with respect to draft articles 1, 2, 88 and 89 in an effort to achieve consensus with respect to the best approach to be taken regarding freedom of contract issues. The Working Group agreed to divide matters relating to freedom of contract into three main issues for the purposes of analysis, i.e. scope of application, protection of third parties and Ocean Liner Service Agreements (OLSAs), and to proceed with the discussion accordingly.

**Scope of application**

83. It was noted that the scope of application issue would require a decision regarding the types of situations and contracts which would be subject to the mandatory rules of the draft instrument and which would not, or which provisions of the draft instrument would apply on a non-mandatory basis in which situations. The Working Group considered the text of draft article 2 as contained in document A/CN.9/WGIII/WP.36, particularly paragraph 3 thereof. It was suggested that there were three possible theoretical approaches to defining the scope of application of the draft instrument, each of them with advantages and disadvantages.

*Documentary approach*

84. The first approach, used in the Hague-Visby rules, was document-oriented and would require the issuance of a bill of lading or similar document to trigger the application

of the draft instrument. One advantage of adopting this approach was that once the document was issued, it would automatically fall within the mandatory liability regime. Another advantage was said to be that this approach was well-known given its long history. However, a disadvantage of the documentary approach was thought to be that modern trade did not necessarily use bills of lading or similar documents, and, further, that new documents could be used in the future which might not fall within any definition devised for this approach. However, it was suggested that the inclusion of a non-exhaustive list of documents intended to be included within the mandatory coverage of the draft instrument, followed by a generic final category, could overcome concerns relating to definition. In response, it was observed that the addition of a generic closing category would not necessarily solve the problem, since it could itself create uncertainty. The view was also expressed that the documentary approach was obsolete, and that it did not fit easily within the scheme devised by the draft instrument.

#### *Contractual approach*

85. The second approach, used in the Hamburg Rules and found in draft paragraph 2 (3) of A/CN.9/WGIII/WP.36, was contract-oriented and would require the issuance of a contract of carriage of goods for the application of the draft instrument. It was stated that certain types of contracts of carriage would need to fall outside the scope of application of the draft convention despite being contracts of carriage, for example voyage charter parties, or specialized contracts of carriage, such as volume contracts, slot or space charter parties, heavy lift contracts and towage contracts, again creating possible definitional problems. However, it was also suggested that many of the contracts to be excluded under the contractual approach fell under the rubric of “non-liner trade” and therefore would also be excluded under the trade approach.

#### *Trade approach*

86. The third approach was trade-oriented and would apply the draft instrument on a mandatory basis to all contracts in the “liner trade”, but would not apply it to the “non-liner” or “tramp” trade. The advantages of this approach were that it reflected well-established trade practice, and obviated the need to exhaustively define all possible types of contracts for the application of the draft instrument. However, this approach could also pose problems in the legal definition of the relevant categories, as well as with respect to the protection of third parties.

#### *Contracts freely negotiated*

87. It was also noted that another aspect relevant to the scope issue was whether a given contract of carriage had been freely negotiated between the parties or not. It was said that the draft instrument should apply to contracts freely negotiated on a non-mandatory basis, except for certain obligations that should not be capable of modification by mutual agreement, such as seaworthiness, while contracts that were not freely negotiated should be mandatorily subject to the draft instrument. Further, some concern was expressed in this regard for the plight of small shippers with unequal bargaining power who, it was said, could be disadvantaged when negotiating contracts which could fall outside of the mandatory application of the instrument.

*Mandatory nature of specific provisions in the draft instrument*

88. Another factor to be considered by the Working Group in this discussion was said to be which, if any, of the particular provisions of the draft instrument should be of a mandatory nature.

*Conclusions reached by the Working Group on scope of application*

89. After discussion, a broad consensus emerged within the Working Group that the draft instrument should be mandatorily applicable to traditional shipments with traditional bills of lading and sea waybills and to shipments under their electronic equivalents. There was also broad agreement that traditional charter parties, volume contracts in the non-liner trade, slot charters in the liner trade, and towage and heavy lift contracts should be excluded from the application of the draft instrument. A majority of the delegations favoured the contractual approach. However, it was believed that a compromise could be achieved by using a combination of the trade approach, the contractual approach and the documentary approach. Other aspects could be factored into this effort to define the mandatory application of the draft instrument, such as the issue of whether or not a contract had been freely negotiated, and whether some provisions of the draft instrument should always be mandatory.

90. The Working Group decided that:

- An informal drafting group should be requested to prepare a provision on scope based on the views outlined in the paragraph above, and, in any event, taking into consideration the text as set out in draft paragraph 2 (3) of A/CN.9/WGIII/WP.36 (see paras. 105 to 109 below).

**Third parties**

91. It was recalled that the Working Group had agreed that the second issue in its analysis of freedom of contract would concern the mandatory nature of the draft instrument regarding the protection of third parties, where such third parties held rights under the draft instrument (A.CN.9/544, para. 81). Whilst the Working Group had before it a draft text relating to third parties contained in draft paragraph 2 (4) of A/CN.9/WG.III/WP.36 requiring the issuance of a negotiable transport document or electronic record, two alternative texts were proposed as follows:

“Alternative 1: Notwithstanding paragraph 1, if a transport document or an electronic record is issued pursuant to a charter party, contract of affreightment, volume contract or similar agreement, then the provisions of this instrument apply to such a transport document or an electronic document or an electronic record to the extent that the transport document or the electronic record governs the relation between the carrier and any person named as consignor or consignee or any person being the holder, provided that the person is not the charterer or any other party to the contract mentioned in paragraph 1.

“Alternative 2: Notwithstanding paragraph 1, the provisions of this instrument apply between the carrier and a third party who according to the provisions of this instrument has rights or duties in relation to the carrier, provided that this person is not the charterer or any other party to the contract mentioned in paragraph 1.”

92. The Working Group heard that these alternative texts had been prepared to reflect the principle that third parties should have mandatory protection under the draft instrument,

but that such protection should not be related to any negotiable transport document such as a bill of lading. Alternative 1 continued to require that the third party be connected to a document or to an electronic record but removed the requirement that the document or record be negotiable, whereas alternative 2 omitted any reference to a transport document or an electronic record of any type.

*Defining the category of “third party”*

93. A view was expressed that alternative 2 provided greater protection for third parties, however, some caution was raised that alternative 2 could be too broad, and could extend third party protection to unintended parties, such as an insurer or a creditor. Another issue raised with respect to alternative 2 was that the phrase “rights or duties in relation to the carrier” raised the possibility that obligations could be imposed on third parties. Support was expressed for alternative 1 on the basis that it required that there be some connection between the third party and a document or electronic record, and that it made clearer who could take advantage of that provision. There was some support for another proposal to limit the definition of third parties to consignors, consignees, controlling parties, holders, persons referred to in draft article 31, and the “notify party”. It was further suggested that the categories of consignor, consignee and document holders could encompass controlling parties and the notify party, thus making specific inclusion of them unnecessary.

*Documentary basis, no documentary basis or negotiable documentary basis*

94. There was support for the suggestion that failure to tie the identity of the third party to a document would make it difficult to establish the limits of the category, and could impose a heavy burden on the carrier to identify third parties. In addition, the suggestion was made that mandatory rules should govern the relationship between the carrier and third parties in order to standardize the contents of the document and to reduce transaction costs, especially in documentary credits. It was suggested that mandatory protection for such a purpose would not extend to third parties without a document or an electronic record. Further, it was thought that third parties should have some reliance on the documents in order to qualify for protection. It was suggested, however, that only documents or electronic records that transferred rights should require third party protection, since otherwise parties could negotiate for their own protection in the sales contract and other trade arrangements. The possibility was raised that this reasoning should also be extended to transferees of the right of control where no document was issued, but that, in any event, this issue should be kept in mind in future discussion on the right of control.

*Additional considerations*

95. The Working Group was reminded that the issue of third parties should be borne in mind when determining which provisions of the draft instrument would be mandatory, in order to ensure that third party protection was not rendered illusory. In addition, it was suggested that there could be some other categories of third parties deserving of protection under the draft instrument, and that the category of third parties should not yet be considered closed. It was also suggested that care should be taken in granting third party rights based on documents other than documents of title. Further, it was suggested that the meaning of “third parties” should be consistent with the meaning attributed to the use of that term in provisions relating to ocean liner service agreements (OLSAs) and in charter parties.



*Conclusions reached by the Working Group with respect to third parties*

96. The Working Group agreed that:

- Third parties should be protected in the draft instrument;
- The identification of such third parties should be made on the basis of the documentary approach in alternative 1;
- The third parties deserving of protection should be established clearly, but the categories should not yet be considered closed;
- The protection of third parties should be taken into account when determining which provisions of the draft instrument were to be mandatory;
- The meaning of the term “third party” should be consistent with its use elsewhere in the draft instrument, notably when used in provisions relating to OLSAs and charter parties.

**Ocean Liner Service Agreements (draft article xx)**

97. It was recalled that the Working Group had agreed that the third issue in its analysis of freedom of contract would concern the application of the draft instrument to Ocean Liner Service Agreements (OLSAs) (see A/CN.9/WG.III/WP.42 and A/CN.9/WG.III/WP.34, paras. 18-29 and 34-35), previously introduced at its twelfth session (see A/CN.9/544, para. 78).

*Presentation of the proposal*

98. The Working Group heard an introduction of the provision on OLSAs, which would be presumptively covered by the draft instrument, but which would be allowed to derogate from some of its terms under certain conditions. It was further said that OLSAs would further the goals of the draft instrument by providing a flexible market-driven solution which would also satisfy future needs in the industry. It was suggested that draft article xx, as contained in document A/CN.9/WG.III/WP.42, aimed at achieving a careful balance between the interests of shippers, carriers and intermediaries, as well as protecting weaker parties. It was added that these goals were achieved, in particular, by adopting the principles of equality of treatment of non-vessel and vessel operating carriers, transparency regarding the derogation, freely and mutually negotiated derogation, objectivity, automatic application of the draft instrument absent express derogation, and the protection of third parties.

*General discussion*

99. The Working Group considered the OLSA proposal, noting that the main effect of the proposed provision was to allow carriers to derogate from the draft instrument, which would represent a major exception to the mandatory regime of the draft instrument. It was said that this could be of particular concern, given the large amount of trade that OLSAs would cover. It was suggested that OLSAs could be defined broadly as volume contracts for the future carriage of a certain quantity of goods over a certain period of time in a series of shipments in the liner trade, a well-known feature of the industry.

100. Some general concerns regarding OLSAs were expressed. It was suggested that it should not be possible for parties to OLSAs to contract out of certain mandatory provisions of the draft instrument. It was also stated that the introduction of a special regime for

OLSAs could create market competition-related problems. However, it was suggested that trade practice demonstrated that both carriers and shippers under OLSAs could gain commercial advantages by derogating from the standard liability regime, and, further, that most cargo claims were made by third parties who would be unaffected by any such derogation between OLSA parties. Concerns were also expressed regarding the protection of small shippers with weak bargaining power who could be subject to potential abuse by carriers through OLSAs. However, it was said that in the current trade practice, small shippers generally preferred to resort to rate agreements, which were not contracts of carriage but which guaranteed a maximum rate without specifying volume, rather than committing to volume contracts, and that the attractiveness of rate agreements combined with market forces would minimize any potential exposure to abuses by carriers under the proposed OLSA regime. Broad support was expressed for the inclusion of OLSA provisions in the draft instrument, subject to these and other concerns.

#### *Definition of OLSA*

101. It was suggested that the definition of OLSAs in draft paragraphs (2) and (3) of draft article xx was excessively detailed. It was said in response that the detail was intended to ensure that any derogation from the draft instrument was not casual or inadvertent. It was further observed that the requirement regarding the provision of a “service not otherwise mandatorily required” was rather vague and could potentially be subject to abuse by carriers wishing to circumvent the mandatory provisions of the draft instrument in the absence of some test regarding the significance of the additional service. Further concerns were expressed regarding the use of the term “mutually negotiated”, which could give rise to evidentiary difficulties on the effective freedom of contract of the parties. There was some support for a proposal that this difficulty could be addressed by placing on the carrier the burden of proving the shipper’s actual consent. However, in response, it was suggested that the very nature of OLSAs meant that the parties to them were experienced professionals capable of understanding the significance of their acts without further procedural safeguards.

#### *Jurisdiction*

102. One aspect of the OLSA proposal was that, in the interests of commercial certainty, the binding choice of forum provision in OLSAs should be extended to third parties who received written notice, provided that a number of conditions were met, such as the existence of a reasonable connection to the forum selected (see A/CN.9/WG.III/WP.34, para. 35, and A/CN.9/WG.III/WP.42, note 3). Concerns were raised regarding this proposal, given the proposed application of the jurisdiction provision to third parties not privy to the agreement, the sensitivity of the issue, and the appropriateness of dealing with it in an international instrument, particularly given jurisprudence on the extension of jurisdiction clauses to third parties.

#### *Multimodal transport*

103. Concerns were raised regarding the effects of the proposed OLSA regime on the multimodal transport network system. It was suggested that the proposed text did not affect the intended operation of the network system in article 8 of the draft instrument, as contractual agreements could not derogate from the mandatory liability provisions of unimodal transport conventions. However, it was also observed that the draft article on

OLSAs did not specify the relationship of the contractual regime towards mandatory domestic law, which could result in ambiguity.

*Conclusions reached by the Working Group on draft article xx*

104. After discussion, the Working Group decided that:

- It was not opposed to the inclusion of a provision on OLSAs in the draft instrument, subject to the clarification of issues relating to the scope of application of the draft instrument to volume contracts generally;
- Particular care should be dedicated to the definition of OLSAs and to the protection of the interests of small shippers and of third parties, and that further consideration should be given to examining which provisions, if any, of the draft convention should be of mandatory application in an OLSA;
- Optimum placement of an OLSA provision within the draft instrument should also be considered;
- The original proponents of the OLSA proposal were invited to work with other interested delegations on refining the OLSA definition.

**Redraft of provisions relating to scope of application**

105. As requested by the Working Group (see paras. 83 to 96 above), an informal drafting group composed of a number of delegations prepared a redraft of the provisions regarding scope of application. In presenting the redraft, the Working Group heard that that text used a “hybrid” approach, incorporating elements from all three of the possible approaches. The redrafted text was based on the broad consensus expressed by the Working Group and outlined in paragraphs 83 to 96 above and taking into consideration draft paragraph 1 (a) and draft article 2 as set out in A/CN.9/WG.III/WP.36. The text that was proposed to the Working Group for its consideration was as follows:

“Article 1

“(a) “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. This undertaking must provide for carriage by sea and may provide for carriage by other modes of transport prior to or after the sea carriage. [A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage provided that the goods are actually carried by sea.]

“[(--) “Liner service” means a maritime transportation service that

- (i) is available to the general public through publication or otherwise; and
- (ii) is performed on a regular basis between specified ports in accordance with announced timetables or sailing dates.]

“[(--) “Non-liner service” means any maritime transportation service that is not a liner service.]

“Article 2

“1. Subject to articles 3 to 5, this Instrument applies to contracts of carriage in which the [contractual] place of receipt and the [contractual] place of delivery are in different States, and the [contractual] port of loading and the [contractual] port of

discharge are in different States, if

“(a) the [contractual] place of receipt [or [contractual] port of loading] is located in a Contracting State, or

“(b) the [contractual] place of delivery [or [contractual] port of discharge] is located in a Contracting State, or

“(c) [the actual place of delivery is one of the optional places of delivery [under the contract] and is located in a Contracting State, or]

“(d) the contract of carriage provides that this Instrument, or the law of any State giving effect to it, is to govern the contract.

“[References to [contractual] places and ports mean the places and ports provided under the contract of carriage or in the contract particulars.]

“[2. This instrument applies without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.]

“Article 3

“1. This Instrument does not apply to

“(a) subject to article 5, charter parties, whether used in connection with liner services or not; and

“(b) subject to article 4, volume contracts, contracts of affreightment, and similar contracts providing for the future carriage of goods in a series of shipments, whether used in connection with liner services or not; and

“(c) subject to paragraph 2, other contracts in non-liner services.

“2. This Instrument applies to contracts of carriage in non-liner services under which the carrier issues a transport document or an electronic record that

“(a) evidences the carrier’s or a performing party’s receipt of the goods; and

“(b) evidences or contains the contract of carriage,

except in the relationship between the parties to a charter party or similar agreement.

“Article 4

“If a contract provides for the future carriage of goods in a series of shipments, this Instrument applies to each shipment in accordance with the rules provided in articles 2, 3 (1) (a), 3 (1) (c), and 3(2).

“Article 5

“If a transport document or an electronic record is issued pursuant to a charter party or a contract under article 3 (1) (c), then such transport document or electronic record shall comply with the terms of this Instrument and the provisions of this Instrument apply to the contract evidenced by the transport document or electronic record from the moment at which it regulates the relationship between the carrier and the person entitled to rights under the contract of carriage, provided that such person is not a charterer or a party to the contract under article 3 (1) (c).”

106. The Working Group heard that the informal drafting group had not had sufficient

time to consider OLSAs, nor draft articles 88 and 89. Further, the redrafted article 1 definition of “contract of carriage” had not changed in substance from the original text in A/CN.9/WG.III/WP.36, but for moving the requirement of the international sea leg to article 2 of the redraft. Definitions of “liner” and “non-liner service” were proposed for inclusion in the draft article 1 definition section. The Working Group heard that article 2 of the redraft contained mainly the original text of draft article 2, but for the addition of a “double” international requirement (of both the overall contract of carriage and the sea voyage itself), the use of the word “contractual” in square brackets to further define the terms, and the placing of paragraph 2 in square brackets. Further, paragraph 3 (1) of the redraft was intended to parallel the exclusion clause in the original paragraph 2 (3), by treating first charter parties, then volume contracts, contracts of affreightment and similar contracts, with subparagraph (c) of the redraft representing an attempt to assist in the identification of “similar contracts”. Paragraph 3 (2) of the redraft then used the combined elements of the draft instrument’s definition of “transport document” in the original draft article 1 (k) to place certain contracts in non-liner services that should not be excluded within the scope of the draft instrument. The Working Group heard that the effect of article 3 of the redraft, while complicated, was to ensure that those transactions covered by the Hague and Hague-Visby Rules would continue to be covered by the draft instrument. Article 4 of the redraft was said to be substantially similar to the original draft article 2 (5). Finally, it was said that article 5 of the redraft was intended to provide third party protection along the lines of the original draft paragraph 2 (4), but that the “non-negotiable document” approach outlined above in paragraph 94 had been used in the redraft.

107. While the Working Group agreed that the redrafted text would require further examination and discussion before any specific positions could be taken on it, a number of general comments were made. Doubts were expressed regarding whether the redraft adequately provided for the internationality of the sea leg of the carriage. The view was expressed that the redraft in fact required “double” internationality, in that the redrafted paragraph 2 (1) required that both the place of receipt and the place of delivery be in different States, and that the port of loading and the port of discharge be in different States.

108. Concern was also expressed as to whether the redraft should clarify what was meant in subparagraph 2 (b) by the terms “volume contracts” and “contracts of affreightment”. A suggestion was made that such terms should be defined to ensure consistency of judicial interpretation. In that respect, it was noted that the redrafted subparagraph 2 (b) was intended to give some assistance in standardizing the interpretation of those terms by describing “similar contracts” as “providing for the future carriage of goods in a series of shipments, whether used in connection with liner services or not”. Some hesitation was expressed against the inclusion of any further definition of these terms, particularly given their varied usage in different jurisdictions.

109. The Working Group agreed that the redraft represented a sound text upon which to base future discussions on scope of application, once further reflection and consultations had taken place.

## Jurisdiction

### General discussion

110. The Working Group proceeded to consider draft chapter 15 on jurisdiction contained in A/CN.9/WG.III/WP.32, consisting of Variant A and Variant B, noting that the difference between the two variants was the inclusion in Variant A of draft article 75 on *lis pendens* (see below, paras. 142 to 144). The Working Group heard a short report from the informal consultation group established for continuation of the discussion between sessions of the Working Group (see A/CN.9/552, para. 167, and paras. 11 and 82 above). The Working Group heard that an exchange of views had taken place within the informal consultation group not simply with respect to the provisions of draft chapter 15, but with respect to broad principles regarding the desirability of including jurisdiction provisions in the draft instrument, and what form these provisions might take.

111. In general, the Working Group supported the inclusion of a chapter relating to jurisdiction. Some views were expressed that the question of jurisdiction should be left entirely to the choice of the parties to the contract of carriage. In addition, it was feared that negotiations in this complex subject area could ultimately result in a failure to reach consensus on the provisions of the draft instrument, or that jurisdiction provisions along the lines of the Hamburg Rules as currently in the draft instrument could create barriers to States wishing to ratify the instrument. The question was also raised whether draft subparagraph 2 (1) (d) regarding the scope of application of the draft instrument should be deleted (see A/CN.9/WG.III/WP.36, footnote 18) if the Working Group agreed to include a chapter on jurisdiction.

112. The Working Group heard that although the European Community had common rules in the area of jurisdiction as embodied in Brussels Regulation I (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), that would not prevent its members from negotiating rules in the draft instrument that derogated therefrom, if necessary.

### *Conclusions reached by the Working Group*

113. After discussion, the Working Group agreed to include in the draft instrument a chapter on jurisdiction.

### Article 72

#### *Jurisdiction limited to Contracting States*

114. There was broad support for the suggestion that the reference to action “in a court” was too broad and should be qualified by inclusion of the words “in a Contracting State”. A related matter was said to be the question of whether it was appropriate that national law be used to establish the competent court for jurisdiction according to the chapeau of draft article 72. In this regard, reference was made to paragraph 33 (1) of the Convention for the Unification of Certain Rules for International Carriage by Air (“the Montreal Convention”), which was said to allow resort to both national and international courts to establish jurisdiction. However, there was support for the view that resort to national law was appropriate and not unusual in transport conventions.

*Conclusions reached by the Working Group*

115. After discussion, the Working Group agreed to add the phrase “in a Contracting State” after the phrase “in a court” in the chapeau of draft article 72.

*Parties to whom the rules should apply*

116. While views were expressed that jurisdiction provisions should cover all contractual issues, the Working Group continued its deliberations on the assumption that, generally speaking, the provisions of draft article 72 were appropriate as a basis for discussion for jurisdiction over actions against the contracting carrier by the cargo claimant. However, it was felt that in cases against the maritime performing party, the connecting factors to establish jurisdiction against the contracting carrier currently set out in draft article 72 would not be appropriate. Further, it was suggested that at least two types of maritime performing parties would require different connecting factors in order for jurisdiction over them to be reasonable: jurisdiction over the stevedore or terminal operator should likely be limited to their principal place of business or the place where the service was performed, while jurisdiction over the ocean carrier could likely be reasonably established at the port of loading or the port of discharge. Support was expressed for that view.

*Conclusions reached by the Working Group*

117. After discussion, the Working Group agreed that:

- The list of connecting factors in draft article 72 would be appropriate only in actions by the cargo claimant against the contracting carrier;
- That actions against the maritime performing party should be subject to different connecting factors.

*“plaintiff”*

118. It was suggested that the term “plaintiff” currently used in the chapeau of draft article 72 to describe the person having the right to choose jurisdiction might not be appropriate. In that respect, it was noted that a carrier defending a claim for cargo loss or damage could effectively pre-empt the cargo claimant’s choice of jurisdiction by bringing as plaintiff an action for a declaration of non-liability. To prevent that, it was suggested that the term used in the chapeau should make clear that the choice of jurisdiction should be reserved for the cargo claimant. It was suggested that that could be accomplished by replacing the term “plaintiff” with “claimant”, and defining “claimant” in terms such as “the person who brings the action against the carrier”.

*Conclusions reached by the Working Group*

119. After discussion, the Working Group agreed to replace the term “plaintiff” with a more appropriate term to clearly indicate the intention that it referred to the “cargo claimant” and not the carrier.

*Concursus—Concentration of suits in a single forum*

120. The question was raised whether the chapter on jurisdiction should ensure that multiple suits arising from the same incident should be concentrated into one single forum. While no specific agreement was reached on this point, it was suggested that the inclusion of the port of loading and the port of discharge as connecting factors in draft article 72 (see

below, para. 128) could assist in providing an obvious and major point of commonality on which many cargo claimants would logically choose to base jurisdiction. Some preference was expressed for rules facilitating the concentration of suits in a single forum, rather than drafting a specific rule for such a purpose. It was also suggested that Brussels Regulation I contained a rule which might be instructive in this regard.

*Conclusions reached by the Working Group*

121. The Working Group did not reach specific agreement on this matter.

*Paragraph (a) Principal place of business or habitual residence*

122. In general, the Working Group supported paragraph (a). It was observed that, whilst paragraph (a) referred to the principal place of business of the defendant, article 34 of the draft instrument on contract particulars simply required the name and address of the carrier. The question was raised whether that information should be taken to be the principal place of business, or whether that requirement should be clarified. It was suggested that, in the event that paragraph (b) was deleted, the wording in paragraph (a) could be clarified, perhaps through a reference to the legal domicile of the defendant. While the question was raised whether domicile and principal place of business were truly different, reference was made to article 34 of the Montreal Convention, which referred to “the court of the domicile of the carrier or of its principal place of business through which the contract has been made”.

123. Given this discussion, it was agreed that the reference to “principal place of business” should be included in square brackets for further discussion, and perhaps definition, and that the word “domicile” should be included in square brackets at the end of that paragraph.

*Conclusions reached by the Working Group regarding paragraph (a)*

124. After discussion, the Working Group agreed:

- To place “principal place of business” in square brackets;
- To insert “domicile” in square brackets at the end of the phrase.

*Paragraph (b) Place of contract*

125. Strong support was expressed for the deletion of paragraph (b). In keeping with footnotes 223 and 30 of A/CN.9/WG.III/WP.32, it was agreed that in modern transport practice, the place of conclusion of the contract was largely irrelevant to the performance of the contract of carriage and, given that the draft instrument did not distinguish between documentary and electronic contexts, that place could be difficult or impossible to determine. A suggestion was made that the branch through which the contract was made could have some continuing relevance as a connecting factor with respect to suits against parties other than the contracting carrier. It was suggested that this might be borne in mind for future consideration.

*Conclusions reached by the Working Group regarding paragraph (b)*

126. After discussion, the Working Group agreed to:

- Delete paragraph (b);



- Bear in mind in future discussions the issue of whether the branch through which the contract was made could be a significant connecting factor in actions against maritime performing parties.

*Paragraph (c) Place of receipt or delivery*

127. General support was expressed for the inclusion of the place of receipt and the place of delivery as connecting factors upon which to base jurisdiction. Concern was expressed that it was unclear whether the terms “place of receipt or the place of delivery” referred to the contractual or actual places of receipt and delivery. It was suggested that this be clarified.

128. It was suggested that, as proposed in paragraph 30 of A/CN.9/WG.III/WP.34, two additional places should be specified, namely the port of loading and the port of discharge. It was suggested that such an inclusion was desirable to encourage the result that all litigation in relation to an accident should take place in the same forum. However, it was suggested that including these additional places could create overly broad connecting factors for jurisdiction, which were unnecessary and could complicate matters. The view was expressed that any need to cover other places was met by paragraph (d) which permitted the plaintiff to choose any additional place.

*Conclusions reached by the Working Group paragraph (c)*

129. After discussion, the Working Group agreed:

- To include reference to port of loading and port of discharge in square brackets;
- To include the words “actual” and “contractual” in square brackets before the word “place” in both instances.

*Paragraph (d) Place designated in the transport document and jurisdiction clauses*

130. Three views emerged in respect of draft paragraph (d). One approach suggested that exclusive jurisdiction should be the principal rule, such that paragraph (d) should represent the only basis for jurisdiction, and whether or not the jurisdiction agreed upon in the contract of carriage was listed in the draft instrument, it would be the only applicable forum. Some support was expressed for the view that commercial parties should be free to choose jurisdiction, and it was suggested that it would provide commercial certainty.

131. Another view was that paragraph (d) should permit exclusive choice of jurisdiction by the contracting parties, but only if they chose one of the places listed in paragraphs (a) and (c). By way of explanation, it was suggested that, while cargo claimants are sophisticated business people, total freedom of choice of jurisdiction could be open to abuse by the carrier. For that reason, it was suggested that paragraph (d) should only permit a choice from places that objectively had a real connection to the transaction and only in places that were in a Contracting State.

132. A third view was that jurisdiction designated in the transport document would simply be considered an additional jurisdictional basis which would be added to the list of possible jurisdictions from which the cargo claimant could choose in the draft article. The view was expressed that it permitted a choice for the cargo claimant in addition to the places listed currently in paragraphs (a) and (c), but did not limit the cargo claimant to accepting the jurisdiction specified in the jurisdiction clause.

133. The Working Group did not reach a consensus on which view should prevail with respect to jurisdiction clauses in the contract of carriage.

*Conclusions reached by the Working Group*

134. The Working Group agreed to further consider this matter in light of the discussion, and did not reach specific agreement.

*OLSAs*

135. The Working Group next heard a proposal (see A/CN.9/WG.III/WP.34, paras. 34 and 35) that two exceptions to the general rules pertaining to jurisdiction as set out in article 72 should be included with respect to OLSAs. It was proposed that, as between parties to an OLSA, there should exist an opportunity to derogate from the terms of the draft instrument, including the choice of forum provisions, and that the choice of forum contained in the OLSA should be exclusive. It was suggested that the conditions and criteria required in order to be considered an OLSA would adequately safeguard the parties to the contract. A second related exception was said to be that when parties to an OLSA designated a forum for cargo claims, that choice should be binding upon third parties, provided that written notice be given to that party as to where the action could be brought and that the place chosen had a reasonable connection to the action. It was said that as the choice of forum was important in terms of providing predictability for commercial parties it was important that that choice be binding on third parties whose rights derived from the OLSA. It was further suggested that this approach could be seen as a compromise approach to the three views expressed with respect to jurisdiction clauses, in that the choice of forum in OLSAs would be exclusive, but otherwise, resort would be had to the list of places set out in the draft instrument.

136. The Working Group did not specifically discuss the OLSA proposal with respect to jurisdiction, although some general concerns were expressed as to the need for the inclusion of a clause on jurisdiction in relation to an OLSA.

**Article 73**

137. The Working Group considered the text of draft article 73, Variant A as contained in document A/CN.9/WG.III/WP.32. The Working Group heard that a portion of the text of subparagraph 21 (2) (a) and the entire text of subparagraph 21 (2) (b) of the Hamburg Rules had been inadvertently omitted from the text of draft article 73, Variant A, and that regard should be had to those provisions of the Hamburg Rules until that omission could be corrected.

*General discussion*

138. Concerns were raised with respect to the inclusion of an arrest provision in the jurisdiction chapter of the draft instrument. It was said that including the place of arrest as a basis for jurisdiction could be a highly complicating factor, which could cause problems with respect to the International Convention Relating to the Arrest of Sea-Going Ships, 1952, and the International Convention on Arrest of Ships, 1999 (the “Arrest Conventions”). It was also stated that not addressing the relationship to the Arrest Conventions in this instrument could give rise to uncertainty as to whether the jurisdiction provided for in those conventions could be upheld for claims falling under this instrument. Support was expressed for these concerns, and for the view that the connection between

draft article 73 and the Arrest Conventions should be more closely examined before any decision was taken by the Working Group.

*Conclusions reached by the Working Group on draft article 73*

139. After discussion, the Working Group agreed to place square brackets around draft article 73, pending further evaluation of its relationship with the Arrest Conventions.

**Article 74**

140. The Working Group considered the text of draft article 74, Variant A as contained in document A/CN.9/WG.III/WP.32. The Working Group heard that draft article 74 represented a compromise between the cargo claimant and the carrier, such that the cargo claimant could choose the jurisdiction in which to sue pursuant to draft article 72, and that the carrier could not deny access to any of the forums listed. However, it was said that the other side of the coin was set out in draft article 74, which limited the cargo claimant to choosing from amongst the forums on that list. While some concern was expressed that the second sentence of draft article 74 referring to protective measures could raise issues with respect to the Arrest Conventions, the opposite view was expressed that that sentence was intended to avoid interference with protective measures, and as such, should not conflict with the Arrest Conventions. There was general support in the Working Group for draft article 74.

*Conclusions reached by the Working Group on draft article 74*

141. After discussion, the Working Group agreed to maintain draft article 74, but to consider the effects of the second sentence of the article when considering the interaction between draft article 73 and the Arrest Conventions.

**Article 75**

142. The Working Group considered the text of draft article 75, Variant A as contained in document A/CN.9/WG.III/WP.32. In reference to footnote 222 in A/CN.9/WG.III/WP.32, the Working Group heard that in keeping with the approach in the Hamburg Rules, Variant A contained a *lis pendens* provision in draft article 75, while Variant B did not, in keeping with the 1999 decision of the International Sub-Committee on Uniformity of the Law of Carriage by Sea of the Comité Maritime International (CMI). The Working Group heard that the CMI had reviewed and endorsed that 1999 decision at its 38th International Conference in June 2004.

143. There was support for the suggestion that draft article 75 should be deleted, and hence that Variant B of chapter 15 should be accepted as a basis for future discussion, since a rule on *lis pendens* would be extremely difficult to agree upon, given the complexity of the subject matter, and the existence of diverse *lis pendens* approaches in various jurisdictions throughout the world. The question was raised regarding what the effect would be if such a provision were omitted from the draft instrument, and the view was expressed that the *lis pendens* issue would be left to national law. In response, however, it was suggested that national law might not adequately treat the problem, since some jurisdictions did not have international *lis pendens* rules, and some might not recognize and enforce international *lis pendens* rulings. While there was support for the deletion of draft article 75, Variant A, the Working Group agreed to maintain the provision but to place it in square brackets pending further discussion.

*Conclusions reached by the Working Group on draft article 75*

144. After discussion, the Working Group agreed to place square brackets around draft article 75, Variant A, pending further discussion.

**Article 75 bis**

145. The Working Group considered the text of draft article 75 bis, Variant A as contained in document A/CN.9/WG.III/WP.32. There was support for the view that the circumstances described in this provision, where parties could agree on the choice of jurisdiction after a claim arose, differed markedly from those considered with respect to choice of jurisdiction clauses, which came into existence prior to any damage or loss arising. There was general agreement that the principle set out in draft article 75 bis, Variant A was acceptable, however, it was also observed that if the Working Group ultimately agreed on an exclusive jurisdiction provision, this draft article could become redundant. In addition, the following concerns were expressed regarding the clarity of the text in that draft article.

*“an agreement”*

146. Questions were raised regarding the form of agreement that would be acceptable pursuant to the draft provision, in particular, whether express agreement was necessary, or whether implicit agreement would be acceptable.

*“made by the parties”*

147. Clarification was also sought regarding whether the term “parties” referred to in the provision referred to parties to the contract or carriage, or whether it was intended to mean the parties to the dispute arising from the loss or damage. There was support for the view that the intention of the provision was that it should refer to the parties to the dispute arising from the loss or damage, rather than to the parties to the contract of carriage. The suggestion was made that this understanding be clarified in the text of the provision.

*“after a claim under the contract of carriage has arisen”*

148. A further question was raised regarding whether the agreement under the draft article could only be made after the institution of a proceeding with respect to the loss or damage, or whether it referred instead to the moment when the loss or damage had occurred. There was support for the view that the intention of the provision was to refer to agreements made after the loss or damage had arisen. A further suggestion was made that the relevant moment should be when the parties had knowledge of the loss or damage. The Working Group agreed to place this phrase in square brackets pending further discussion.

*Concursus concerns*

149. Some support was expressed for the view that the concursus problem discussed generally with respect to jurisdiction (see above, paras. 120 to 121) could also arise in respect of draft article 75 bis, in that claims could be proceeding with respect to the contracting carrier and the maritime performing parties at the same time, thus perhaps compounding the problem of agreement on jurisdiction. It was suggested that this problem should be borne in mind in future discussions.

*Conclusions reached by the Working Group on draft article 75 bis*

150. After discussion, the Working Group agreed to:

- Place square brackets around the phrase, “after a claim under the contract of carriage has arisen”, in order to indicate that further clarification could be necessary;
- Consider whether further clarifications were needed with regard to the form of the agreement necessary, and to the identity of the parties.

**Arbitration**

151. The Working Group proceeded to consider chapter 16 on arbitration contained in A/CN.9/WG.III/WP.32, consisting of Variant A and Variant B, the difference being the inclusion in Variant A of draft articles 78 and 80, respectively, on the seat of arbitration and on mandatory provisions relating to arbitration. With reference to footnote 225 in A/CN.9/WG.III/WP.32, the Working Group heard that in keeping with the approach in the Hamburg Rules, Variant A reproduced the arbitration provisions in the Hamburg Rules, while Variant B was in keeping with the 1999 decision of the International Sub-Committee on Uniformity of the Law of Carriage by Sea of the CMI. The Working Group heard that the CMI had reviewed that 1999 decision at its 38th International Conference in June 2004, and that it had agreed on the principle expressed in draft article 76, and while support had also been expressed regarding draft article 79, no overall consensus regarding the arbitration chapter had been achieved.

152. The Working Group heard a short report from the informal consultation group established for continuation of the discussion between sessions of the Working Group (see A/CN.9/552, para. 167, and paras. 11, 82 and 110 above). The Working Group heard that an exchange of views had taken place within the informal consultation group with respect to the inclusion of arbitration rules in the draft instrument, and regarding the various aspects that those rules might entail.

*Relation with general international arbitration practice*

153. It was noted that draft chapter 16 was incorporated from the Hamburg Rules, which were drafted in 1978, before the wide acceptance of uniform standards for international arbitration. It was suggested that the draft instrument should be aligned, in particular, to the UNCITRAL Model Law on International Commercial Arbitration (Model Law) and to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention), and that departures from these standards should be considered only in case of specific policy reasons. In this context, it was further stated that three points, in particular, needed careful consideration:

- The draft article 76 requirement of a written form for arbitration agreements might need to be coordinated with the current work of UNCITRAL on article 7 of the Model Law, which aimed at liberalizing the form requirement;
- The draft article 77 requirement of incorporation of the arbitration agreement in the transport document or electronic record might need to be coordinated with the general arbitration standard regarding incorporation by reference;
- Draft article 79, which might be interpreted as restricting the possibility of arbitration *ex aequo et bono* (in justice and fairness, i.e. overriding the strict rule of law, if

necessary), may need to be reconsidered in view of the fact that in some parts of the world, such arbitration is also being practiced in the field of maritime law.

#### *General discussion*

154. The view was expressed that the principle of freedom of arbitration was a concept deeply rooted in both the Model Law and New York Convention, and that it required that no provisions on arbitration should be included in the draft instrument. It was further expressed that arbitration clauses were widely used in the non-liner trade, and that any interference with the existing practice of freedom of arbitration would not be accepted by commercial parties. Further, it was said that the non-liner trade, which often incorporated the Hague-Visby Rules into their charter parties, would not be inclined to incorporate the draft instrument into future charter parties if the instrument contained rules on arbitration. In addition, it was expressed that arbitration procedures were essential to international trade, as were existing arbitration centres and rules on arbitration, such that including arbitration rules in the draft instrument could create commercial uncertainty. Support was expressed for this view.

155. However, it was also suggested that it would be beneficial to regulate in necessary detail matters relating to arbitration, possibly along the lines of the Hamburg Rules.

156. A third position was that the draft instrument should contain only basic provisions on arbitration so as not to disrupt the international arbitration regime, but so as to ensure the application of the mandatory provisions of the draft instrument. In particular, it was said that it should not be possible through simply choosing arbitration to circumvent the rules on jurisdiction that the Working Party had agreed were useful in preventing abuse in the draft instrument. Support was also expressed for this approach. Along these lines, it was suggested that the presence of an arbitration clause in a contract should not affect the claimant's right to litigate in places suggested in the draft instrument with one exception: if one of the places in which the claimant could initiate litigation was the place chosen for arbitration, the claimant could only arbitrate rather than litigate in that place. The claimant could choose to litigate in the other places.

#### *Conclusions*

157. After general discussion, the Working Group decided that:

- All of chapter 16 should be put in square brackets;
- The words "by agreement evidenced in writing" in draft article 76 should be put in square brackets;
- Draft article 79 should be put in square brackets;
- The Secretariat should be requested to explore the possible conflicts between the draft instrument and uniform international arbitration practice, as reflected in UNCITRAL instruments and model laws;
- Consideration should be given to the development of a formula to prevent the possibility that any mandatory rules of the draft instrument could be circumvented through resort to arbitration.

### III. Other business

#### Electronic commerce issues

158. The Working Group heard that, following its completion of the UNCITRAL Model Law on Electronic Signatures in 2001, the Commission had asked that Working Group IV (Electronic commerce) consider three possible future areas of work. These were: the preparation of an international instrument dealing with issues of electronic contracting; undertaking a comprehensive survey of possible legal barriers to the development of electronic commerce in existing uniform law conventions and trade agreements; and addressing the issues raised by the negotiability and transfer of rights in goods.

159. The Working Group heard that the Working Group on Electronic Commerce had reached the conclusion that, as negotiability and transfer of rights was a delicate area of law that would require very specific solutions, it should not be dealt with in the draft convention on the use of electronic communications in international contracts (annex to A/CN.9/571). The Working Group heard that the development of that convention and the survey in respect of existing international instruments had been undertaken simultaneously and, at its forty-fourth session, the Working Group on Electronic Commerce had completed its consideration of the draft convention on the use of electronic communications in international contracts.

160. The Working Group was informed that the draft convention contained two provisions of interest in the context of the current work being undertaken by the Working Group. Draft paragraph 2 (2) of that draft convention expressly excluded “any transferable document (including a bill of lading) or instrument entitling the bearer or beneficiary to claim delivery of the goods or payment of a sum of money”. Also, draft paragraph 19 (2) provided that the draft convention applied “to electronic communications in connection with the formation or performance of a contract or agreement to which another international convention, treaty or agreement applies, unless the State has declared, that it will not be so bound”. It was noted that, notwithstanding the exemption provided under draft paragraph 2 (2), draft paragraph 19 (2) had the effect that a contract of carriage, which was not of itself a document of title, might be covered by the provisions of the draft convention. The Working Group was invited to consider the implications of that provision.

161. The Working Group was also informed that, whilst the Working Group on Electronic Commerce had not yet had an opportunity to formally consider the electronic communications chapter and related provisions in the draft instrument currently being prepared, a number of delegations within that Working Group had expressed informal views on those areas in the draft instrument. These views included concerns with the notion used in the draft instrument of “negotiable electronic transport document” in view of the difficulties of achieving functional equivalence between paper documents of title and their electronic equivalent, and in particular, guaranteeing the uniqueness of electronic records. Additional aspects that might require further consideration included provisions on authentication of communications between the parties, in particular, in view of the cross-border nature of the draft instrument.

162. It was suggested that, given the areas of complementarity and mutual interest both in the draft convention and in the draft instrument, the work of both Working Groups could be assisted by the holding of an intersessional informal meeting of experts from both the electronic commerce and transport law fields. The Working Group agreed to that suggestion.

**Scheduling of fifteenth and sixteenth sessions**

163. The Working Group noted that its fifteenth session was scheduled to be held in New York from 18 to 28 April 2005. The Working Group took note with appreciation of the decision made by the Commission at its thirty-seventh session that two-week sessions would be allocated to the Working Group for continuation of its work (see A/59/17, para. 136).

164. It was noted that, subject to the approval of the Commission at its thirty-eighth session, the sixteenth session of the Working Group was scheduled to be held in Vienna from 28 November to 9 December 2005 (see A/59/17, para. 137).

**Planning of future work**

165. With a view to structuring the discussion on the remaining provisions of the draft instrument, the Working Group adopted the following tentative agenda for its two subsequent sessions:

*Fifteenth session (New York, 18 to 28 April 2005)*

- Electronic commerce
- Transport documents
- Right of control
- Transfer of rights
- Continued discussion on freedom of contract, including OLSA and scope of application
- Continued discussion on jurisdiction and arbitration

*Sixteenth session (Vienna, 28 November to 9 December 2005, subject to approval)*

- Shipper's obligations
- Delivery of goods
- Limitation levels
- Right of and time for suit
- Pending issues

*Round table on e-commerce, right of control and transfer of rights*

166. The Working Group took note of the initiative by several delegations to continue its efforts in the informal consultation group for the continuation of the discussion between sessions of the Working Group, with a view to accelerating the exchange of views, the formulation of proposals and the emergence of consensus in preparation for a third and final reading of the draft instrument (see A/CN.9/552, para. 167). The Working Group heard that the informal consultation group would next address the issues to be considered in New York in the spring of 2005, and that an informal round table meeting was planned for all interested members and observers on the topics of e-commerce, right of control and transfer of rights for 24 to 25 February 2005, possibly in London. Further, the Working Group heard that the informal consultation group was open to all delegations, and that submissions were welcome in all official languages, with multilingualism being the basis for the work. It was further noted that the past and future work of the informal consultation group would be placed on a secure website for archive purposes, if desired by the Working Group.



**B. Note by the Secretariat on the preparation of a draft instrument  
on the carriage of goods [wholly or partly] [by sea] -  
Provisional redraft of the articles of the draft instrument  
considered in the report of Working Group III  
on the work of its thirteenth session (A/CN.9/552),  
submitted to the Working Group on Transport Law  
at its fourteenth session  
(A/CN.9/WG.III/WP.39) [Original: English]**

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## Introduction

1. During its thirteenth session, Working Group III considered a number of provisions of the draft instrument on the carriage of goods [wholly or partly] [by sea] as contained in the annex to the note by the Secretariat (A/CN.9/WG.III/WP.32). The Secretariat was requested to prepare a revised draft of those provisions considered, based on the deliberations and conclusions of the Working Group during its thirteenth session as contained in the report of that session (A/CN.9/552). The provisional redraft of those articles appears in sections I to IV below.

## I. Chapter 5: Liability of the carrier (continued)

### A. Liability of performing parties (draft article 15, continued)

2. The Working Group considered draft paragraphs 15(5) and (6) at paragraphs 10 to 17 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft paragraphs 15(5) and (6) would read as follows:

#### Article 15 bis<sup>1</sup>

“1.<sup>2</sup> If the carrier and one or more maritime performing party(ies) are liable<sup>3</sup> for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several [, such that each such party shall be liable for compensating the entire amount of such loss, damage or delay, without prejudice to any right of recourse it may take against other liable parties,]<sup>4</sup> but only up to the limits provided for in articles 16, 24 and 18.

<sup>1</sup> As decided at para. 17 of A/CN.9/552, draft paras. 5 and 6 were moved out of draft article 15 into a provision of their own and are now in draft article 15 bis.

<sup>2</sup> This provision, formerly draft para. 15(6) (in A/CN.9/WG.III/WP.32), was renumbered as draft para. 15(5) (see para. 12, A/CN.9/WG.III/WP.36) and has now been renumbered as draft para. 15 bis (1).

<sup>3</sup> In footnote 82 of A/CN.9/WG.III/WP.36, it was noted that the scope of this para. should be limited to maritime performing parties. Since this draft para. has now been moved to a separate draft article, for greater clarity, the phrase “If more than one maritime performing party is liable” as it appears in A/CN.9/WG.III/WP.36, has been changed to “If the carrier and one or more maritime performing party(ies) are liable”. The Working Group may also wish to consider whether this clarification alleviates the concerns raised at para. 14 of A/CN.9/552, but for the concern regarding set-off, which is considered in draft para. 15 bis (3) below.

<sup>4</sup> As decided at paras. 12 and 17 of A/CN.9/552, the phrase in square brackets has been added for clarification of the meaning of “joint and several liability”. However, the Working Group may wish to consider the use of “joint and several liability” in numerous international instruments, including: para. 10(4) of the Hamburg Rules; para. 27(4) of the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, as amended by the Protocol of

“2.<sup>5</sup> Without prejudice to article 19, the aggregate liability of all such persons shall not exceed the overall limits of liability under this instrument.<sup>6</sup>

[“3. Where a claimant has made a successful claim against a non-maritime performing party for the loss of, damage to, or delay in delivery of the goods, the amount received by the claimant shall be set off against any subsequent claim for that loss, damage or delay that the claimant makes against a carrier or a maritime performing party.”]<sup>7</sup>

## B. Delay (draft article 16)

3. The Working Group considered draft article 16 at paragraphs 18 to 31 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 16 would read as follows:

### “Article 16. Delay

“1. Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time expressly agreed upon<sup>8</sup> 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.<sup>9</sup>

“2. [Unless otherwise agreed,]<sup>10</sup> If delay in delivery causes [consequential]<sup>11</sup> loss not resulting from loss of or damage to the goods carried and hence not covered by article 17, the amount payable as compensation for such loss shall be limited to an

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Modification of 1999 (“CIM-COTIF 1999”); para. 4(5) of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000 (“CMNI”); para. 30(3) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended by protocols in 1955 and 1975 (“Warsaw Convention”); and para. 36(3) of the Convention for the Unification of Certain Rules for the International Carriage by Air, Montreal 1999 (“Montreal Convention”).

<sup>5</sup> This provision, formerly draft para. 15(7) (in A/CN.9/WG.III/WP.32), was renumbered as draft para. 15(6) (see para. 12, A/CN.9/WG.III/WP.36) and has now been renumbered as draft para. 15 bis (2).

<sup>6</sup> As noted at paras. 13 and 17 of A/CN.9/552, the general principle on aggregate claims expressed in para. 6, now para. 15 bis (2), was considered appropriate.

<sup>7</sup> As decided at paras. 14 and 17 of A/CN.9/552, a revised draft has been prepared, pending further discussion regarding the preparation of a uniform rule on set-off, or of leaving the issue to domestic law. See also *supra*, note 3.

<sup>8</sup> As suggested at para. 20 of A/CN.9/552, the phrase “the time expressly agreed upon” in para. 5(2) of the Hamburg Rules may be more accurate than “any time expressly agreed upon”.

<sup>9</sup> As decided at paras. 22 and 24 of A/CN.9/552, the carrier should be liable for delay in delivery based on fault, and the default rule at the end of the para. was retained without square brackets.

<sup>10</sup> As decided at paras. 28 and 31 of A/CN.9/552, the words “[Unless otherwise agreed]” were inserted at the beginning of para. 2, but the issue should be reassessed in the context of draft article 19 and chapter 19.

<sup>11</sup> As suggested at para. 25 of A/CN.9/552, clarification of the wording regarding consequential damages has been suggested. The Working Group may also wish to consider the following alternative to the first sentence of draft para. 16(2):

“Compensation for physical loss of or damage to the goods caused by delay shall be calculated in accordance with article 17 and, unless otherwise agreed, compensation for economic loss caused by delay shall be limited to an amount equivalent to [one times] the freight payable on the goods delayed.”

amount equivalent to [one times]<sup>12</sup> the freight payable on the goods delayed. The total amount payable under this provision and article 18(1) shall not exceed the limit that would be established under article 18(1) in respect of the total loss of the goods concerned.”

### **C. Interpretation of the instrument (draft article 2 bis)**

4. As noted at paragraph 31 of A/CN.9/552, the Working Group decided that a provision along the lines of paragraph 7(1) of the United Nations Sales Convention should be introduced into the text to promote uniformity in the interpretation of the draft instrument. Such a provision might appropriately be placed in chapter 1 of the draft instrument on “General provisions”, provisionally numbered article 2 bis, and could read as follows:

“Article 2 bis. Interpretation of the instrument

“In the interpretation of this instrument, 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.”

### **D. Calculation of compensation (draft article 17)**

5. The Working Group considered draft article 17 at paragraphs 32 to 37 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 17 would read as follows:

“Article 17. Calculation of compensation

“1. Subject to article 18, the compensation payable by the carrier for loss of or damage to the goods shall be calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 7.<sup>13</sup>

“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.<sup>14</sup>

“3. In case of loss of or damage to the goods, the carrier shall not be liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 except where the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of article 88.”

<sup>12</sup> As decided at paras. 26, 27 and 31 of A/CN.9/552, the words “[one times] the freight payable on the goods delayed” were inserted in para. 2 for continuation of the discussion at a future session.

<sup>13</sup> As decided at paras. 33 and 34 of A/CN.9/552, improved consistency with draft article 7 was sought by replacing the phrase “according to the contract of carriage” with the phrase “established in accordance with article 7”.

<sup>14</sup> As noted at paras. 35 to 37 of A/CN.9/552, the Working Group approved the substance of paras. 2 and 3.

## E. Limits of liability (draft article 18)

6. The Working Group considered draft article 18 at paragraphs 38 to 51 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 18 would read as follows:

### “Article 18. Limits of liability

“1. Subject to article 16(2) the carrier’s liability for loss of or damage to [or in connection with]<sup>15</sup> 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.

“[2. Notwithstanding paragraph 1, if the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused]<sup>16</sup> 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.]

“3. When goods are carried in or on a container,<sup>17</sup> 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.

“4. 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.”<sup>18</sup>

## F. Amendment of limitation amounts (draft article 18 bis)

7. As noted at paragraphs 40 and 44 of A/CN.9/552, the Working Group requested that the Secretariat prepare draft provisions for a rapid amendment procedure for the limitation on liability, using existing models and proposals. Article 18 bis, proposes such a provision,

<sup>15</sup> As decided at paras. 41, 42 and 44 of A/CN.9/552, the phrase “or in connection with” has been placed in square brackets in this and other draft articles for further examination and discussion.

<sup>16</sup> As decided at para. 47 of A/CN.9/552, draft para. 2 was maintained in square brackets, and reference to delay in delivery was introduced in square brackets, for future discussion.

<sup>17</sup> As noted at para. 49 of A/CN.9/552, the definition of “container” in draft article 1 might need to be further considered to ensure that it covered pallets.

<sup>18</sup> As noted at para. 51 of A/CN.9/552, the Working Group approved the substance of para. 4.

but the Working Group may wish to note that the placement of similar provisions in other instruments has been in the “Final Clauses” chapter at the end of those instruments:

“Article 18 bis. Amendment of limitation amounts<sup>19</sup>

“1. Without prejudice to the provisions of article \*\*<sup>20</sup>, the special procedure in this article shall apply solely for the purposes of amending the limitation amount set out in paragraph 18(1) of this instrument.

“2. Upon the request of at least one quarter<sup>21</sup> of the States Parties to this instrument<sup>22</sup>, the depositary<sup>23</sup> shall circulate any proposal to amend the limitation amount specified in paragraph 18(1) of this instrument to all of the States Parties<sup>24</sup> and shall convene a meeting of a Committee composed of a representative from each of the States Parties to consider the proposed amendment.

“3. The meeting of the Committee shall take place on the occasion and at the location of the next session of the United Nations Commission on International Trade Law.

“4. Amendments shall be adopted by the Committee by a two-thirds majority of its members present and voting.<sup>25</sup>

“5. When acting on a proposal to amend the limits, the Committee shall take into account the experience of incidents and, in particular, the amount of damage resulting therefrom, changes in the monetary values and the effect of the proposed amendment on the cost of insurance.<sup>26</sup>

“6. (a) No amendment of the limit under this article may be considered less than five<sup>27</sup> years from the date on which this instrument was opened for signature nor less than five years from the date of entry into force of a previous amendment under this article.

<sup>19</sup> The proposal is based upon the amendment procedure set out at article 23 of the 2002 Protocol to the Athens Convention (“Athens Convention”) and at article 24 of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (“OTT Convention”).

<sup>20</sup> This reference would be to an article on “Revision and amendment”, which would appear in the “Final Clauses” chapter of the instrument, but which has not yet been drafted or discussed. See, e.g., article 32 of the Hamburg Rules or article 16 of the Hague Rules.

<sup>21</sup> Para. 23(2) of the Athens Convention refers to “one half” rather than “one quarter” of the States Parties.

<sup>22</sup> Para. 23(2) of the Athens Convention includes the phrase “but in no case less than six” of the States Parties.

<sup>23</sup> The Secretary-General of the United Nations would be named as the depositary in an article entitled “Depositary” in the “final Clauses” chapter of the instrument.

<sup>24</sup> Para. 23(2) of the Athens Convention also includes reference to Members of the International Maritime Organization.

<sup>25</sup> Para. 23(5) of the Athens Convention is as follows: “Amendments shall be adopted by a two-thirds majority of the States Parties to the Convention as revised by this Protocol present and voting in the Legal Committee ... on condition that at least one half of the States Parties to the Convention as revised by this Protocol shall be present at the time of voting.”

<sup>26</sup> This provision has been taken from para. 23(6) of the Athens Convention. See, also, para. 24(4) of the OTT Convention.

<sup>27</sup> Paras. 11 and 12 of A/CN.9/WG.III/WP.34 suggest that the time period in this draft para. should be seven years rather than five years.

“(b) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in this instrument increased by six per cent per year calculated on a compound basis from the date on which this instrument was opened for signature.<sup>28</sup>

“(c) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in this instrument multiplied by three.<sup>29</sup>

“7. Any amendment adopted in accordance with paragraph 4 shall be notified by the depositary to all States Parties. The amendment shall be deemed to have been accepted at the end of a period of eighteen<sup>30</sup> months after the date of notification, unless within that period not less than one fourth<sup>31</sup> of the States that were States Parties at the time of the adoption of the amendment have communicated to the depositary that they do not accept the amendment, in which case the amendment is rejected and shall have no effect.

“8. An amendment deemed to have been accepted in accordance with paragraph 7 shall enter into force eighteen months after its acceptance.

“9. All States Parties shall be bound by the amendment, unless they denounce this convention in accordance with article \*\*<sup>32</sup> at least six months before the amendment enters into force. Such denunciation shall take effect when the amendment enters into force.

“10. When an amendment has been adopted but the eighteen-month period for its acceptance has not yet expired, a State which becomes a State Party during that period shall be bound by the amendment if it enters into force. A State which becomes a State Party after that period shall be bound by an amendment which has been accepted in accordance with paragraph 7. In the cases referred to in this paragraph, a State becomes bound by an amendment when that amendment enters into force, or when this instrument enters into force for that State, if later.”

## G. Loss of the right to limit liability (draft article 19)

8. The Working Group considered draft article 19 at paragraphs 52 to 62 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 19 would read as follows:

<sup>28</sup> No similar provision is found in the OTT Convention. An alternative approach as suggested in paras. 11 and 12 of A/CN.9/WG.III/WP.34 could be: “No limit may be increased or decreased so as to exceed an amount which corresponds to the limit laid down in this instrument increased or decreased by twenty-one per cent in any single adjustment.”

<sup>29</sup> No similar provision is found in the OTT Convention. An alternative approach as suggested in paras. 11 and 12 of A/CN.9/WG.III/WP.34 could be: “No limit may be increased or decreased so as to exceed an amount which in total exceeds the limit laid down in this instrument by more than one hundred per cent, cumulatively.”

<sup>30</sup> Paras. 11 and 12 of A/CN.9/WG.III/WP.34 suggest that the time period in draft paras. 7, 8 and 10 should be twelve months rather than eighteen months.

<sup>31</sup> The OTT Convention specifies at para. 24(7) “not less than one third of the States that were States Parties”.

<sup>32</sup> This reference would be to an article on “Denunciation” of the draft instrument, which would appear in the “Final Clauses” chapter of the instrument, but which has not yet been drafted or discussed. See, e.g., article 34 of the Hamburg Rules or article 15 of the Hague Rules.

“Article 19. Loss of the right to limit liability

“Neither the carrier nor any of the persons mentioned in article 14 bis<sup>33</sup> shall be entitled to limit their liability as provided in articles [16(2),] 24(4), and 18<sup>34</sup> of this instrument, [or as provided in the contract of carriage,]<sup>35</sup> if the claimant proves that [the delay in delivery of,]<sup>36</sup> the loss of, or the damage to [or in connection with]<sup>37</sup> the goods resulted from a personal<sup>38</sup> 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.”

## H. Notice of loss, damage or delay (draft article 20)

9. The Working Group considered draft article 20 at paragraphs 63 to 87 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 20 would read as follows:

“Article 20. Notice of loss, damage, or delay

“[Variant A of paragraph 1<sup>39</sup>

“1. The carrier shall be presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice<sup>40</sup> of loss of or damage to [or in connection with]<sup>41</sup> the goods, indicating the general nature of such loss or damage, shall have been given [by or on behalf of the consignee] 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][seven days][seven working days at the place of delivery][seven consecutive days]<sup>42</sup> after the delivery of the goods. Such a notice is not required in

<sup>33</sup> As noted at para. 62 of A/CN.9/552, the reference to “article 15 (3) and (4)” was updated to read “article 14 bis”.

<sup>34</sup> As decided at paras. 55 and 62 of A/CN.9/552, the suggestion to add a reference to article 17 might need to be further discussed in the context of chapter 19.

<sup>35</sup> As decided at paras. 56, 57 and 62 of A/CN.9/552, the words “[or as provided in the contract of carriage,]” were maintained in square brackets pending further discussion on chapter 19.

<sup>36</sup> As decided at paras. 54 and 62 of A/CN.9/552, the issue of delay should be further discussed on the basis of a revised draft to be prepared by the Secretariat to reflect the proposals with respect to draft paragraph 16(1) at paras. 20 to 24 of A/CN.9/552, and at para. 3, *supra*.

<sup>37</sup> See *supra*, note 15.

<sup>38</sup> As decided at paras. 59, 60 and 62 of A/CN.9/552, the word “personal” was retained without square brackets.

<sup>39</sup> As decided at para. 75 of A/CN.9/552, the original text and the proposed redraft of para. 1, as suggested at para. 66 of A/CN.9/552, were placed in square brackets for future discussion. Variant A of para. 1 is the text in A/CN.9/WG.III/WP.32, but for the deletion of “[a reasonable time]” as decided at para. 75 of A/CN.9/552, and with the additions as noted.

<sup>40</sup> Draft article 5 of the draft instrument states that the notice in, *inter alia*, draft para. 1 may be made using electronic communication; otherwise, it must be made in writing.

<sup>41</sup> See *supra*, note 15.

<sup>42</sup> As decided at para. 75 of A/CN.9/552, the words “a reasonable time” were deleted from the original version of paragraph 1, and “seven days” was inserted into that para., with the words “seven consecutive days” and “seven working days” appearing as alternatives in square brackets.



respect of loss or damage that is ascertained in a joint inspection<sup>43</sup> of the goods by the consignee and the carrier or the performing party against whom liability is being asserted.]

“[Variant B of paragraph 1<sup>44</sup>

“1. Notice of loss of or damage to [or in connection with] the goods, indicating the general nature of such loss or damage, shall be given [by or on behalf of the consignee] 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] [a reasonable time] [\_\_\_working days at the place of delivery] [\_\_\_consecutive days] after the delivery of the goods. [A court [may] [shall] consider the failure to give such notice in deciding whether the claimant has carried its burden of proof under article 14 (1).] 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.]

“2. No compensation shall be payable under article 16 unless notice of loss due to delay<sup>45</sup> was given to the carrier<sup>46</sup> within 21 consecutive days following delivery of the goods.

“3. When the notice referred to in this article<sup>47</sup> is given to the performing party that delivered the goods, it shall have the same effect as if that notice was given to the carrier, and notice given to the carrier shall have the same effect as a notice given to a maritime performing party.<sup>48</sup>

“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 and must provide access to records and documents relevant to the carriage of the goods.”<sup>49</sup>

## I. Non-contractual claims (draft article 21)

10. The Working Group considered draft article 21 at paragraphs 88 to 91 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 21 would read as follows:

<sup>43</sup> It was suggested in para. 95 of A/CN.9/525 that “concurrent inspection” or “*inspection contradictoire*” might be more appropriated phrases in a civil law context.

<sup>44</sup> As decided at para. 75 of A/CN.9/552, the original text and the proposed redraft of para. 1, as suggested at para. 66 of A/CN.9/552, were placed in square brackets for future discussion. Variant B of para. 1 is the text at para. 66 of A/CN.9/552.

<sup>45</sup> As decided at paras. 77 and 81 of A/CN.9/552, the phrase “loss due to delay” was substituted for the phrase “such loss”.

<sup>46</sup> As decided at paras. 78 and 81 of A/CN.9/552, the phrase “the person against whom liability is being asserted” was replaced by “the carrier”.

<sup>47</sup> As noted at para. 82 of A/CN.9/552, “in this chapter” was corrected to “in this article”.

<sup>48</sup> As decided at paras. 83 and 84 of A/CN.9/552, a revised draft of this paragraph has been prepared and the phrase “the performing party that delivered the goods” has been changed to “a maritime performing party.”

<sup>49</sup> As decided at para. 87 of A/CN.9/552, para. 4 has been maintained, with the word “[for]” deleted and the phrase “must provide” maintained, without square brackets.

“Article 21 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 maritime<sup>50</sup> performing party for loss of, for damage to, [or in connection with]<sup>51</sup> the goods covered by a contract of carriage and delay in delivery of such goods, whether the action is founded in contract, in tort, or otherwise.”<sup>52</sup>

## II. Chapter 6: Additional provisions relating to carriage by sea

### A. Liability of the carrier (draft article 22)

11. The Working Group considered draft article 22 at paragraphs 92 to 99 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised versions of the subparagraphs of draft article 22 would be subsumed back into article 14 and would read as follows:

“Article 22<sup>53</sup>

“1. Notwithstanding the provisions of article 14(1) the carrier shall not be liable for loss, damage or delay arising or resulting from fire on the ship, unless caused by the fault or privity of the carrier.”<sup>54</sup>

“2. Article 14 shall also apply in the case of the following events:

“(a) Saving or attempting to save life or reasonable measures to save or attempt to save property at sea;”<sup>55</sup>

“(b) Reasonable attempts to avoid damage to the environment;”<sup>56</sup>

“(c) Perils, dangers and accidents of the sea or other navigable waters.”<sup>57</sup>

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<sup>50</sup> As decided at paras. 89 and 91 of A/CN.9/552, the word “maritime” was added.

<sup>51</sup> See *supra*, note 15.

<sup>52</sup> As decided at paras. 90 and 91 of A/CN.9/552, the potentially repetitious nature of para. 15(4) and draft article 21 will be further considered in the next iteration of the draft instrument.

<sup>53</sup> As decided at paras. 93 and 99 of A/CN.9/552, a revised draft merging draft article 22 with draft article 14 will be prepared following further discussion of draft article 14 anticipated during the fourteenth session of the Working Group.

<sup>54</sup> As decided at paras. 94, 95 and 99 of A/CN.9/552, the fire exception has been maintained and will be further considered in the context of draft article 14.

<sup>55</sup> As decided at paras. 96 and 99 of A/CN.9/552, the words “saving or attempting to save property at sea” were replaced by the words “reasonable measures to save or attempt to save property at sea”.

<sup>56</sup> As decided at paras. 97 and 99 of A/CN.9/552, the phrase, “reasonable attempt to avoid damage to the environment” has been introduced.

<sup>57</sup> As noted at para. 98 of A/CN.9/552, there was general agreement with the rule on “perils, dangers and accidents of the sea or other navigable waters”.

## B. Deviation (draft article 23)

12. The Working Group considered draft article 23 at paragraphs 100 to 102 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 23 would read as follows:

“Article 23. Deviation<sup>58</sup>

“[Variant A<sup>59</sup>

“1. 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].

“2. Where under national law a deviation of itself constitutes a breach of the carrier’s obligations, such breach only has effect consistently with this instrument.<sup>60]</sup>”

“[Variant B<sup>61</sup>

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

“2. To the extent that a deviation constitutes a breach of the carrier’s obligations under a legal doctrine recognized by national law or in this instrument, that doctrine applies only when there has been an unreasonable deviation with respect to the routing of an ocean-going vessel.

“3. To the extent that a deviation constitutes a breach of the carrier’s obligations, the breach has effect only under the terms of this instrument. In particular, a deviation does not deprive the carrier of its rights under this instrument except to the extent provided in article 19.]”

## C. Deck cargo (draft article 24)

13. The Working Group considered draft article 24 at paragraphs 103 to 117 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 24 would read as follows:

<sup>58</sup> As decided at para. 102 of A/CN.9/552, the text of draft article 23 as set out at A/CN.9/WG.III/WP.32 has been placed together with the alternative text proposed at para. 38 of A/CN.9/WG.III/WP.34 in square brackets for future discussion.

<sup>59</sup> Variant A is the draft article as set out at A/CN.9/WG.III/WP.32.

<sup>60</sup> As noted at footnote 112 of A/CN.9/WG.III/WP.32, alternative language for this para. could read: “Where under national law a deviation of itself constitutes a breach of the carrier’s obligations, such breach would not deprive the carrier or a performing party of any defence or limitation of this instrument.” If such language is adopted, the Working Group may wish to consider whether para. 1 is necessary.

<sup>61</sup> Variant B is the draft article as proposed at para. 38 of A/CN.9/WG.III/WP.34.

“Article 24. Deck cargo

“1. Goods may be carried on or above deck only if

“(a) Such carriage is required by applicable laws or administrative rules or regulations, or

“(b) They are carried in or on containers [fitted to carry cargo on deck] on decks that are specially fitted to carry such containers, or

“(c) [In cases not covered by paragraphs (a) or (b) 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.

“2. If the goods have been shipped in accordance with paragraphs 1(a) or<sup>62</sup> (c), the carrier shall not be 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 paragraph 1(b), the carrier shall be 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 paragraph 1, the carrier shall be liable, irrespective of article 14, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.<sup>63</sup>

“3. If the goods have been shipped in accordance with paragraph 1(c), the fact that particular goods are carried on deck must be included in the contract particulars. Failing this, the carrier shall have the burden of proving that carriage on deck complies with paragraph 1(c) 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.<sup>64</sup>

“[4. If the carrier under this article 24 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 16 and 18; however, if the carrier and shipper [expressly]<sup>65</sup> 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]<sup>66</sup> resulted from their carriage on deck]<sup>67</sup>.]”<sup>68</sup>

<sup>62</sup> As decided at paras. 107 and 109 of A/CN.9/552, “or” has replaced “and”.

<sup>63</sup> As decided at paras. 108 and 109 of A/CN.9/552, para. 2 will be discussed in greater detail in conjunction with draft para. 14 (4).

<sup>64</sup> As decided at paras. 110 and 111 of A/CN.9/552, discussion of para. 3 and whether it should cover third-party reliance on non-negotiable transport documents and electronic records would continue after discussion of third-party rights and freedom of contract.

<sup>65</sup> As decided at paras. 112 and 117 of A/CN.9/552, “expressly” was retained in square brackets.

<sup>66</sup> As decided at paras. 115 and 117 of A/CN.9/552, square brackets were placed around “exclusively”.

<sup>67</sup> As decided at paras. 113-114 and 117 of A/CN.9/552, square brackets were placed around “that exclusively resulted from their carriage on deck”.

<sup>68</sup> As decided at paras. 116 and 117 of A/CN.9/552, square brackets were placed around para. 4, for discussion at a future session, with further study of its relationship with draft article 19.

### III. Chapter 7: Obligations of the shipper<sup>69</sup>

#### A. Delivery ready for carriage (draft article 25)

14. The Working Group considered draft article 25 at paragraphs 118 to 123 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 25 would read as follows:

“Article 25. Delivery ready for carriage

“The shipper shall deliver the goods ready for carriage, unless otherwise agreed in the contract of carriage, and<sup>70</sup> in such condition that they will withstand the intended carriage, including their loading, handling, stowage, lashing and securing, and 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, handling and discharge of the container or trailer, and that they will not cause injury or damage.”<sup>71</sup>

#### B. Carrier’s obligation to provide information and instructions (draft article 26)

15. The Working Group considered draft article 26 at paragraphs 124 to 129 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 26 would read as follows:

“Article 26. Carrier’s obligation to provide information  
and instructions

“The carrier shall provide to the shipper, on its request [and in a timely manner]<sup>72</sup>, such information as is within the carrier’s knowledge and instructions that are reasonably necessary or of importance to the shipper in order to comply with

<sup>69</sup> As decided at para. 129 of A/CN.9/552, titles have been proposed for the draft articles in chapter 7.

<sup>70</sup> As decided at paras. 119, 120 and 123 of A/CN.9/552, draft article 25 was retained, and the principle that the obligations of the shipper should be subject to the contract of carriage was maintained, but the brackets deleted. To clarify as suggested in para. 119 of A/CN.9/552, the opening phrase, “[Subject to the provisions of the contract of carriage,]” has been deleted, and the phrase “, unless otherwise agreed in the contract of carriage, and” has been added.

<sup>71</sup> To improve the wording as suggested at paras. 122 and 123 of A/CN.9/552, the Working Group may wish to consider alternative language for the second sentence of draft article 25: “In the event the goods are delivered in or on a container or trailer packed by the shipper, this obligation extends to the stowage, lashing and securing of the goods in or on the container or trailer.”

<sup>72</sup> As decided at paras. 135 to 137 of A/CN.9/552, draft article 28 was deleted and replaced by a mention in draft article 26 that the shipper should provide “[in a timely manner]” the information and instructions required, for continuation of the discussion after draft articles 29 and 30 had been considered.

its obligations under article 25.<sup>73</sup> [The information and instructions so provided shall be accurate and complete.]”<sup>74</sup>

### C. Shipper’s obligation to provide information, instructions and documents (draft article 27)

16. The Working Group considered draft article 27 at paragraphs 130 to 133 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 27 would read as follows:

“Article 27. Shipper’s obligation to provide information,  
instructions and documents

“The shipper shall provide to the carrier [in a timely manner, such accurate and complete]<sup>75</sup> information, instructions, and documents as are reasonably necessary for:

“(a) The handling and carriage of the goods, including precautions to be taken by the carrier or a performing party, unless the shipper may reasonably assume that such information is already known to the carrier<sup>76</sup>;

“(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;

“(c) The compilation of the contract particulars and the issuance of the transport documents or electronic records, including the particulars referred to in article 34(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.”

### D. Draft article 28

17. The Working Group considered draft article 28 at paragraphs 134 to 137 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, it was agreed that draft article 28 would be deleted and the phrases noted in draft articles 26 and 27 in paragraph 16 above would be added in lieu of retaining draft article 28.

<sup>73</sup> As decided at paras. 127 to 129 of A/CN.9/552, further consideration might need to be given to the alternative wording at para. 128 of A/CN.9/552, “unless the carrier may reasonably assume that such information is already known to the shipper”.

<sup>74</sup> As decided at paras. 135 to 137 of A/CN.9/552, “[the information and instructions given must be accurate and complete]” has been added for future discussion. See *supra* note 72.

<sup>75</sup> As decided at paras. 135 to 137 of A/CN.9/552, “[in a timely manner, such accurate and complete information, instructions and documents ...]” has been added for future discussion. See *supra* note 72.

<sup>76</sup> As decided at paras. 132 and 133 of A/CN.9/552, the current text was maintained for future discussion, but “unless the shipper may reasonably assume that such information is already known to the carrier” was added to the end of subpara. (a).

## E. Basis of shipper's liability (draft article 29 and 30) and Carrier's liability for failure to provide information and instructions (draft article 13 bis)

18. The Working Group considered draft articles 29 and 30 at paragraphs 138 to 148 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, including consideration of the proposal to replace draft articles 29 and 30 with a single draft article as set out at paragraph 139 of A/CN.9/552, the provisional revised version of the draft articles 29 and 30 could read as follows:

### “Article 29. Basis of shipper's liability

“1. The shipper shall be liable<sup>77</sup> for loss resulting from loss, damage [, delay]<sup>78</sup> or injury caused by the goods, and from a breach of its obligations under article 25 and paragraph 27(a)<sup>79</sup>, unless [and to the extent] the shipper proves that neither its fault nor the fault of any person mentioned in article 32 caused [or contributed to] the loss, damage [, delay] or injury.

[Variant A of paragraph 2<sup>80</sup>

“2. The shipper shall be liable<sup>81</sup> for loss or damage caused by a breach of its obligations under paragraphs 27(b) and (c).]

[Variant B of paragraph 2<sup>82</sup>

“2. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of receipt by the carrier 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 under the contract of carriage to any person other than the shipper.]

“3. When loss or damage [or injury] is caused jointly by the failure of the shipper and of the carrier to comply with their respective obligations, the shipper and the carrier shall be jointly liable to the consignee or the controlling party<sup>83</sup> for any such loss or damage [or injury].<sup>84</sup>

<sup>77</sup> As decided at para. 144 of A/CN.9/552, para. 29(1) has been redrafted to mirror the provision on carrier's liability at draft para. 14(1) of A/CN.9/WG.III/WP.36. The parties to whom the shipper is liable have been deleted in keeping with draft article 14 and, as noted at para. 144 of A/CN.9/552, the issue of liability to the consignee and the controlling party as originally expressed in draft article 29 in A/CN.9/WG.III/WP.32 might need to be reconsidered later.

<sup>78</sup> “Delay” arises by virtue of creating a mirror provision of draft article 14, but it has been placed in square brackets since it has not been specifically discussed in the context of draft article 29.

<sup>79</sup> Reference to article 28 has been deleted, in keeping with the deletion of article 28 at para. 17, *supra*.

<sup>80</sup> As decided at paras. 142 and 148 of A/CN.9/552, a rule of strict liability was retained in square brackets in cases where the shipper failed to meet the requirements of subparas. (b) and (c) of draft article 27.

<sup>81</sup> See *supra* note 77.

<sup>82</sup> As decided at paras. 142 and 148 of A/CN.9/552, a provision similar to article III.5 of the Hague Rules should have been introduced in square brackets.

<sup>83</sup> As noted at para. 144 of A/CN.9/552, the issue of liability to the consignee and the controlling

“Article 13 bis. Carrier’s liability for failure to provide information and instructions<sup>85</sup>

“The carrier shall be liable<sup>86</sup> for loss, damage [, delay]<sup>87</sup> or injury caused by a breach of its obligations under article 26, unless [and to the extent] the carrier proves that neither its fault nor the fault of any person mentioned in article 14 bis caused [or contributed to] the loss, damage [, delay] or injury.”

## F. Special rules on dangerous goods (new draft article 30)

19. The Working Group considered the issue of dangerous goods at paragraphs 146 to 148 of A/CN.9/552, and decided that a specific provision should be inserted in the draft instrument to deal with the issue of dangerous goods based on the principle of strict liability of the shipper for insufficient or defective information regarding the nature of the goods. A provisional draft article on dangerous goods could read as follows:

“Article 30. Special rules on dangerous goods<sup>88</sup>

“1. ‘Dangerous goods’<sup>89</sup> means:

“(a) any substances, materials and articles carried on board a ship as cargo, referred to in (i) to (vii) below:

“(i) oils carried in bulk listed in appendix I of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended;

party might need to be reconsidered later.

<sup>84</sup> As decided at paras. 145 and 148 of A/CN.9/552, para. 3 of Variant B of draft article 29 (A/CN.9/WG.III/WP.32) was retained for future discussion. The Working Group may wish to consider whether this provision on concurrent causes should also mirror the corresponding para. in draft article 14.

<sup>85</sup> As decided at paras. 140 and 148 of A/CN.9/552, aspects of draft articles 29 and 30 dealing with the liability of the carrier have been called “article 13 bis”, for possible placement after draft article 13, at the end of draft “Chapter 4. Obligations of the carrier”.

<sup>86</sup> See *supra* note 77.

<sup>87</sup> See *supra* note 78, but in the context of draft article 26.

<sup>88</sup> The Working Group may wish to note that draft paras. 30(2) to (5), taken from article 13 of the Hamburg Rules, overlap and may not be consistent with draft articles 27 and 29 regarding the shipper’s obligations and liability with respect to the provision of information regarding the handling and carriage of goods, and with draft articles 12 and 14 regarding the carrier’s rights and liabilities in respect of goods which may become a danger.

<sup>89</sup> This definition is that of “hazardous and noxious substances” taken from the International Convention On Liability And Compensation For Damage In Connection With The Carriage Of Hazardous And Noxious Substances By Sea, 1996, (“HNS Convention”). The Working Group may wish to consider whether this is an appropriate definition of ‘dangerous goods’, and, if so, whether subpara. 1(b) with respect to residues is relevant. For the further information of the Working Group, amendments made in May 2002 to the International Convention for the Safety of Life at Sea (SOLAS), 1974 Chapter VII on the Carriage of Dangerous Goods made the International Maritime Dangerous Goods Code referred to in subpara 1(iv) mandatory from 1 January 2004 (a few non-relevant provisions remained recommendatory). Also, the Working Group may wish to consider the placement of this definition, and whether it should be moved under draft article 1 “Definitions”.



“(ii) noxious liquid substances carried in bulk referred to in appendix II of Annex II to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended, and those substances and mixtures provisionally categorized as falling in pollution category A, B, C or D in accordance with regulation 3(4) of the said Annex II;

“(iii) dangerous liquid substances carried in bulk listed in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, 1983, as amended, and the dangerous products for which the preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.3 of the Code;

“(iv) dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code, as amended;

“(v) liquefied gases as listed in chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, 1983, as amended, and the products for which preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.6 of the Code;

“(vi) liquid substances carried in bulk with a flashpoint not exceeding 60°C (measured by a closed cup test);

“(vii) solid bulk materials possessing chemical hazards covered by appendix B of the Code of Safe Practice for Solid Bulk Cargoes, as amended, to the extent that these substances are also subject to the provisions of the International Maritime Dangerous Goods Code when carried in packaged form;

and

“(b) Residues from the previous carriage in bulk of substances referred to in (a)(i) to (iii) and (v) to (vii) above.

“2. The shipper must mark or label in a suitable manner dangerous goods as dangerous.

“3. Where the shipper hands over dangerous goods to the carrier or performing party, 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 performing party does not otherwise have knowledge of their dangerous character:

“(a) The shipper is liable to the carrier and any performing party 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.

“4. The provisions of paragraph 3 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.

“5. If, in cases where the provisions of paragraph 3, 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 14.”

### **G. Material misstatement by shipper (draft article 29 bis)**

20. The Working Group considered the inclusion of a draft article 29 bis in the draft instrument (A/CN.9/WG.III/WP.34, para. 43) at paragraphs 149 to 153 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional version of draft article 29 bis would read as follows:

[“Article 29 bis. Material misstatement by shipper

“A carrier is not liable for delay in the delivery of, the loss of, or damage to or in connection with the goods if the nature or value of the goods was knowingly and materially misstated by the shipper in the contract of carriage or a transport document.”]<sup>90</sup>

### **H. Assumption of shipper’s rights and obligations (draft article 31)**

21. The Working Group considered draft article 31 at paragraphs 154 to 158 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 31 would read as follows:

“Article 31. Assumption of shipper’s rights  
and obligations<sup>91</sup>

“If a person identified as “shipper” in the contract particulars, although not the shipper as defined in article 1(d), [accepts] [receives]<sup>92</sup> the transport document or electronic record, then such person is (a) [subject to the responsibilities and liabilities]<sup>93</sup> imposed on the shipper under this chapter and under article 57, and (b) entitled to the shipper’s rights and immunities provided by this chapter and by chapter 13.”

<sup>90</sup> As decided at paras. 150 to 153 of A/CN.9/552, draft article 29 bis has been included in square brackets, and issues of causation and inclusion of damages for delay would be discussed at a future session. Further, draft article 29 bis could be placed in chapter 5 on the liability of the carrier.

<sup>91</sup> As decided at paras. 155 and 158 of A/CN.9/552, further thought should be given to the scope of the provision, and whether it should only be a default rule where the identity of the contractual shipper was not known.

<sup>92</sup> As decided at paras. 157 and 158 of A/CN.9/552, “accepts” has been placed in square brackets for future discussion, together with “receives”.

<sup>93</sup> As decided at paras. 156 and 158 of A/CN.9/552, “subject to the responsibilities and liabilities” has been placed in square brackets.

## I. Responsibility for subcontractors, employees and agents (draft article 32)

22. The Working Group considered draft article 32 at paragraphs 159 to 161 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft article 32 would read as follows:

“Article 32. Responsibility for sub-contractors,  
employees and agents

“The shipper shall be 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.”<sup>94</sup>

## IV. Chapter 9: Freight

23. The Working Group considered draft chapter 9 at paragraphs 162 to 164 of A/CN.9/552. Following the discussion of the Working Group at its thirteenth session, the provisional revised version of draft chapter 9,<sup>95</sup> for placement at an appropriate location in the next iteration of the draft instrument, and subject to renumbering, would read as follows:

“[Article 43.

“2. 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:

“(a) With respect to any liability under chapter 7 of the shipper or a person mentioned in article 31; or

“(b) With respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security pursuant to article 45 or otherwise for the payment of such amounts.

“(c) To the extent that it conflicts with article 62.]”

[“Article 44.

“1. If the contract particulars in a negotiable transport document or a[n] negotiable electronic record contain the statement “freight prepaid” or a statement of a similar

<sup>94</sup> As decided at paras. 160 to 161 of A/CN.9/552, the current text was maintained for future discussion, and questions regarding the interaction of this provision with paragraph 11 (2) and draft article 29 bis should be considered at a future session.

<sup>95</sup> As decided at para. 164 of A/CN.9/552, chapter 9 was deleted, except for draft para. 43(2) and the first two sentences of draft para. 44(1) in A/CN.9/WG.III/WP.32.

nature, then neither the holder nor the consignee, shall be liable for the payment of the freight. This provision shall not apply if the holder or the consignee is also the shipper.”]

**C. Preparation of a draft instrument on the carriage  
of goods [wholly or partly] [by sea] - Comments from  
Denmark, Finland, Norway and Sweden (the Nordic countries)  
on the freedom of contract, submitted to the Working Group  
on Transport Law at its fourteenth session  
(A/CN.9/WG.III/WP.40) [Original: English]**

On 27 September 2004 the Secretariat received comments from Denmark, Finland, Norway and Sweden (the Nordic countries). Those comments are reproduced in annex I in the form in which they were received by the Secretariat.

**ANNEX I**

**COMMENTS FROM DENMARK, FINLAND, NORWAY AND SWEDEN (THE  
NORDIC COUNTRIES) ON THE FREEDOM OF CONTRACT**

**I. Background**

1. The question of freedom of contract was debated at the 12th session of Working Group III in 2003 and in a round table meeting in London in February 2004. The representatives of Denmark, Finland, Norway and Sweden have since continued the discussions of the issue based on the discussions at the round-table meeting and the UNCITRAL Secretariat's provisional redraft presented in document WP.36.
2. The Nordic countries have similar Maritime Codes enacted in 1994. The provisions of carriage of goods by sea in the Nordic Maritime Codes are based on the Hague-Visby Rules, which the Nordic countries have ratified (including the 1979 Protocol). The Nordic countries have not ratified the Hamburg Rules, 1978, but they have on a national basis taken into consideration those rules in the Maritime Codes to the extent that they are not in conflict with the Hague-Visby Rules.
3. With a view to assisting in the preparation of the Draft Instrument, the Nordic countries have, in the following, outlined preferred solutions regarding the issue of freedom of contract for the present debate, pending further developments with regard to the issue. The envisaged changes to the draft text of article 2 of the Instrument, as contained in WP.36, are highlighted in appendix A.

**II. Definition of contract of carriage**

4. The UNCITRAL Secretariat's provisional redraft WP.36 includes in article 1(a) a definition of "contract of carriage" with an alternative formulation in footnote 14. Leaving aside the multimodal aspects of the Instrument at present, the Instrument's understanding of a contract of carriage is quite extensive and thus creates possibilities to include a number of different contractual situations in the Instrument, notwithstanding how possible exclusions are separately defined. The first part of the text presented in WP. 36 is not far

from the definition included in the Hamburg Rules. The differences are merely due to the envisaged door-to-door setting of the Instrument. The Hague-Visby Rules also have an extensive starting point, be it that a bill of lading is required as a document in order for the Rules to become applicable.

5. In the previous discussions, including the round-table meeting, efforts have been made to specify the definition of what contractual situations would fall under the Scope of the Instrument. The different approaches can be described as the “contractual approach”, the “documentary approach” and the “trade approach”. Simultaneously, there has been no real suggestion that exclusions would not be included in the Instrument. This would mean that there might be provisions both with specifications on inclusions and specifications on exclusions.

6. Different proposals were drafted in the round table meeting, which all had merits and were based on serious efforts to make it clear what falls under the Instrument and what does not. However, in a careful analysis afterwards, the Nordic countries drew the conclusion that none of the proposals would provide for a satisfactory solution as a text in a Convention, which on a global level should take into account the different legal regimes. It was therefore felt that an uncomplicated and workable approach on a global level would be to accept the fairly extensive inclusive definition as formulated in the UNCITRAL secretariat’s provisional redraft WP.36. The Nordic countries, in coordination with most other views expressed, aim to maintain the scope of freedom of contract basically on the same lines as now with some new specifications. The redraft is considered to largely reflect the approaches in both the Hague-Visby Rules and the Hamburg Rules. The issuance of a bill of lading is, however, not relevant.

7. *The Nordic countries support the text presented in the Secretariat’s redraft in WP.36.*

### III. Exclusions

8. As the inclusive approach is fairly general by nature, with no bill of lading necessary for application of the Instrument, it becomes important to concentrate on the exclusions. This is also relevant in view of the fact that there is no specific reason to have far-reaching specifications in the inclusive definition if the exclusions are clear enough.

9. With the development of transport logistics and new contractual arrangements due to practical and commercial needs, the traditional exclusion of charter parties from the scope of mandatory liability regimes does not suffice. It is necessary to express in the Instrument what other situations would be excluded from the Instrument, and thus, at least internationally, fall under freedom of contract. It is therefore in the light of this development considered necessary that in addition to the starting point of maintaining the present exclusion to enumerate other situations than charter parties as excluded from the scope of application of the Instrument. It is considered that the UNCITRAL secretariat’s provisional redraft WP.36 also at this point presents a workable solution on a global level.

10. The exclusions as mentioned in the Instrument are not combined with definitions. There has previously been international debate on introducing definitions also as far as at least certain parts of the exclusions are concerned. Further definitions would, however, run the risk of making the Instrument unmanageable. A strong argument is that the exclusions are commercially familiar phenomena, and disputes would therefore be rare on which

contractual situations are within the scope of application of the Instrument and which are not. Should problems arise, courts and arbitrators would have to provide clarifications. The grey zone would not be unreasonably problematic. Such zones always exist, also if further definitions on exclusions would be included.

11. The above-mentioned inclusive definition and the exclusions are much in line with present regimes. Any changes in familiar structures would run the risk that the Instrument would be interpreted differently than previous regimes, even if this would not in all respects be intended.

12. With the above-mentioned inclusive definition and considering the exclusions, the fact remains that liner operations where general cargo is carried would automatically fall under the Instrument, as intended and chartering and similar situations outside, as intended.

13. The issuance of a bill of lading (or a similar “document of title”) is not required for the application of the mandatory provisions in cargo claims under the Instrument as between the carrier and the shipper. This solution reflects the development in the commercial market and is strongly supported.

14. *The Nordic countries support that article 2 paragraph 3 should be included in the Instrument without the existing brackets. The Instrument would thus not apply to charter parties, contracts of affreightment, volume contracts, or similar agreements. (The issue of OLSAs is dealt with in section 4.)*

15. *Article 2 paragraph 5 as it stands is also acceptable.*

## V. Ocean liner service agreement (OLSA)

16. The proposal by the United States included in UNCITRAL WP.34 deals with OLSAs separately from the above-mentioned basic concepts. OLSAs, as further defined, would, according to the proposal, be regulated by the Instrument, but on a non-mandatory basis. OLSAs are in other words not excluded, but they may under certain conditions be excluded if the contracting parties wish to do so.

17. From the explanations given it seems that the concept of OLSA is increasingly growing in importance and the concept therefore deserves attention in the discussion of the Draft Instrument.

18. One of the main aims of the mandatory rules is to protect the cargo side from unfair conditions of carriage. Such a potential imbalance is, or at least has been, prevalent in many practical situations in liner operations. Also, an international mandatory liability regime enhances international predictability. On the other hand, not all situations in liner services and carriage of general cargo need to be potentially unbalanced. If there are undoubted situations in general terms where the parties can genuinely freely negotiate the conditions of carriage, there does not seem to be a fundamental necessity of applying mandatory law.

19. The Nordic countries are prepared to continue to work on a solution to the American *idea* of the non-mandatory approach to OLSAs, but with certain reservations. It is of utmost importance that the definition of an OLSA is clear in order to avoid any misunderstandings. The definition of OLSAs as it stands in the proposal included in WP.34 must still be developed. For example, the definition in subparagraph (a) includes

“meaningful service commitment”. Even if a specification is included in subparagraph (b), the concept remains unclear and creates doubts of application.

20. Also, volume contracts, which are excluded, might be understood to be covered at least partly by the definition of OLSAs. The Nordic Maritime Codes, for example, relate volume contracts (quantity contracts) to carriage on board ship of a definite quantity of goods divided into several voyages during a provided period. This framework contract is under freedom of contract, but for individual voyages the provisions on carriage of general cargo or those of voyage chartering apply, as the case may be. As an OLSA would be a very specified contract situation it might be accepted that the provisions of OLSAs would prevail over those on volume (quantity) contracts. A similar question might arise as far as consecutive voyages are concerned. In that case there is the same solution as for OLSAs.

21. Technically, the provisions of OLSAs in the Instrument should be included in a separate article where it is also stated that the OLSA provisions prevail over the provisions of volume contracts and, if necessary, those of consecutive voyages. Possible consequential clarifications to article 2 paragraphs 3 and 4 should be made.

22. While the basic concepts (inclusions and exclusions) from a Nordic point of view will not change from what is familiar already, the OLSA non-mandatory regulation will create a change in the liability regime, as certain liner operations, which have been under mandatory rules, will be under freedom of contract. Such a change requires careful consideration in the future preparations.

## **V. The position of a third party**

23. Both under the Hague-Visby Rules and under the Hamburg Rules the third party is under certain circumstances under the protection of mandatory law in spite of the original contractual situation being excluded from the scope of the mandatory liability regime. A precondition for the mandatory protection for the third party, for example, a consignee not being the charterer, is to possess a bill of lading.

24. The UNCITRAL secretariat’s provisional redraft WP.36 regulates the position of the third party in article 2 paragraph 4. A requirement for protection is the issuance of a negotiable transport document or a negotiable electronic record.

25. The Nordic countries see no reason to change the basic concept in law as far as this third party is concerned. Consequently, the mandatory protection must prevail. The third party is protected in spite of what kind of basic contract was concluded. Thus the position of the third party should not be changed depending on the original arrangements. For example, a volume contract or an OLSA would not hinder the application of the mandatory liability regime in relation to the third party. Consequently, the brackets in the UNCITRAL secretariat’s provisional redraft article 2 paragraph 4 can be removed, and explicit references made, not only to charter parties, but also to contracts of affreightment, volume contracts, and similar agreements. The open question is, on what basis will the third party be mandatorily protected. The Nordic countries have discussed the Instrument’s present approach and the possible inclusion of sea waybills, even if this document would be non-negotiable. It was felt that the third party’s position in relation to non-negotiable sea waybills is in need of further discussions.



## **VI. Multimodal aspects**

26. Freedom of contract might have a multimodal angle, but this has not been addressed in this document.

## **VII. Summary**

27. The common Nordic position is that

(a) the UNCITRAL secretariat's provisional redraft WP.36, article 1 (a), is supported (not footnote 14),

(b) the exclusions from the Instrument of contract situations mentioned in WP.36, article 2 subparagraph 3 are acceptable without the brackets and without further definitions,

(c) the work on the inclusion of OLSAs in the Instrument on a non-mandatory basis could continue with a special emphasis on clarifying the definition as such and also the relation to volume contracts and consecutive voyages,

(d) a third party, not being the charterer, must, in spite of what the basic contract between the shipper and the carrier is, be protected by the mandatory liability regime included in the Instrument at least when the relation between the carrier and the third party is regulated by a negotiable transport document or a negotiable electronic record, but possibly also in view of sea waybills which are non-negotiable.

28. Multimodal aspects might cause further adjustments. Also, different details might cause certain adjustments in the present wordings, but the basic concepts are found in this summary under (a) to (d) inclusive.

## APPENDIX A

### “Article 1. Definitions

“For the purpose of this instrument:

“(a) Contract of carriage means a contract under which a carrier against payment of freight undertakes to carry goods by sea from a place in one State to a place in another State; such contract may also include an undertaking by such carrier to carry the goods by other modes prior to or after the carriage by sea.

### “Article 2. Scope of application

Paragraphs 1, 1bis and 2 as in WP 36.

“3. This instrument does not apply to charter parties, contracts of affreightment, volume contracts, or similar agreements [with the exception of agreements referred to in article 2bis].

“4. Notwithstanding paragraph 3, if a negotiable transport document or a negotiable electronic record is issued pursuant to a charter party, contract of affreightment, volume contract, or similar agreement [such as an agreement referred to in article 2bis], 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 or other than the charterer. [Sea waybills?]

“5. If a contract provides for the future carriage of goods in a series of shipments, this instrument applies to each shipment to the extent that paragraphs 1, 2, 3 and 4 so specify, [with the exception of agreements referred to in article 2bis].”

### Article 2bis Maritime Liner Service Agreement (including OLSAs)

Article 2 bis would include specific provisions on OLSAs qualifying the concept and its relation to volume contracts and consecutive voyages.

**D. Preparation of a draft instrument on the carriage of goods  
[wholly or partly] [by sea] - Comments from the UNCTAD  
Secretariat, submitted to the Working Group  
on Transport Law at its fourteenth session  
(A/CN.9/WG.III/WP.41) [Original: English]**

On 21 September 2004 the Secretariat received comments by the United Nations Conference on Trade and Development. Those comments are reproduced in Annex I in the form in which they were received by the Secretariat.

**ANNEX I**

**COMMENTS FROM THE UNCTAD SECRETARIAT ON THE LIABILITY OF  
THE CARRIER UNDER ART. 14 OF THE DRAFT INSTRUMENT**

**Introductory remarks**

1. Art. 14 of the Draft Instrument deals with the liability of the carrier for loss, damage or delay of the cargo. That is to say, the provision establishes rules, including rules on burden of proof, that determine under which circumstances a carrier shall be liable for loss, damage or delay of the cargo and under which circumstances the carrier shall be exempt from such liability. Losses for which the carrier is not liable need to be absorbed by cargo interests. Therefore, Art. 14 plays a pivotal role in the overall scheme of liability regulation and risk allocation as between carrier and cargo interests under the Draft Instrument.
2. The text of Article 14 (originally Art. 6.1) has undergone several attempts at revision, with the latest version being reflected in WP. 36. Attempts have been made to further clarify the text, notably by the CMI at its annual conference in Vancouver, where an improved draft was prepared.
3. The following comments seek to facilitate the further discussions within the Working Group by highlighting some central considerations relevant to matters regulated in Article 14. These comments should be considered in context with the substantive comments submitted by the UNCTAD Secretariat in relation to the original Art. 6.1 (see WP. 21/Add.1, Annex II at paras. 55-64).

**I. Basis of liability and list of “excepted perils”**

4. Art. 14 (1) sets out a general rule on liability of the carrier. If it is seen necessary to supplement this general rule with a list of exceptions/perils/events (“excepted perils”) in Art. 14 (2), the content and wording of the listed “excepted perils” deserves careful consideration.
5. In the Hague-Visby Rules, a relevant list of exceptions is contained in Art. IV, r. 2 (a)-(q). Two of these exceptions, the so-called nautical fault and fire exceptions, contained in Art. IV, r. 2 (a) and (b), are available to the carrier in cases of negligence on the part of the carrier’s people. The other exceptions (Art. IV, r. 2 (c)-(q)) are subject to the

carrier's performance of his obligations and reflect circumstances where negligence of the carrier is not normally involved (such as events beyond the control of the carrier, acts or omissions of the shipper, defects in the goods or inherent vice).

6. Art. 14 (2) lists a number of "excepted perils" which, subject to some textual changes, correspond to Art. IV, r. 2 (c)-(q) of the Hague-Visby Rules. Whether a fire exception (and a currently deleted nautical fault exception) shall be included in the Draft Instrument, possibly in a separate provision, Art. 22, is still subject to discussion.<sup>1</sup>

7. Art. 14 (2) (h) and (i) set out some new exceptions to liability, which are not contained in the Hague-Visby Rules and therefore deserve particular attention. Art. 14 (2) (h) and (i) need to be considered in context with draft Arts. 11 (2) 12, 13 (2), the provisions which—if adopted—would provide the carrier with certain new rights. Pending a final decision on these provisions, Art. 14 (2) (h) and (i) would also need to be placed in square brackets.

### 1. Art. 14 (2) (h)

8. This provision is the corollary to Art. 11 (2), a provision in square brackets, where it is stated that parties may agree that certain of the carrier's obligations in relation to the care, handling and carriage of the cargo shall be performed by or on behalf of the shipper. As has been pointed out in comments by the UNCTAD Secretariat on the original provisions (Art. 5.2.2 and 6.1.3 (ix))<sup>2</sup>, this approach gives rise to concern in the context of contracts of adhesion, i.e. contracts on standard terms of the carrier, typically contained in a transport document and not subject to negotiation. In relation to these contracts, a carrier could, by way of including a clause in the transport document, decide unilaterally to delegate responsibility for the care of the cargo (e.g. loading, stowage and discharge) to the shipper/consignee. Furthermore, according to Art. 14 (2) (h), as drafted, the carrier would also be exempt from liability for cargo loss due to the negligence of his own agents and servants or of any performing parties in handling the goods "*on behalf of the shipper*".

### 2. Art. 14 (2) (i)

9. This "excepted peril" corresponds to rights of the carrier set out in Arts. 12 and 13 (2) (see WP. 32). Accordingly, when considering whether the carrier should be exempt from liability, as proposed in Art. 14 (2) (i), both these provisions need to be considered in context.

(a) According to **Art. 12, Variant A**, a carrier would be entitled to refuse to carry and, if necessary, destroy goods which "*reasonably appear likely ... to become, a danger to persons or property or an illegal or unacceptable danger to the environment*". The carrier's broad rights would arise "*notwithstanding*" Articles 10, 11 and 13 (1), i.e. notwithstanding the carrier's obligations in respect of carriage, care of cargo and seaworthiness of the vessel. Effectively this means that a carrier would not be liable even if negligently caused unseaworthiness of the vessel had given rise to the (potential) danger posed by the goods.

The rights of the carrier under this provision differ considerably from those under the Hague-Visby Rules, Art. IV, r. 6. As has already been pointed out in comments by the

<sup>1</sup> See WP. 36 at para. 9.

<sup>2</sup> See WP. 21/Add. 1, Annex II at paras. 49-50 and 61.

UNCTAD Secretariat on the original proposal (Art. 5.3<sup>3</sup>), several aspects of the draft provision give rise to concern. These include the degree of discretion afforded to the carrier, the fact that the carrier's rights shall not be subject to the carrier's compliance with his main obligations (in particular the seaworthiness obligation) and the absence of any safeguards against unreasonable claims or behaviour by the carrier in situations where dangerous goods are carried with the carrier's consent.

An alternative proposal, **Art. 12, Variant B**, is more closely modelled after the text of Art. IV, r. 6 of the Hague-Visby Rules, but also provides the carrier with rights "*notwithstanding*" its obligations under Arts. 10, 11 and 13 (1). Thus, in contrast to the Hague-Visby Rules, the carrier would be entitled to jettison dangerous cargo without compensation, even in cases where, for instance, the vessel was unseaworthy due to negligence of the carrier.

(b) **Art. 13 (2)**, a provision in square brackets, would provide a carrier with a broad statutory right to sacrifice goods. Such a right is not contained in the Hague-Visby Rules or any other maritime liability convention and it is not clear why a binding rule to this effect should be introduced into the set of mandatorily applicable liability rules contained in the Draft Instrument. It should be noted that the right to sacrifice of cargo would arise irrespective of the causes of the peril and "*notwithstanding*" the carrier's main obligations under the Draft Instrument (Arts. 10, 11 and 13 (1)). Thus, it would seem that even if a peril was due to other cargo transported on the same vessel or due to negligently caused unseaworthiness of the vessel, a carrier would still be entitled to jettison cargo without compensation.

## II. Allocation of the burden of proof and allocation of liability in cases of concurrent causes

10. Much of the discussion on the text of Art. 14 focuses on how to regulate the burden of proof and the allocation of liability in cases of concurrent causes. These issues are both important and complex.

### 1. The relevance of allocating the burden of proof

11. The legal burden of proof is a technical legal concept, which serves to determine the answer to an important practical question, namely: *if two parties argue, who needs to prove what?* In relation to any legal dispute this is a matter of great significance, which may affect the outcome of the dispute. This is particularly so in cases where evidence is difficult to obtain. The party bearing the burden of proof with regard to a particular issue or argument needs to provide relevant evidence. If it cannot do so, it will lose the argument and will have to accept defeat on the issue in question. Thus, whoever bears the burden of proof bears the risk associated with a lack of evidence.

12. The practical significance of allocating the burden of proof is well illustrated by a recent English decision on the liability of a warehousing company for loss of goods in its possession.<sup>4</sup> According to the relevant contract, the defendant warehousing company

<sup>3</sup> See WP. 21/Add. 1, Annex II at paras. 51-52.

<sup>4</sup> *Euro Cellular (Distribution) Plc. v. Danzas Ltd. T/A Danzas AEI Intercontinental and another* [2004] 1 Lloyd's Rep. 521. For present purposes it is immaterial that the decision does not relate to the carriage of goods.

would be liable only in cases of negligence. The central question for decision by the court was: which party should bear the burden of proof regarding negligence. *Did the claimants need to prove that the company had been negligent or did the defendant company need to prove that it had not been negligent?* The answer to this question was crucial to the outcome of the claim, as there was virtually no evidence on the causes of the loss. Thus, whoever would bear the burden of proof would have to bear the loss. In the event, the court decided that the burden of proof was on the defendant warehousing company, both for reasons of justice and of common sense: the company would be in a much better position to explain what had happened and, indeed, should be the party to provide an explanation. As the company was unable to disprove negligence, the court decided that it was liable for the loss claimed.

13. In relation to loss arising from the international carriage of goods by sea, evidence about the causes of a loss will often be difficult to obtain, particularly for the consignee or shipper of cargo, who may not have access to any of the relevant facts. Moreover, loss, damage or delay of cargo during transit are often due to a combination of factors and, in these cases, evidence about the extent to which different identified causes have contributed to a loss may be even more difficult to find. Against this background, it is clear that rules on the allocation of the burden of proof as between carrier and cargo interests are crucial to the overall allocation of risk as between the two parties.

## **2. The position under the Hague Rules, Hague-Visby Rules and Hamburg Rules**

14. Despite significant differences in the text, under the Hague and Hague-Visby Rules, as well as under the Hamburg Rules, once a cargo claimant has established a loss, the *burden of proof in relation to the causes of the loss* is on the carrier. This is generally recognized. In the absence of sufficient evidence about the cause(s) of a loss, the carrier will be responsible for the (whole) loss. The carrier is therefore generally liable in cases of unexplained losses. In cases where there is a *combination of causes*, the carrier is liable for the whole loss, unless it can prove the *extent to which a quantifiable proportion of the loss was solely due to a cause for which he is not responsible*.

## **3. Burden of proof and allocation of liability for loss due to concurrent causes in Art. 14 of the Draft Instrument**

15. While in relation to the final structure, content and text of Art. 14 a number of issues are still subject to debate, the revised text of Art. 14 (1)-(3) (WP. 36) suggest that the burden of proof relating to the *causes* of a loss shall be on the carrier. Accordingly, the carrier would bear the risk associated with a lack of evidence and would be liable in cases of unexplained losses. However, as parts of the revised text of Art. 14 (1)-(3) are still in square brackets, it is, at this stage, difficult to assess the overall effect of the proposed provisions, in particular in context with Art. 14 (4), the provision dealing with allocation of liability in cases where loss is due to a combination of causes (such as e.g. unseaworthiness and perils of the sea).

16. The draft text of Art. 14 (1)-(3) suggests, more or less explicitly (depending on whether some wording, currently in square brackets is included) that a carrier would also be required to prove *the extent* to which circumstances for which a carrier was not responsible had *contributed* to a loss. This would correspond to the approach adopted in the established maritime conventions, as set out above.

17. However, Art. 14 (4), which provides that liability shall be allocated on a proportionate basis, contains wording, in square brackets, which seems to reflect a different approach, namely one which corresponds in substance to the second alternative included in Art. 6.1.4. of the original Draft Instrument (WP. 21<sup>5</sup>).

18. The second sentence of Art. 14 (4) provides that liability may be apportioned on a 50/50 basis as between carrier and cargo interests in cases where a court is “unable to determine the actual apportionment”. This means that, in cases where evidence on the proportion of loss due to the different causes was insufficient to allow any assessment, the carrier would be liable only for 50 per cent of the loss. Therefore, in contrast to the Hague-Visby Rules and the Hamburg Rules, a carrier would *not* bear the burden of proving the extent to which a quantifiable proportion of a loss was due to causes for which the carrier was not responsible.

19. The practical consequences of this difference in approach would be significant. It needs to be borne in mind that a court can only decide—including on the apportioning of liability—on the basis of the evidence available to it, as adduced by the parties to a dispute. The question is how to deal with situations where evidence is not readily available to one or to both parties to a dispute. In this context, burden of proof serves to allocate risk as between the two parties. Under the Hague-Visby Rules, too, a court apportions liability according to the evidence before it. However, under the Hague-Visby Rules, as the carrier bears the burden of proof, he would be held liable for the entire loss (subject to a monetary cap) unless he could prove the *proportion* of loss not due to his fault. In contrast, under Art. 14 (4), as proposed, the situation would be markedly different. In the absence of sufficient evidence, a carrier’s maximum exposure would be limited to liability for 50 per cent of a loss (subject to a monetary cap). In practice, a carrier would, therefore, only have an incentive to adduce any relevant evidence if this would reduce his liability even further. Effectively, a cargo claimant would bear the risk associated with a lack of evidence.

20. It is not entirely clear how this approach is to be reconciled with the approach on burden of proof reflected in Art. 14 (1)-(3), referred to above. This in particular if wording currently contained in square brackets was adopted and the carrier would be required (explicitly) to also prove *the extent* to which circumstances for which the carrier was not responsible have *contributed* to a loss.

21. Thus, it appears that a central question, which remains for consideration of the Working Group, is whether in respect of loss due to concurrent/combined causes, the Draft Instrument should follow the approach in established maritime liability regimes or should adopt a new approach. *Effectively, the question is whether, in cases of insufficient evidence on the extent of contributory causes of a loss, a carrier should be liable for the whole loss (Hague-Visby Rules) or, alternatively, whether the carrier should be liable for 50 per cent of the loss only.*

22. It has been suggested that a new approach to burden of proof and allocation of liability may be justified, in particular in view of the fact that the so-called nautical fault exception, contained in Art. IV, r. 2 (a) of the Hague-Visby Rules, may not be available to a carrier under the Draft Instrument. It should be noted, however, that while the applicability of the nautical fault exception may affect the outcome of a cargo claim in some instances, (i.e. where negligence in the navigation or management of the ship causes

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<sup>5</sup> For relevant comments by the UNCTAD Secretariat on the provision, see WP. 21/Add.1, Annex II at para. 64.

or contributes to a loss), a change in approach to the general rule on allocation of liability as proposed in Art. 14 (4) could affect a much larger number of cargo claims, namely all cases in which negligently caused unseaworthiness of a vessel had contributed to a loss, but evidence on the relevant proportion was unavailable.

#### 4. Claims by the carrier against cargo interests

23. It should be emphasized that any decision on burden of proof and allocation of losses due to concurrent causes in the context of Art. 14 would only be relevant in relation to cargo claims, but not in relation to claims brought by the carrier against cargo interests for losses of the carrier, e.g. for damage to the vessel due to the carriage of dangerous cargo under Art. 30. At present, it is not clear how burden of proof and allocation of liability would be regulated in cases where both dangerous cargo and unseaworthiness of the vessel may have contributed to cause a loss *to* the carrier. Such losses *sustained by* the carrier may, in practice, be of significant proportion (e.g. loss of the vessel) and the question of burden of proof and allocation of liability would thus be of considerable interest to potentially liable cargo interests. Under the Hague-Visby Rules, it is clear, at least according to English law, that a carrier would not be able to claim an indemnity from the shipper (cf. Art. IV, r.6) unless he could disprove negligence in respect of the unseaworthiness (cf. Art. IV, r.1) or prove the extent to which a quantifiable proportion of the loss was solely due to the shipment of dangerous cargo, carried without the carrier's knowledge/consent.

24. At present, the Draft Instrument does not include a provision similar to Art. IV, r. 1 of the Hague-Visby Rules and it is therefore not clear whether the position under the Draft Instrument shall be the same as under the Hague-Visby Rules or whether a shipper, in order to defeat a claim by the carrier, would also need to prove that the unseaworthiness which had contributed to the loss was due to the carrier's negligence. The Working Group may wish to consider whether to include a separate provision on burden of proof (similar to Art. IV, r. 1 Hague-Visby Rules) in Article 13, the provision dealing with the carrier's seaworthiness obligation.



**E. Preparation of a draft instrument on the carriage of goods  
[wholly or partly] [by sea] - Proposal by the United States of  
America, submitted to the Working Group on Transport Law  
at its fourteenth session**

**(A/CN.9/WG.III/WP.42) [Original: English]**

In preparation for the fourteenth session of Working Group III (Transport Law), the Government of the United States of America, on 8 November 2004, submitted the text of a proposal modifying its original proposal on Ocean Liner Service Agreements, as contained in paragraph 29 of A/CN.9/WG.III/WP.34. The text of the modified proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

**ANNEX I**

**PROPOSAL BY THE UNITED STATES OF AMERICA**

1. In WP.34, the United States presented an overall proposal covering the key subjects that should be addressed in the draft instrument. Paragraph 29 of WP.34 proposes a definition of an Ocean Liner Service Agreement, i.e., a definition of the category of transactions that we believe should be presumptively covered by the draft instrument, but which should be allowed to derogate from the terms of the draft instrument under certain conditions.
2. Since WP.34 was distributed in August 2003, the United States has listened carefully to the comments we have received on the definition of an OLSA included in paragraph 29. These comments came from individual private sector interests in the United States, from other States, and from U.S. and international non-governmental organizations. One of the concerns expressed was that, due to a provision of U.S. shipping law, non-vessel operating common carriers (NVOCCs) in the U.S. trade would be unable to enter into an OLSA, as that term was defined in paragraph 29.
3. Another less substantive concern was that the draft instrument would be clearer if the OLSA concept was contained in a stand-alone article, rather than as part of what is now Article 88 of WP.32 (Limits of Contractual Freedom).
4. In response to those concerns, the United States has modified its proposal contained in paragraph 29 of WP.34. This proposal provides for a stand-alone article on OLSAs, and defines an OLSA in a way that meets shipper concerns for specificity, and meets NVOCC concerns that the definition be broad enough to include them. This proposal has the support of all affected U.S. interests, including shippers, VOCCs and NVOCCs.
5. The United States therefore proposes the following language, in lieu of our proposal in paragraph 29 of WP.34:

*Article XX*

1. [Notwithstanding art. xx [contract of carriage definition/excluded contracts provision], this instrument applies to an Ocean Liner Service Agreement. [Note 1.]
2. An Ocean Liner Service Agreement means a contract that is mutually negotiated and agreed to in writing or electronically between one or more carriers

and one or more shippers and that provides for the liner carriage of goods by sea in a series of shipments over a specified period of time. Such contract shall obligate the carrier(s) to perform a service not otherwise mandatorily required by this instrument and shall obligate the shipper(s) to tender a minimum volume of cargo and to pay the rate(s) set forth in the contract. The carrier(s) service obligation shall include ocean carriage and may also include carriage by other modes of transport, warehousing, or logistics services, as required by the shipper. Liner carriage means an advertised maritime transport service for the carriage of general cargo on an established and regular pattern of trading between a range of specified ports. [Note 2]

3. An Ocean Liner Service Agreement may not be (i) a carrier's schedule of prices and services, a bill of lading, or a cargo receipt or similar document, although an Ocean Liner Service Agreement may incorporate such documents by reference; or (ii) a charter of a liner vessel or the charter of space on a liner vessel.

4. Notwithstanding paragraph 1, an Ocean Liner Service Agreement may provide for greater or lesser duties, rights, obligations, and liabilities than those set forth in this instrument. A provision in an Ocean Liner Service Agreement that provides for greater or lesser duties, rights, obligations, and liabilities shall be set forth in the body of the contract and may not be incorporated by reference from another document. Any terms in an Ocean Liner Service Agreement that vary from this instrument shall be binding only on the parties to the contract and any third-party who expressly consents to be bound thereby. [Note 3]

5. If a transport document or electronic record is issued pursuant to an Ocean Liner Service Agreement, then the provisions of this instrument apply to the contract evidenced by or contained in that transport document or electronic record to the extent that the transport document or the electronic record governs the relations between the carrier and any holder or consignor or consignee named in said transport document or electronic record who is not a party to the Ocean Liner Service Agreement, except to the extent that said holder, consignor or consignee expressly consented to be bound by an Ocean Liner Service Agreement or such terms therein that are different from those set forth in the instrument.

**Note 1:** The bracketed language cannot be finalized until other articles, such as the definition of "contract of carriage" and the treatment of excluded contracts, have been finalized. The intent, however, is to avoid any confusion between the OLSA provision, on the one hand, and other provisions which might suggest that OLSAs were excluded (such as the definition of contract of carriage, and the list of excluded contracts) from the Instrument.

**Note 2:** In order to ensure that the OLSA provision is interpreted to apply equally to vessel operators and non-asset based carriers who issue documentation in their own name and are responsible for the performance of the ocean carriage, the United States proposes that the definition of "carrier" included in Article 1(b) of WP.32 be amended to read as follows: "Carrier" means a person, whether or not that person operates a vessel, that enters into a contract of carriage with a shipper."

**Note 3:** The United States notes that it has proposed in WP.34 that the parties to an OLSA could bind a third party to a forum selected for the litigation of cargo claims that is designated in an OLSA, as long as certain conditions have been satisfied, including, among others, that notice of the designated forum is provided to the third party. See WP.34, paragraph 35.

**F. Report of the Working Group on Transport Law on the work of its  
fifteenth session (New York, 18-28 April 2005)**

**(A/CN.9/576) [Original: English]**

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## Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.<sup>1</sup> The Working Group commenced its deliberations on a draft instrument on the carriage of goods [wholly or partly] [by sea] at its ninth session in 2002. The most recent compilation of historical references regarding the legislative history of the draft instrument can be found in document A/CN.9/WG.III/WP.43.

2. Working Group III (Transport Law), which was composed of all States members of

<sup>1</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.

the Commission, held its fifteenth session in New York from 18 to 28 April 2005. The session was attended by representatives of the following States members of the Working Group: Australia, Austria, Belarus, Brazil, Cameroon, Canada, Chile, China, Colombia, Croatia, Czech Republic, Ecuador, France, Germany, Guatemala, India, Iraq, Italy, Japan, Kenya, Kuwait, Lithuania, Madagascar, Mexico, Mongolia, Morocco, Pakistan, Qatar, Republic of Korea, Russian Federation, Serbia and Montenegro, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uganda, United States of America and Venezuela (Bolivarian Republic of).

3. The session was also attended by observers from the following States: Afghanistan, Cuba, Denmark, Ethiopia, Finland, Greece, Holy See, Netherlands, New Zealand, Norway, Philippines, Senegal and Ukraine.

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

(a) **Intergovernmental organizations invited by the Commission:** African Union, Council of the European Union, European Commission (EC);

(b) **International non-governmental organizations invited by the Commission:** Association of American Railroads (AAR), Comité Maritime International (CMI), International Chamber of Commerce (ICC), International Federation of Freight Forwarders Associations (FIATA), International Group of Protection and Indemnity (P&I) Clubs, International Multimodal Transport Association (IMMTA), International Union of Marine Insurance (IUMI) and The Baltic and International Maritime Council (BIMCO).

5. The Working Group elected the following officers:

*Chairman:* Mr. Rafael Illescas (Spain)

*Co-Chairman:* Mr. David Morán Bovio (Spain)

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

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

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.43);

(b) A note prepared by the Secretariat containing a first revision of the draft instrument (A/CN.9/WG.III/WP.32);

(c) A provisional redraft of the articles of the draft instrument considered in the report of Working Group III on the work of its twelfth session (A/CN.9/WG.III/WP.36) and its thirteenth session (A/CN.9/WG.III/WP.39);

(d) A note prepared by the Secretariat containing a provisional redraft of the scope of application provisions of the draft instrument as submitted for consideration of the Working Group by the informal drafting group during the fourteenth session, along with a slightly revised commentary (A/CN.9/WG.III/WP.44);

(e) A note prepared by the Secretariat on uniform international arbitration practice (A/CN.9/WG.III/WP.45);

(f) Comments received from the UNCTAD Secretariat on the freedom of contract (A/CN.9/WG.III/WP.46);

(g) A note prepared by the Secretariat containing proposed revised provisions on electronic commerce (A/CN.9/WG.III/WP.47).

7. 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 [wholly or partly][by sea];
  4. Other business;
  5. Adoption of the report.

## **I. Deliberations and decisions**

8. The Working Group continued its review of the draft instrument on the carriage of goods [wholly or partly] [by sea] (“the draft instrument”) on the basis of:
  - The text contained in the annex to a note by the Secretariat (A/CN.9/WG.III/WP.32);
  - A proposed interim redraft of the articles considered by the Working Group at its twelfth (A/CN.9/WG.III/WP.36), thirteenth (A/CN.9/WG.III/WP.39) and fourteenth (A/CN.9/WG.III/WP.44) sessions; and
  - Proposed revised provisions on electronic commerce (A/CN.9/WG.III/WP.47).
9. The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. Those deliberations and conclusions are reflected in section II below.

## **II. Preparation of a draft instrument on the carriage of goods [wholly or partly][by sea]**

### **Scope of application and Freedom of contract (draft articles 1, 2, 88 and 89)**

10. The Working Group was reminded that it had most recently considered the topics of scope of application and freedom of contract at its fourteenth session (see A/CN.9/572, paras. 81-104), and that it had previously considered draft articles 1 and 2 at its twelfth session (see A/CN.9/544, paras. 51-84), and draft articles 88 and 89 at its eleventh session (see A/CN.9/526, paras. 203-218).
11. The Working Group heard a short report from the informal consultation group (see A/CN.9/572, para. 166) which took the initiative of continuing the discussion between sessions of the Working Group, with a view to accelerating the exchange of views, the formulation of proposals and the emergence of consensus in the preparation of the draft instrument. The Working Group heard that an exchange of views had taken place within the informal consultation group with respect to the topics of scope of application and freedom of contract, taking into account the draft text prepared by the informal drafting group as instructed by the Working Group during its fourteenth session (see A/CN.9/572, para. 90) as published in A/CN.9/WG.III/WP.44, and the text of draft articles 88 and 89 as they appeared in A/CN.9/WG.III/WP.32.

### **General discussion and methodology for continuation of work**

12. The Working Group heard that in the course of the intersessional work undertaken by the informal consultation group, a number of drafting suggestions had been made and views regarding some more substantive policy issues had been expressed with respect to the scope of application provisions set out in A/CN.9/WG.III/WP.44, and regarding draft articles 88 and 89 of the draft instrument. Further to the conclusions reached by the Working Group with respect to the issue of Ocean Liner Service Agreements (OLSAs) (see A/CN.9/572, para. 104, and, more generally, A/CN.9/WG.III/WP.42 and A/CN.9/WG.III/WP.34, paras. 18-29 and 34-35), it was suggested that the inclusion of OLSAs within the draft instrument needed not necessarily to be accomplished by way of separate provisions, which could be difficult to draft. Instead, it was suggested that since OLSAs were a type of volume contract, adjustments could be made to the provisions in A/CN.9/WG.III/WP.44 and to draft articles 88 and 89 in order to subsume OLSAs into the existing approach to volume contracts in the scope of application of the draft instrument. Such a drafting approach was also said to be favourable in that it obviated the need for a definition of OLSAs, which had been an issue of some concern in the Working Group.

13. General support was expressed for this suggested technique for the inclusion of OLSAs into the scope of application scheme for the draft instrument under consideration by the Working Group. The Working Group agreed that an informal drafting group should prepare the necessary adjustments to the existing scope of application provisions in order to improve the drafting and to accommodate the inclusion of OLSAs therein. However, it was noted that certain substantive policy issues raised by the scope of application provisions should be decided by the Working Group prior to the commencement of the drafting exercise. It was agreed by the Working Group that consideration of these matters should take place on the basis of a list of key issues as set out in the following headings and paragraphs.

#### **Issue 1: Should OLSAs be included within the scope of application of the draft instrument as volume contracts, the inclusion of which would be determined by the character of the individual shipments thereunder?**

14. The Working Group considered whether it was acceptable that OLSAs be treated as a type of volume contract in the draft instrument, which would be regulated as part of the general scope of application provisions. It was suggested that the draft instrument would not apply to volume contracts unless the draft instrument would apply to individual shipments thereunder. It was also suggested that those volume contracts that were subject to the draft instrument could derogate from certain of its provisions, provided that certain additional conditions aimed at protecting the parties to the volume contract were met.

15. Support was expressed for this approach to OLSAs in the draft instrument. One advantage of the approach was said to be that it separated the issue of scope of application of the draft instrument from the issue of derogation from certain of the specific provisions of the draft instrument. Another advantage was said to be that the concept of "volume contracts" was preferable to that of OLSAs, as it was a broader and more universal concept. Some concerns were raised about the complexity of the scheme, and about potential confusion thereunder. Other concerns were raised that particularly careful drafting would be necessary to avoid the increased breadth of the concept of volume contracts resulting in the inadvertent inclusion in the draft instrument of some contracts of carriage in the non-liner trade. A question was raised regarding whether the "future carriage of goods in a series of shipments" as appeared in draft article 4 of

A/CN.9/WG.III/WP.44 was the same concept as volume contracts, or whether it was broader. In addition, questions were raised regarding how an individual shipment would be classified if it were made pursuant to a contract of carriage in which the carrier agreed to use a liner service, but instead used a non-liner service.

*Conclusions reached by the Working Group regarding Issue 1*

16. After discussion, the Working Group decided that:

- Issue 1 should be answered in the affirmative; and that
- An informal drafting group should be requested to make adjustments to the provisions on the scope of application based on the views outlined in the paragraphs above.

**Issue 2: Under what conditions should it be possible to derogate from the provisions of the draft instrument?**

17. It was suggested that the following four conditions should be met before it would be possible for a volume contract, or individual shipments thereunder, to derogate from the draft instrument:

- The contract should be [mutually negotiated and] agreed to in writing or electronically;
- The contract should obligate the carrier to perform a specified transportation service;
- A provision in the volume contract that provides for greater or lesser duties, rights, obligations, and liabilities should be set forth in the contract and may not be incorporated by reference from another document; and
- The contract should not be [a carrier's public schedule of prices and services,] a bill of lading, transport document, electronic record, or cargo receipt or similar document but the contract may incorporate such documents by reference as elements of the contract.

18. While a view was expressed that no derogation from the provisions of the draft instrument should be allowed under any conditions, there was support for derogation to be allowed in some circumstances. The view was expressed that the four conditions outlined in the paragraph above were not of sufficient clarity or sufficiently differentiated from other contracts to enable identification of the specific situations in which derogation should be allowed. Other views emphasized that the intention of having to meet the conditions outlined prior to being allowed to derogate from the draft instrument was to avoid a situation where the volume contract could be abused to the detriment of one of the parties to it. It was suggested that this goal was achieved through the combined effect of the conditions set out in the paragraph above that there be mutual agreement to known terms of the contract. Some doubt was expressed whether it was necessary that this agreement be in writing.

*Conclusions reached by the Working Group regarding Issue 2*

19. After discussion, the Working Group decided that:

- The derogation scheme suggested could form the basis for further discussion, but that the informal drafting group should be requested to take into account the views



outlined in the paragraphs above in its consideration of the necessary conditions required for derogation from the draft instrument.

**Issue 3: Should there be mandatory provisions of the draft instrument from which derogation should never be allowed, and if so, what were they?**

20. The view was expressed that in its discussions with respect to article 14 of the draft instrument, the Working Group had considered and discarded the concept of overriding obligations in the draft instrument. Concern was expressed that establishing provisions of the draft instrument from which derogation was not possible would be tantamount to recreating this concept. It was further suggested that if the parties to a volume contract of the nature being considered were sufficiently protected to derogate from the provisions of the draft instrument, they should be entitled to negotiate all aspects of the agreement, including matters such as seaworthiness.

21. There was support for the contrary view that under no circumstances should derogation be allowed from certain provisions of the draft instrument, particularly those relating to seaworthiness under draft article 13. Some concerns were raised regarding the implications of never permitting a derogation from the seaworthiness obligations, particularly regarding any provisions of the draft instrument which could be connected to seaworthiness, such as limitations on liability. While a view was expressed that prohibiting derogation from the seaworthiness obligations would not affect the rules with respect to limitations on liability, it was suggested that the overall implications arising from treating the seaworthiness obligations in this manner would require further consideration.

22. More generally, it was suggested that obligations relating to maritime safety should not be open to derogation under the draft instrument, but support was also expressed for the contrary view that safety issues should instead be left to public law. It was noted that certain provisions pertaining to the obligations of the shipper, such as those pursuant to draft articles 25 and 27, and to the draft article 26 obligation of the carrier to provide information to the shipper upon request, were considered to have safety implications, and were thus open to consideration for similar treatment.

*Conclusions reached by the Working Group regarding Issue 3*

23. After discussion, the Working Group decided that:

- The seaworthiness obligation should be a mandatory provision of the draft instrument from which derogation was not allowed;
- The informal drafting group should be requested to take into account the views outlined in the paragraphs above in its consideration of this issue.

**Issue 4: Should a derogation from the provisions of the draft instrument that is applicable as between the carrier and the shipper extend to third parties to the contract who had expressly consented to be bound, and under what conditions?**

24. The Working Group next considered whether a derogation from the draft instrument that was applicable as between the carrier and the shipper should extend to third parties to the contract who had expressly consented to be so bound. There was support for the view that the meaning of the phrase “expressly consented” was ambiguous, and that it would be difficult to adequately protect the interests of third parties absent greater specificity. An example raised in this regard was the commercially feasible situation where one party

might purport to consent to a derogation on behalf of all of its buyers. Concern was also raised regarding whether the requirement was one of express consent to be bound by the volume contract in general, or by the specific derogation from the draft instrument. It was thought by some that express consent by the third party to the specific derogation should be required. The general view was that, should such a provision be agreed to by the Working Group, careful drafting would be necessary to adequately enunciate the key requirement that the third party had expressly consented to be bound by the contractual derogation.

25. Support was expressed for the suggestion that a provision along the lines of draft article 5, as it appeared in A/CN.9/WG.III/WP.44, provided sufficient protection to third parties entitled to rights under the contract of carriage, and that no additional provision to protect third parties was required with respect to derogation from the draft instrument by the parties to a volume contract. However, there was also support for the view that draft article 5 was inadequate for the protection of third parties in this particular context, and that a separate but carefully crafted provision was required. It was suggested that the primary purpose of such a provision in the draft instrument was to limit the ability of the parties to a volume contract to derogate from the provisions of the draft instrument and to avoid binding third parties to that derogation unless they expressly so consented. It was suggested that failure to include such a provision in the draft instrument would leave the matter to national law, resulting in a situation where third parties might only derive rights from the contract. It was further suggested that this situation could thus create the risk in some jurisdictions that third parties could be unprotected and could be bound by contractual derogations from the draft instrument to which they had not agreed. A view was expressed that draft article 5 in A/CN.9/WG.III/WP.44 could be adjusted to deal with these various concerns, thus eliminating the need for an additional provision. It was further suggested that to do otherwise would establish two different regimes for third parties, depending on whether they derived their rights pursuant to a charter party or from a volume contract.

26. Additional concerns were expressed regarding how a derogation that bound a third party to a volume contract might affect that party's rights with respect to choice of forum in jurisdiction or arbitration clauses. It was agreed that this issue should be discussed when the Working Group considered the chapters on jurisdiction and arbitration. Another issue was raised with respect to the agreement expressed by the Working Group at its fourteenth session that a documentary approach should be used for the identification of third parties whose rights should be protected pursuant to the draft instrument (see A/CN.9/572, paras. 91, 94 and 96). It was suggested that this decision was made only with respect to the more general provisions regarding the scope of application for the protection of third parties, and not with respect to the specific situation of the protection of rights of third parties to volume contracts (for further discussion of the documentary approach, see paras. 35 to 44 below.)

27. General agreement was expressed with several of the concerns noted in the above paragraphs regarding binding third parties to contractual derogations from the draft instrument absent their express consent. However, support was expressed for the suggestion that a broader, more commercial approach should be taken to the issue, and that third parties should automatically be bound to contractual derogations as they should have no greater rights than the original parties to the contract. It was also suggested that the Working Group should consider the commercial context, for example, where third parties

were not truly strangers to the contracting parties, but where they could be different members of the same corporate group.

*Conclusions reached by the Working Group regarding Issue 4*

28. After discussion, the Working Group decided that:

- A provision allowing for third parties to a volume contract to expressly agree to be bound by derogations from the draft instrument agreed to as between the parties to the contract should be included in the draft instrument;
- The informal drafting group should draft a provision in this regard for consideration by the Working Group, taking into account the views outlined in the paragraphs above.

**Issue 5: The definition of “contract of carriage”**

29. The next issue with respect to scope of application and freedom of contract that was considered by the Working Group was the definition of “contract of carriage”, as set out in A/CN.9/WG.III/WP.44.

30. It was suggested that the words “[an undertaking for]” should be inserted between the words “against” and “the payment of freight” to avoid the risk that the phrase “against the payment of freight” could be narrowly construed to exclude cases of future payment. While some support was expressed for this addition, it was not thought by the Working Group to add to the clarity of the provision.

31. The Working Group further discussed whether the opening phrase of the second sentence of the definition should be “This undertaking” or “This contract”, or whether the word “The” should be used instead of “This”. The Working Group expressed a preference for the use of the phrase “The contract”.

32. The suggestion was also made that the word “[international]” should be inserted between the phrases “must provide for” and “carriage by sea”. The reason for this suggestion was said to be concern that draft article 2 as it appeared in A/CN.9/WG.III/WP.44 did not adequately convey the requirement of internationality of the sea leg of the carriage. While doubts were expressed regarding the necessity for the inclusion of the word “international”, the Working Group agreed to keep it in the provision in square brackets pending its consideration of draft article 2.

33. Another issue raised for the consideration of the Working Group was whether to retain or to delete the following final phrase in that definition: “[A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage provided that the goods are actually carried by sea.]” A view was expressed in support of retaining this phrase and deleting the square brackets around it. It was suggested that the inclusion of such a phrase would promote certainty regarding the application of the draft instrument to situations where the contract of carriage did not specify how the carriage was to take place, but where the actual carriage was by sea. While some sympathy was expressed for this view, it was suggested that a flexible interpretation of the first sentence of the draft provision could achieve a similar result, and that the final phrase in square brackets could be deleted as unnecessary. Further, it was thought that a contract could implicitly provide for carriage by sea, and that, in any event, the key for determining the scope of application of the draft instrument was the contract of carriage, not the actual carriage of the goods.

Another view was expressed that, in light of the adoption of a “maritime plus” approach in the draft instrument, the inclusion of such a phrase would be superfluous.

*Conclusions reached by the Working Group regarding Issue 5*

34. After discussion, the Working Group decided that:

- The phrase “This undertaking” at the start of the second sentence of the definition of the “contract of carriage” should be replaced by the phrase “The contract”;
- The word “[international]” should be inserted in square brackets between the phrases “must provide for” and “carriage by sea” pending consideration by the Working Group of draft article 2 of A/CN.9/WG.III/WP.44;
- The bracketed final phrase of the definition should be deleted.

**Issue 6: Should a documentary or non-documentary approach be adopted for the protection of third parties in draft article 5 as set forth in A/CN.9/WG.III/WP.44?**

35. The Working Group was reminded that it had most recently considered the issue of protection of third parties and a previous draft of draft article 5 as set forth in A/CN.9/WG.III/WP.44 at its fourteenth session (see A/CN.9/572, paras. 91-96 and 105). Based on these discussions, a few amendments to the text of draft article 5 of A/CN.9/WG.III/WP.44 were suggested and the discussion continued on the basis of the following text:

“Article 5

“If a transport document or an electronic record is issued pursuant to a charter party or a contract under Article 3 (1)(c), then [such transport document or electronic record shall comply with the terms of this Instrument and] the provisions of this Instrument apply to the contract evidenced by the transport document or electronic record [from the moment at which it regulates] [in] the relationship between the carrier and [the person entitled to rights under the contract of carriage] [the consignor, consignee, controlling party, holder or person referred to in article 31], provided that such person is not [a] [the] charterer or [a] [the] party to the contract under Article 3 (1)(c).”

36. The Working Group discussed whether the documentary approach to the protection of third parties should be retained (see A/CN.9/572, para. 96); and, if so, which third parties would be subject to protection under the draft instrument. A number of delegations expressed support for a documentary approach. It was stated that the need to protect reliance by third parties would arise only in the presence of a document. It was suggested that the documentary approach better provided a commercially viable solution and was more in line with trade practice. It was also stated that in some legal systems reliance was attached to documents other than bills of lading, as well as to documents held by the shipper, and that practice also involved the circulation of non-negotiable instruments. It was indicated that these circumstances called for broadening the scope of application of the draft instrument relating to the protection of third parties. However, the contrary view was also expressed that the scope of application of draft article 5 as set forth in A/CN.9/WG.III/WP.44 was too broad.

37. Significant support was also expressed for a non-documentary approach. It was stated that it was not possible to understand the rationale for protecting third party holders

of non-negotiable instruments. It was also stated that in some trades, and, specifically, in the short shipping trade, commercial practice did not foresee the issuance of any type of document, that in other trades the documents never left the hands of the carrier, and that the documentary approach would deprive third parties involved in such trades of any protection. It was further pointed out that the carrier and the shipper were in a position to decide whether to issue a document and to choose the type of document, and that a documentary approach would thus make the protection of third parties dependent on the decision of the parties to the contract.

38. Another line of reasoning in support of a non-documentary approach indicated that freedom of contract could be allowed only insofar as it was limited to parties to the contract and that third parties might even be unaware of these contractual provisions. It was suggested that it was illogical to base the protection of third parties on the existence of a document. Moreover, it was stated that reliance by third parties was justifiable only when the document provided conclusive evidence, such as for negotiable bills of lading, while no premium on reliance was due to parties willing to take a risk on the basis of less secure documents.

39. It was further suggested that the non-documentary approach was more open to the possible future needs of electronic commerce, and also in light of the fact that electronic transport records might not bear any resemblance to bills of lading. The contrary view was also held, in light of the reference to electronic transport records in draft article 5 as set forth in A/CN.9/WG.III/WP.44, and of the general position of the draft instrument in support of any possible technological development.

40. In contrast, it was stated that the non-documentary approach had a very broad scope of application and that its adoption would have unforeseeable consequences, while the documentary approach was well known and the consequences of its application were easily predictable.

*Relationship between the scope of application of draft article 5 of A/CN.9/WG.III/WP.44 and protection of third parties*

41. It was indicated that draft article 5 as set forth in A/CN.9/WG.III/WP.44 operated only in favour of third parties to charter parties and other contracts excluded from the scope of application of the draft instrument, and that draft article 5 could be considered a scope of application provision whose effect was to extend protection to third parties otherwise excluded. However, it was also stated that there was no need to place third parties to such contracts in a position more favourable than the parties to the same contracts. In response, it was indicated that the long-standing practice to provide protection to third-party holders of bills of lading issued under charter parties should not be discontinued. It was added that, historically, freedom of contract had been introduced in international maritime transport instruments through the exemption of certain contracts such as charter parties from the scope of application of these instruments, such as, for example, article V of the Hague Rules, which did not intend to protect third parties but merely to exclude charter parties. Further, it was suggested that, while it was possible to achieve the same result by including those excluded contracts in the scope of application of the draft instrument and allowing for freedom of contract, both techniques required provisions for the protection of third parties.

42. It was further indicated that draft article 5 in the text of A/CN.9/WG.III/WP.44 omitted the reference to volume contracts contained in the text of draft article 2 (4) as set

forth in A/CN.9/WG.III/WP.36, because it was held that, in practice, transport documents were not issued under framework volume contracts, but only under the individual shipments that were performed under the volume contracts.

*Documents requirements under the documentary approach*

43. On the assumption that a documentary approach would be adopted, the Working Group discussed matters relating to the types of documents that should trigger the protection of third parties. While there was some consensus that bills of lading would suffice for this purpose, concerns were expressed regarding receipts, and different opinions were expressed with regard to “intermediary” non-negotiable documents such as sea waybills. It was suggested that the language contained in draft article 3 (2) as set forth in A/CN.9/WG.III/WP.44 could provide useful guidance to clarify this matter.

*Conclusions reached by the Working Group on issue 1*

44. After discussion, the Working Group decided that:

- The current text, as it appears in paragraph 35 above, should be taken as a basis for further refinement to reconcile the two positions on the basis of a new text to be elaborated by the informal drafting group for the further consideration of the Working Group;
- Failing such drafting effort, text reflecting both positions should be kept in square brackets in the draft instrument for continuation of the discussion at a future session.

**Issue 7: Should a “one-way” or a “two-way” mandatory approach be adopted in draft article 88?**

45. The Working Group next considered the text of draft article 88 as it appeared in A/CN.9/WG.III/WP.32, with the addition of the words “[maritime]” before the words “performing party” in paragraphs 1 and 2, and of square brackets around the words “[, the shipper, the controlling party, or the consignee under this Instrument]” at the end of paragraph 1. The issue was discussed whether a “one-way” or a “two-way” mandatory approach should be adopted in draft article 88.

46. Support was expressed for the adoption of the “one-way” mandatory approach in draft article 88. Under this approach, the contractual decrease of liability of the carrier and of the other parties mentioned in the draft article would not be possible, while its increase would be allowed. It was indicated that this approach assumed that the shipper should be provided with protection inspired by principles akin to those of consumer protection. It was suggested that in paragraph 1 the words “[, or increase]” should be deleted and the square brackets around the words “or” should be removed.

47. It was further indicated that the “one-way” mandatory approach was compatible with the freedom for the shipper to increase its liability limits. However, the view was also expressed that it should not be possible for the parties to increase the obligations of the shipper. In this line, it was suggested that the position of the shipper regarding its liability should be better clarified in the individual relevant provisions. Moreover, it was suggested that a provision should be inserted in the draft instrument to prevent the shipper from decreasing its obligations.

48. Some support was also expressed in favour of the “two-way” mandatory approach, according to which no contractual change in the liability of the parties would be allowed. It

was suggested that this approach better reflected the current economic balance between carriers and shippers, while the adoption of the “one-way” mandatory approach was described as providing shippers with unnecessary protection. However, it was also pointed out that at the international level the “two-way” mandatory approach had been adopted only in the Convention on the Contract for the International Carriage of Goods by Road, 1956 (the “CMR Convention”) with questionable results, as this provision prevented competition among carriers to the detriment of their customers.

*Conclusions reached by the Working Group on issue 7*

49. After discussion, the Working Group decided that:

- In draft article 88(1) the words “[, or increase]” should be deleted and the square brackets around the words “or” should be removed.

**Issue 8: Which parties should be covered under draft article 88?**

50. It was suggested that further attention should be dedicated to the determination of the parties covered under the draft article. It was indicated that, for instance, the draft text made no reference to the consignor while referring to the consignee. It was also indicated that consideration should be given to the possibility of extending the protection granted by the article to all performing parties in light of the multimodal nature of the draft instrument. However, in this respect, it was also indicated that non-maritime performing parties did not fall under the scope of application of the instrument. Finally, it was suggested that the reference to maritime performing parties would be necessary to ensure that the carrier would not escape liability by invoking the exclusive liability of the maritime performing parties.

*Conclusions reached by the Working Group on issue 8*

51. After discussion, the Working Group decided that:

- The square brackets around the word “maritime” in draft article 88 (1) and (2) should be removed;
- The square brackets around the last phrase of draft article 88 (1) should be retained for continuation of the discussion at a future session.

**Proposed redraft of provisions regarding scope of application and freedom of contract (draft articles 1, 2, 3, 4, 88, 89 and new draft article 88a)**

52. Based upon the discussion in the Working Group (see above, paras. 10 to 51) regarding the provisions of the draft instrument relating to scope of application and freedom of contract as they appeared in A/CN.9/WG.III/WP.44 (draft articles 1, 2, 3, 4 and 5) and A/CN.9/WG.III/WP.32 (draft articles 88 and 89), an informal drafting group composed of a number of delegations prepared a revised version of those provisions that resulted in proposed redraft articles 1, 2, 3, 4, 88 and 89, and a proposed new draft article 88a intended to allow for derogation from the draft instrument in the case of volume contracts that would meet certain prescribed conditions. The proposed new text of those provisions was as follows:

“Article 1

“(a) “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract must provide for carriage by sea and may provide for carriage by other modes of transport prior to or after the sea carriage.

“(x) “Volume contract” means a contract that provides for the carriage of [a specified minimum quantity of] cargo in a series of shipments during an agreed period of time.

“(xx) “Non-liner transportation” means any transportation that is not liner transportation. For the purpose of this paragraph, “liner transportation” means a transportation service that (i) is offered to the public through publication or similar means and (ii) includes transportation by vessels operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

“Article 2

“1. Subject to Articles 3 (1), this Instrument applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading [of a sea carriage] and the port of discharge [of the same sea carriage] are in different States, if:

(a) The place of receipt [or port of loading] is located in a State Party; or

(b) The place of delivery [or port of discharge] is located in a State Party; or

[(c) The contract of carriage provides that this Instrument, or the law of any State giving effect to it, is to govern the contract.]

References to [places and]<sup>2</sup> ports mean the [places and] ports agreed in the contract of carriage.

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

“Article 3

“1. This Instrument does not apply to:

(a) Charter parties;

(b) Contracts for the use of a ship or of any space thereon;

(c) Except as provided in paragraph 2, other contracts in non-liner transportation; and

(d) Except as provided in paragraph 3, volume contracts.

“2. Without prejudice to subparagraphs 1(a) and (b), this Instrument applies to contracts of carriage in non-liner transportation when evidenced by or contained in a transport document or an electronic transport record that also evidences the carrier’s

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<sup>2</sup> If Article 1 included definitions of “place of receipt” and “place of delivery,” the references to “place” would become unnecessary.



or a performing party's receipt of the goods, except as between the parties to a charter party or to a contract for the use of a ship or of any space thereon.

"3. (a) This Instrument applies to the terms that regulate each shipment under a volume contract to the extent that the provisions of this chapter<sup>3</sup> so specify.

(b) This Instrument applies to the terms of a volume contract to the extent that they regulate a shipment under that volume contract that is governed by this Instrument under subparagraph (a).

"Article 4

"Notwithstanding Article 3, if a transport document or an electronic transport record is issued pursuant to a charter party or a contract under Article 3 (1)(b) or (c), the provisions of this Instrument apply to the contract evidenced by or contained in the transport document or electronic transport record as between the carrier and the consignor, consignee, controlling party, holder, or person referred to in article 31 that is not the charterer or the party to the contract under Article 3 (1)(b) or (c).

"Article 88

"1. Unless otherwise specified in this Instrument, any provision is null and void if:

(a) It directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Instrument;

(b) It directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Instrument; or

(c) It assigns a benefit of insurance of the goods in favour of the carrier or a person mentioned in Article 14bis.

"[2. Unless otherwise specified in this Instrument, any provision is null and void if:

(a) It directly or indirectly excludes, limits, [or increases] the obligations under Chapter 7 of the shipper, consignor, consignee, controlling party, holder, or person referred to in Article 31; or

(b) It directly or indirectly excludes, limits, [or increases] the liability of the shipper, consignor, consignee, controlling party, holder, or person referred to in Article 31 for breach of any of their obligations under Chapter 7.]

"Article 88a<sup>4</sup>

"1. Notwithstanding article 88, if terms of a volume contract are subject to this Instrument under Article 3 (3)(b), the volume contract may provide for greater or lesser duties, rights, obligations, and liabilities than those set forth in the Instrument provided that the volume contract [is agreed to in writing or electronically],<sup>5</sup> contains a prominent statement that it derogates from provisions of the Instrument, and:

(a) Is individually negotiated; or

<sup>3</sup> Under this draft, proposed articles 2 to 4 would constitute the scope of application chapter, and proposed article 1 would constitute the definitions chapter.

<sup>4</sup> The position of the maritime performing party would have to be further examined in connection with draft article 15.

<sup>5</sup> Article 5 of A/CN.9/WG.III/WP.47 would be expanded to incorporate this provision.

(b) Prominently specifies the sections of the volume contract containing the derogations.

“2. A derogation under paragraph 1 shall be set forth in the contract and may not be incorporated by reference from another document.

“3. A [carrier’s public schedule of prices and services,] transport document, electronic transport record, or similar document is not a volume contract under paragraph 1, but a volume contract may incorporate such documents by reference as terms of the contract.

“4. The right of derogation under this article applies to the terms that regulate shipments under the volume contract to the extent these terms are subject to this Instrument under Article 3 (3)(a).

“5. Paragraph 1 is not applicable to:

(a) Obligations stipulated in Article 13 (1)(a) and (b) [and liability arising from the breach thereof or limitation of that liability];

(b) Rights and obligations stipulated in Articles [19], [25], [26], [27] and [XX] Figure 1<sup>6</sup> [and the liability arising from the breach thereof]].

“6. Paragraph 1 applies:

(a) Between the carrier and the shipper;

(b) Between the carrier and any other party that has expressly consented [in writing or electronically]<sup>7</sup> to be bound by the terms of the volume contract that derogate from the provisions of this Instrument. [The express consent must demonstrate that the consenting party received a notice that prominently states that the volume contract derogates from provisions of the Instrument and the consent shall not be set forth in a [carrier’s public schedule of prices and services,] transport document, or electronic transport record. The burden is on the carrier to prove that the conditions for derogation have been fulfilled.]

“Article 89

“Notwithstanding chapters 4 and 5 of this Instrument, the terms of the contract of carriage may exclude or limit the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals except where it is proved that the loss, damage, or delay resulted from an action or omission of the carrier [or of a person mentioned in Article 14bis] done recklessly and with knowledge that such loss, damage, or delay would probably occur; or

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<sup>6</sup> Article XX refers to a new provision on the regulation of dangerous goods which should be incorporated into the Instrument pursuant to a decision taken in 13th session of the Working Group in May 2004 that a specific provision should be inserted at an appropriate place in the draft instrument to deal with the issue of dangerous goods, based on the principle of strict liability of the shipper for insufficient or defective information regarding the nature of the goods (see A/CN.9/552, paras. 146-148). Such a provision has been proposed in para. 19 of A/CN.9/WG.III/WP.39.

<sup>7</sup> Article 5 of A/CN.9/WG.III/WP.47 would be expanded to incorporate this provision.

(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 transport record is issued for the carriage of the goods.”

53. The Working Group heard a brief report from the informal drafting group outlining the changes that had been made from previous versions of these articles as they appeared in A/CN.9/WG.III/WP.44 and A/CN.9/WG.III/WP.32. In the definition of “contract of carriage”, the final bracketed sentence of the previous version of draft article 1 (a) had been deleted as decided by the Working Group (see above, paras. 33 and 34). Further, a definition of “volume contract” was added as proposed paragraph (x), and the definition of “liner service” was deleted as unnecessary in light of later proposed provisions that referred only to “non-liner transportation”. In proposed redraft article 2 (1), the specific references to “[contractual]” were deleted in favour of the final sentence. The previous version of draft article 2 (1)(c) was deleted as having insufficient support. The language in square brackets in proposed redraft article 2 (1)(a) and 2 (1)(b) was intended to emphasize the sea carriage aspect and was included for further discussion by the Working Group. In an effort to improve clarity, the previous version of draft articles 3 and 4 were combined to create proposed redraft article 3. It was noted that the main rule in proposed redraft article 3 (1) enumerated the contracts that were not included within the scope of application of the draft instrument, and that, while subparagraph (b) clearly included charter parties, they were nonetheless named in subparagraph (a) for historical purposes. Proposed redraft article 3 (2) set out a slightly rephrased version of the previous version of draft article 3 (2) with respect to the inclusion of certain contracts in non-liner transportation. Proposed redraft article 3 (3) was intended to bring volume contracts within the scope of application of the draft instrument on the basis of individual shipments performed under such contracts. Proposed redraft article 4 restated the elements of previous draft article 5 using the documentary approach, and specifically enumerated the persons to whom it applied. Like its predecessor in A/CN.9/WG.III/WP.32, proposed redraft article 88 dealt with the mandatory provisions of the draft instrument, dividing the issue into paragraph 1, concerning the carrier and maritime performing party, and paragraph 2, regarding cargo interests. Proposed paragraph 1 reflected the one-way mandatory approach agreed upon with respect to the carrier, and paragraph 2 reflected a more nuanced approach to the obligations of cargo interests for further discussion by the Working Group. Proposed new article 88a was drafted to reflect the discussion in the Working Group regarding the possibility to derogate from the provisions of the draft instrument in certain cases regarding volume contracts, including the necessary conditions for such derogation, as well as some additional requirements. Further, it was noted that pursuant to proposed new article 88a (4), if the volume contract in question met the listed requirements, the valid stipulations derogating from the draft instrument would cover both the volume contract and each individual shipment as specified in proposed new article 88a. Proposed new article 88a (5) set out the mandatory provisions from which there could never be derogation, and proposed new article 88a (6) established to whom the derogation would apply, and the necessary components for “express consent” to the derogation, as well as the added safeguard of placing on the carrier the burden of proving that the conditions for derogation had been met.

**Proposed redraft of article 1**

54. The Working Group first considered the proposed text for draft article 1 (see paragraph 52 above).

*Definition of volume contract (proposed redraft article 1, paragraph x)*

55. It was suggested that the words “[a specified minimum quantity of]” in proposed draft article 1 (x) should be deleted to reflect a commercial practice in volume contracts, which does not specify the minimum quantity of goods to be transported but only an estimated quantity. It was emphasized that a reference to the quantity of goods to be transported should be retained although without mentioning a minimum quantity.

56. It was suggested that the words “during an agreed period of time” in proposed draft article 1 (x) should be deleted. However, it was indicated that a limited time period was essential to the definition of volume contracts. It was added that, in practice, it was not possible for carriers to reserve space for a shipper for an indeterminate period of time.

*Definition of liner and non-liner transportation (proposed draft article 1, paragraph xx)*

57. It was suggested that the order of the sentences in the proposed text of draft article 1 (xx) should be inverted. However, it was also observed that the order of the sentences in the proposed draft article 1 (xx) better reflected the use of the notion of non-liner transportation in the draft instrument. Another drafting suggestion was to delete the definition of “non-liner transportation” completely. In addition, in response to a question, the use of the phrase “includes transportation” in subparagraph (ii) was explained as being necessary to describe only part of the transportation service being offered, which could include other services, such as warehousing.

*Conclusions reached by the Working Group on proposed draft article 1*

58. After discussion, the Working Group decided that:

- The proposed draft text for article 1 should be retained for continuation of the discussion at a future session in light of the considerations expressed above.

**Proposed redraft of article 2**

59. The Working Group next considered the proposed redraft of article 2 (see paragraph 52 above).

*Definition of geographical scope of application*

60. Concerns were expressed that the proposed text for draft article 2 (1) of the draft instrument would not sufficiently clarify the requirement of the internationality of the sea leg of the carriage to trigger the application of the draft instrument. Various views were expressed as to whether both references to sea carriage contained in square brackets in the chapeau of redraft article 2 (1) should be retained, or whether only one or the other of the references should be retained, but no decision was made on this point.

*Proposed draft article 2 (1) (c). Contractual choice of application of the draft instrument*

61. It was suggested that the proposed bracketed text for the redraft of article 2 (1)(c) should be deleted, since, in the absence of a reference to internationality in the definition of the contract of carriage, the text might enable parties to a contract of domestic carriage to opt for the application of the draft instrument. However, it was also suggested that the proposed bracketed text should be retained as it corresponded to article X (c) of the Hague-Visby Rules, which had wide application in practice, especially for cross-traders carrying goods through States not party to the instrument. In turn, it was observed that article X (c) of the Hague-Visby Rules had created in certain countries difficulties at the constitutional level, which might be prevented by the deletion of the proposed bracketed text for draft article 2 (1)(c). It was further indicated that article X (c) of the Hague-Visby Rules had been introduced in that instrument by the Visby Protocol, 1968, for reasons which were immaterial to the draft instrument, and that the provision gave rise to different interpretations in various jurisdictions. It was also suggested that retention of the proposed bracketed text for draft article 2 (1)(c) would be incompatible with draft chapters 15 and 16 of the draft instrument since the joint effect of these rules would be to allow parties a choice of procedural rules and this choice would conflict with mandatory provisions of private international law. In this line, it was suggested that further consideration should be given to the possibility of redrafting the proposed bracketed text for draft article 2 (1)(c), so as to limit its effect to contractual matters, such as, for instance, the contractual election of applicable law.

*Conclusions reached by the Working Group on proposed draft article 2*

62. After discussion, the Working Group decided that:

- The proposed redraft of article 2, including all text within square brackets, would be used as a basis for continuation of the discussion at a future session.

**Proposed redraft of article 3**

63. The Working Group considered the proposed redraft of article 3 (see paragraph 52 above).

*Derogations from the scope of application of the draft instrument*

*Proposed draft article 3, paragraphs 1 and 2*

64. It was observed that the proposed redraft of article 3 (1) was intended mainly to exclude contracts of carriage in non-liner transportation from the scope of application of the draft instrument. The Working Group heard that the intent of the proposed redraft of article 3 (2) was to create an exception to the proposed redraft of article 3 (1) with respect to certain types of carriage in non-liner transportation, where the current practice saw the issuance of a transport document or electronic transport record. The rule in the proposed redraft of article 3 (2), under which these contracts would fall under the scope of application of the draft instrument, was described as consistent with the Hague-Visby Rules insofar as bills of lading were concerned. In addition, the effect of the proposed redraft of article 3 (2) would be to extend the traditional rule to cover all cases where a transport document or electronic transport record was issued.

*Proposed draft article 3, paragraph 3*

65. Clarification was sought on the use of the words “terms that regulate each shipment” and “terms of a volume contract” in proposed draft article 3 (3) of the draft instrument. It was indicated that the reference to the “terms that regulate each shipment” was meant to circumvent the difficulties that arose from the “shipment” being a mere performance under the contract of carriage, while defining the scope of application of the draft instrument required reference to contractual stipulations. In view of the absence of an individual contract governing each individual shipment, reference had to be made to those stipulations in the volume contract that governed each individual shipment. The purpose of subparagraph (b) was to make it clear that only those terms of the volume contract governing individual shipments fell under the scope of application of the draft instrument. Conversely, the terms or stipulations of the volume contract that did not regulate individual shipments remained outside the scope of application of the draft instrument. As to volume contracts regulating shipments exempted from the scope of application of the draft instrument (such as, for instance, when charter parties were used for the individual shipments), they would equally remain outside the scope of application of the draft instrument.

*Conclusions reached by the Working Group on proposed draft article 3*

66. After discussion, the Working Group decided that:

- The proposed text for draft article 3 should be inserted in the draft instrument for continuation of the discussion at a future session in light of the views and clarifications expressed above.

**Proposal for the insertion of draft article 4**

67. The Working Group considered the proposed text of draft article 4 (see para. 52 above).

*Protection of third parties when transport documents or electronic transport records are issued under a contract exempted from the scope of application of the draft instrument*

68. It was indicated that the intended effect of the proposed draft of article 4 was to provide protection to third parties under the draft instrument in cases where a transport document or electronic transport record was issued pursuant to a contract that remained outside the scope of application of the draft instrument under its draft article 3 (1)(a), (b) or (c). It was further indicated that the mechanism proposed in draft article 4 was similar to the one in place under the Hague-Visby Rules for cases when bills of lading were issued. However, adjustments to that mechanism were necessary in light of the adoption of a contractual approach to identify the third parties in need of protection pursuant to the draft instrument, and also in view of the need to refer not only to bills of lading but also to all transport documents or electronic transport records in accordance with the wishes of the Working Group.

69. The view was expressed that the proposed draft of article 4 should provide protection only to holders of negotiable documents and to “good faith” holders of non-negotiable documents, in the sense that third-party holders of such non-negotiable documents are likely to be unaware of the actual nature of the relationship between shipper and carrier, and thus in need of protection. It was also indicated that, while the practice had developed

a category of transport documents, such as sea waybills, that could be referred to for descriptive purposes as “quasi-negotiable” documents, it was not possible to adequately define such transport documents, thus the proposed draft of article 4 used the broader “transport document or an electronic transport record” category.

70. It was suggested that some tramp trade might fall under the definition in draft article 3 (1)(d) of the draft instrument, and that, in order to protect third parties holding documents issued in this trade, reference to draft article 3 (1)(d) should be added at the end of the proposed draft of article 4. It was also suggested that, in the case where a consignee assigned its rights to a charterer, further clarification might be required as to whether the charterer would be bound by the terms of the charter party or would be protected as a third party. However, the view was also expressed that a special situation such as that described should not be addressed in the draft instrument.

#### *Notion of transport document and receipts*

71. It was suggested that the notion of transport document in the proposed draft of article 4 needed clarification. A view was expressed that the application of the draft instrument to third parties should not be conditional upon the existence of a transport document.

72. Although the term “transport document” defined in draft article 1 (k) included a mere receipt of goods, it was explained that the issuance of such documents did not trigger the application of the draft instrument to a third party because proposed draft article 4 provided that “the provisions of this instrument apply to the contract evidenced by or contained in the transport document or electronic transport record”. It was further indicated that the proposed draft of article 4 applied to contracts in non-liner trade exempted from the scope of application of the draft instrument, and that in practice in this trade a receipt would rarely be issued, and then most often in cases where the shipper and the consignee were legally or economically the same entity. However, it was also suggested that a receipt might well provide evidence of a contract, and that third-party holders of a receipt would fall under the scope of application of the proposed text for draft article 4 of the draft instrument insofar as the receipt evidenced the contract.

#### *Conclusions reached by the Working Group on proposed draft article 4*

73. After discussion, the Working Group decided that:

- The proposed text for draft article 4 should be used as a basis for continuation of the discussion at a future session;
- The suggestion to insert a reference to draft article 3 (1)(d) at the end of draft article 4 should be considered in the text to be prepared by the Secretariat, as should any necessary clarification of the treatment of receipts.

#### **Proposed redraft of article 88**

74. The Working Group first considered the proposed text for draft article 88 (see para. 52 above). As previously noted, paragraph 1 of draft article 88 dealt with the mandatory provisions of the draft instrument regarding the carrier and the maritime performing party, and paragraph 2 of draft article 88 concerned the mandatory provisions of the draft instrument with respect to cargo interests.

*Redraft of article 88, paragraph 1—Mandatory provisions regarding the carrier and the maritime performing party*

75. General support was expressed in the Working Group for the principles enunciated in the redraft of article 88 (1). It was observed that, while the provision at paragraph (c) duplicated the current state of the law, paragraphs (a) and (b) represented a slightly new approach in maritime transport law. In effect, pursuant to paragraph (a), the carrier was prohibited from redefining its obligations under the draft instrument by excluding or limiting them, while paragraph (b) prevented the carrier from excluding or limiting its liability for breaching an obligation under the draft instrument. It was said that paragraph (a) preventing a redefinition by the carrier of its obligations was intended to prevent the carrier from circumventing its obligations by doing indirectly what it could not do directly.

76. Certain drafting issues were raised in the Working Group. The question was raised why the language in the chapeau of the redraft of article 88 (1) had deleted the phrase “any contractual stipulation”, which had appeared in A/CN.9/WG.III/WP.32, and replaced it in the redraft with “any provision”. In response, it was said that no substantive change had been intended by this, and that this change could be further considered by the Working Group. A preference was also noted that the phrase “if and to the extent it is intended” which appeared in A/CN.9/WG.III/WP.32 be reinserted into the redraft of article 88 (1). Further, it was suggested that reference should be made in paragraph (a) to draft articles 10, 11 and 12 of the draft instrument that set out the obligations of the carrier. Further, the question was raised whether the ability of the parties to agree that certain obligations of the carrier were performed on behalf of the shipper, the controlling party or the consignee pursuant to draft article 11 (2) could be said to contradict the redraft of article 88 (1), particularly given that provision’s reference to maritime performing parties. By way of explanation, it was noted that reference was made to maritime performing parties in the redraft of article 88 (1) in order to regulate “Himalaya clauses”, which could exempt or reduce the liability of a maritime performing party by extending to maritime performing parties certain contractual benefits that they would not otherwise enjoy. Another suggestion made was that the phrase “breach of an obligation” in paragraph (b) could be replaced with “breach of a provision”.

*Conclusions reached by the Working Group on the redraft of article 88(1)*

77. After discussion, the Working Group decided that:

- The proposed redraft of article 88(1) should be retained for continuation of the discussion at a future session in light of the considerations expressed above.

*Proposed article 88, paragraph 2—Mandatory provisions with respect to cargo interests*

78. Support was expressed in the Working Group for the provision proposed as draft article 88 (2), and the view was expressed that the proposal reflected the discussion on this topic in the Working Group (see above, paras. 45 to 51). It was thought that, since the proposed redraft of article 88 (1) set out mandatory provisions with respect to the carrier and the maritime performing party, in order to be consistent, the draft instrument should also provide mandatory provisions regarding cargo interests. It was suggested that to ensure true equality of treatment in this regard, there was no reason to prohibit a shipper from increasing its responsibilities, and a deletion of the phrase “[or increases]” in paragraphs (a) and (b) was encouraged.



79. Another view was that mandatory provisions should only exist in the draft instrument when truly necessary, and it was suggested that if the purpose of such provisions was to protect small shippers, paragraph 2 should be deleted in its entirety. The view was also expressed that there should not be absolutely equal treatment for carriers and shippers with respect to the mandatory provisions concerning them, since carriers had the advantage of limited liability under the draft instrument, and since paragraph 1 was intended to protect small shippers, but paragraph 2 was intended to protect small carriers and other cargo interests. It was further observed that chapter 7 of the draft instrument contained the obligations of the shipper pursuant to the draft instrument, and the suggestion was made that any treatment of whether those obligations should be mandatory, such as, for example, the draft article 25 obligation to safely stow the goods, should be dealt with on an article-by-article basis in that chapter, rather than in a general provision such as that proposed in article 88 (2). There was support for the suggestion that proposed article 88 (2) should be deleted. However, the contrary view was expressed: that it was more convenient from a drafting perspective to have a general provision like proposed article 88 (2) than to proceed with an article-by-article examination of the shipper's obligations. The suggestion was made that proposed article 88 (2) should be kept in the text in square brackets until the Working Group had examined the obligations of the shipper in chapter 7 and had decided whether it was more convenient to deal with the mandatory obligations of the shipper in an article-by-article approach or by means of a general provision.

*Conclusions reached by the Working Group on proposed article 88 (2)*

80. After discussion, the Working Group decided that:

- Proposed article 88 (2) should be retained in square brackets for further discussion following an examination of the shipper's obligations in chapter 7 of the draft instrument.

**Proposed draft article 88a**

**Draft article 88a (1)**

81. The Working Group next considered proposed draft article 88a (1) (see para. 52 above).

**General discussion**

82. As a basis for continuation of the discussion at a future session, and subject to possible drafting adjustments in light of the debate, support was expressed for the principle set out in proposed draft article 88a (1), and for its general structure to allow for derogations from the draft instrument under certain conditions. It was observed that proposed draft article 88a (1) had been very delicately drafted, with a view to balancing the need to ensure agreement regarding the derogation in issue with a need to maintain a measure of commercial pragmatism. The view was expressed that this was achieved in proposed article 88a (1) by requiring the volume contract to contain a prominent statement that it derogated from the draft instrument, and that either the volume contract was individually negotiated under paragraph (a) or, under paragraph (b), that it prominently specified the sections of the volume contract containing the derogations. It was thought that, while drafting adjustments were required, this approach provided an appropriate

structure for protecting the parties to the contract without making the conditions of protection so onerous as to be commercially impractical.

83. Some concern was expressed regarding the use of the word “or” between paragraphs (a) and (b) of proposed article 88a (1), since it was thought that an appropriate condition for this derogation was that all such volume contracts would be “individually negotiated”. It was suggested that the proposed article could name some indicators to be examined when deciding whether a contract was individually negotiated, such as, for example, the relative bargaining power of the parties. The view was expressed that paragraph (b) should be placed in square brackets, or that it could be deleted entirely in order to require all volume contracts derogating from the draft instrument to be individually negotiated. However, the view was also expressed that this paragraph was of great importance in some jurisdictions, where small shippers were virtually economically compelled to conclude volume contracts, and often on standard terms. Given the danger that these standard terms could pose in terms of hiding derogations from the obligations in the draft instrument, it was thought that paragraph (b) provided practical and indispensable protection for small shippers faced with such standard terms. Another advantage of keeping paragraph (b) in proposed draft article 88a (1) was said to be that, while negotiations regarding the specific obligations of the contract were clearly within the contemplation of paragraph (a) of the provision, paragraph (b) was needed to encompass those situations where the obligations of the contract and the derogations from the draft instrument were accepted and not negotiated, but where the negotiation focused instead on the price to be paid for freight.

84. Other drafting suggestions were raised with respect to proposed article 88a (1). Some doubts were expressed regarding the meaning of the word “prominent”, which appeared twice in proposed article 88a (1), and it was thought that the meaning of this term could be clarified. Another suggestion was that proposed article 88a (1) could specifically include in its language that it was “subject to paragraph 5” of proposed article 88a (1).

*Conclusions reached by the Working Group on proposed draft article 88a (1)*

85. After discussion, the Working Group decided that:

- Proposed draft article 88a (1) would be retained in the text of the draft instrument as a basis for continuation of the discussion at a future session, subject to possible drafting adjustments in light of the above discussion.

**Draft article 88a (2) and (3)**

86. It was suggested that the requirement that the derogations from the draft instrument should be set forth in the contract of carriage contained in draft article 88a (2) was superfluous, since draft article 88a (1) already mandated that the derogations should be prominent in the contract. However, it was also indicated that the two provisions differed in scope, since draft article 88a (1) required that all the derogations, and the provisions affected by the derogations, should be contained exclusively in the contract of carriage and should be brought to the attention of the other contracting party, while draft article 88a (2) prevented the incorporation of derogations in the contract of carriage by reference.

87. The view was expressed that draft article 88a (3) required further clarification with respect to the relation between the transport document, as defined in draft article 1 (k), and the contract of carriage. It was suggested that the word “is” in draft article 88a (3) should be replaced by the words “does not provide evidence of” or a similar expression to signify that the transport document should not be used to evidence the contract of carriage. It was

indicated that a definition of the volume contract should be inserted in the draft instrument. It was also proposed that draft article 88a (3) should be divided into two separate sentences, with the deletion of the connector “but”.

88. A concern was expressed that the reference to documents incorporated by reference in the second sentence of draft article 88a (3) could lead to the insertion of derogations to the draft instrument in the incorporated documents. However, it was observed that draft article 88a (2) mandated that all derogations should be contained in the contract of carriage. The view was expressed that draft article 88a (3) should not be inserted in the draft instrument unless it would set conditions for derogations. In response, it was suggested that shippers in certain countries, while being fully aware of the needs of effective contract drafting, felt the need to be protected by a provision along the lines of draft article 88a (3).

*Conclusions reached by the Working Group on proposed draft article 88a (2) and (3)*

89. After discussion, the Working Group decided that:

- The proposed draft text for article 88a (2) and (3) should be retained for continuation of the discussion at a future session in light of the considerations expressed above.

**Draft article 88a (4)**

90. It was indicated that draft article 88a (4) was necessary in view of the contractual approach adopted in the definition of the scope of application of the draft instrument. It was further observed that draft article 88a (4) reflected the decision that only those terms of a volume contract regulating shipments falling under the scope of application of the draft instrument would be subject to derogation (see above, para. 52).

91. It was suggested that a reference to draft article 88a (5) should be inserted in draft article 88a (4). It was also suggested that the words “any shipment” should be substituted for the word “shipments” to emphasize that the provision applied to the terms that regulated each of the shipments, effected under a volume contract, that fell under the scope of application of the draft instrument. However, it was also observed that the use of the words “any shipment” could generate misunderstanding since only some terms of the volume contract might be subject to the draft instrument, for example in the case of a volume contract that mixes international and domestic shipments.

*Conclusions reached by the Working Group on proposed draft article 88a (4)*

92. After discussion, the Working Group decided that:

- The proposed draft text for article 88a (4) would be used as a basis for continuation of the discussion at a future session in light of the considerations expressed above.

**Draft article 88a (5)**

*Effects on other international transport agreements*

93. A concern was expressed that under the “network system” for multimodal carriage adopted in the draft instrument, draft article 88a (5) might introduce in the contract of carriage derogations also to international transport agreements not relating to maritime transport, and that this result would conflict with mandatory rules of international law. However, it was pointed out that draft article 8 of the draft instrument was not a conflict of

conventions provision, but rather reflected a policy decision to allow certain provisions of other international instruments to apply to land carriage under the draft instrument. In response, it was indicated that only selected provisions of other international agreements would be applicable to the contract of carriage under the draft instrument, and that the proposed text of draft article 88a (5) would allow derogation from these selected provisions in a volume contract. There was general agreement that the point needed further clarification in the text of draft article 88a (5) or of draft article 8.

*Relation with other paragraphs of draft article 88a*

94. It was suggested that the chapeau of draft article 88a (5) should also contain reference to paragraph 4 of draft article 88a.

*Liability for intentional or reckless behaviour*

95. It was suggested that the reference in draft article 88a (5)(a) to draft article 19 of the draft instrument should be placed in a separate paragraph and expanded upon to prevent the parties to a volume contract from reducing their liability for any intentional or reckless behaviour.

*Non-derogable obligations*

96. It was suggested that a reference to draft article 13 (1)(c) should be inserted in draft article 88a (5)(a). It was indicated that the provision in draft article 13 (1)(c) with respect to the cargoworthiness of a ship constituted an important aspect of the duty of seaworthiness, and that therefore the insertion of a reference to this provision would be in line with the rationale of draft article 88a (5)(a). However, the view was also expressed that, unlike the duties in draft article 13 (1)(a) and (b), the duty in draft article 13 (1)(c) was not a public policy and general security issue and that therefore its application should be left to the freedom of the parties.

97. It was indicated that the brackets around the proposed bracketed text in draft article 88a (5)(a) should be removed to clarify that a derogation would not be possible for the articles enumerated in draft article 88a (5)(a) with respect to both the regime and the level of liability. It was also suggested that a reference to the provisions of the draft instrument on jurisdiction and arbitration should be inserted in draft article 88a (5)(b).

98. It was further suggested that the Working Group should give further consideration to the list of non-derogable provisions enumerated in draft article 88a (5), with a view to including in this list other obligations, such as the draft article 35 signature requirement.

*Conclusions reached by the Working Group on proposed draft article 88a (5)*

99. After discussion, the Working Group decided that:

- The proposed draft text for article 88a (5) would be used as a basis for continuation of the discussion at a future session, bearing in mind the drafting suggestions expressed above on the inclusion of other articles of the draft instrument and to the provisions of the draft instrument on jurisdiction and arbitration;
- The relationship between draft article 88a (5) and the other paragraphs in draft article 88 should be clarified, as well as the interaction of draft article 88a (5) with the provisions of other international transport instruments;

- The possibility of inserting in a separate paragraph of draft article 88a (5) a reference to liability for intentional or reckless behaviour should be the object of further discussion at a future session.

#### **Draft article 88a (6)**

100. It was generally felt that the chapeau of paragraph 6 of draft article 88a should refer not only to paragraph 1 but to all other paragraphs of draft article 88a. As a matter of drafting, it was also suggested that the words “any other party” in proposed draft article 88a (6)(b) should be replaced by the words “any party other than the shipper”.

#### *Draft article 88a (6)(b). Protection of third parties.*

101. It was observed that the proposed text of draft article 88a (6)(b) represented a compromise position between, on the one hand, excluding the application of contractual derogations to the draft instrument to third parties and, on the other hand, applying these contractual stipulations to third parties without limitation. It was added that this compromise position reflected a delicate balance between the intended goals to protect third parties and to adopt a commercially practical provision. It was suggested that requesting consent to be bound by the terms of a volume contract derogating from the draft instrument would provide sufficient safeguards to third parties. However, the view was also expressed that the consent of third parties to be bound by the terms of a volume contract derogating from the draft instrument was not necessary since third parties such as consignees would wilfully acquire rights under the contract of carriage, and a special regime should be envisaged only in the case of issuance of negotiable transport documents, possibly along the lines of draft article 77 of the draft instrument.

#### *Express consent*

102. Concerns were expressed with respect to the meaning of the words “express consent” in proposed draft article 88a (6)(b). The view was expressed that the words “express consent” should not be defined in the draft instrument. It was further suggested that clarifications were needed to ensure that the consent would be expressed directly and individually by the third party to avoid that the third party would automatically become bound by derogations consented to on its behalf. Broad support was expressed for the notion that consent by third parties should be both express and individual, without being unduly cumbersome for carriers. The need to consult domestic industries regarding this paragraph was expressed during the discussion. However, the view was also expressed that a suitable mechanism should accommodate those cases when numerous individuals would be affected as third parties by the execution of a volume contract, such as when the volume contract that spanned several years was concluded.

103. It was suggested that the second part of proposed draft article 88a (6)(b) needed clarification with respect to the possibility for the third party to consent expressly to be bound by the derogating terms of the volume contract in a transport document. It was indicated that, for example, the handwritten expression of such consent on the front of a transport document should be considered valid for the purposes of proposed draft article 88a (6)(b).

#### *Conclusions reached by the Working Group on proposed draft article 88a (6)*

104. After discussion, the Working Group decided that:

- The proposed text for draft article 88a (6) should be used as a basis for continuation of the discussion at a future session in light of the views expressed above;
- The suggestion to insert a reference to paragraphs (1) to (5) of draft article 88a in the chapeau of draft article 88a (6) should be considered in the text to be prepared by the Secretariat.

### **Draft article 89**

105. The Working Group considered the proposed redraft of article 89 (see paragraph 52 above). The Working Group was reminded that it had most recently considered draft article 89 at its eleventh session (see A/CN.9/526, paras. 216-218).

#### *Draft article 89 (1). Carriage of live animals*

##### *Freedom of contract approach vs. exemption from liability approach*

106. It was recalled that the approach taken in article 5 (5) of the Hamburg Rules was based on exemption from liability and exempted the carrier from liability only for loss, damage or delay in delivery of live animals resulting from any special risks inherent in that kind of carriage. It was also indicated that under the Hamburg Rules the carrier of live animals was subject to all the obligations mandated in that instrument. In contrast, it was observed that draft article 89 (a) was based on a contractual approach, and that under this provision the carrier of live animals was exposed to liability only for reckless actions and omissions and under the additional conditions set forth in the draft provision. Support was expressed for both approaches. It was also indicated that the practical result of the two approaches was similar. Wide support was expressed for the suggestion to complement the reference to the liability of the carrier with a reference to its obligations. In addition, a view was expressed that the carrier's loss of the right to limit liability was regulated pursuant to draft article 19, independent of draft article 89 (a).

##### *Servants and agents of the carrier and other maritime performing parties*

107. A view was expressed that reference to servants or agents of the carrier should be avoided since the need to dispose intentionally of stressed animals arose regularly in this trade. However, the prevailing view was that the bracketed language in draft article 89 (a) should be retained because in practice only servants or agents of the carrier would interact with live animals on board, and that a reference to maritime performing parties should be inserted after the bracketed text. In this line, it was indicated that intentional disposal of stressed animals would be exempt from liability as a reasonable measure to protect property at sea (see draft article 14 (3)(l), A/CN.9/572, para. 64).

##### *Multimodal transport*

108. A question was raised as to whether draft article 89(a) would introduce exemption of liability in the non-maritime legs of the carriage in case of multimodal transport. In response it was explained that, while the carriage of live animals was typically multimodal in practice, it was never conducted on the basis of a multimodal contract of carriage and that therefore the non-maritime leg of the carriage was subject to domestic law.

##### *Conclusions reached by the Working Group on proposed draft article 89*

109. After discussion, the Working Group decided that:

- The proposed text of draft article 89, including the bracketed text and the additional reference to the maritime performing parties, should be retained for continuation of the discussion at a future session in light of the considerations expressed above;
- A reference to the obligations of the carrier should be inserted in the chapeau of draft article 89;
- The substance of draft article 89 (b) was generally acceptable.

## **Jurisdiction—Chapter 15**

110. The Working Group was reminded that it had considered the provisions of chapter 15 of the draft instrument on jurisdiction at its fourteenth session and that it had agreed to include in the draft instrument a chapter on jurisdiction (see A/CN.9/572, paras. 110-150). Based on those deliberations, and taking into account the decisions made by the Working Group during that session, revised text was proposed for the provisions of chapter 15. With a view to considering both this revised text and certain policy questions that had arisen during intersessional discussions (see A/CN.9/572, para. 166), it was agreed by the Working Group that consideration of these matters should take place by grouping certain of the provisions together on the basis of a list of key issues as set out in the following headings and paragraphs.

### **Issue 1: Connecting factors—Draft article 72, proposed new definitions, proposed new article 72 bis**

#### **Draft article 72**

111. The Working Group considered the following text of draft article 72 proposed by a number of delegations in accordance with the decisions taken by the Working Group at its fourteenth session (see A/CN.9/572, paras. 113-134):

“Article 72.

“In judicial proceedings relating to carriage of goods under this instrument the [cargo claimant], at its option, may institute an action in a court in a Contracting State 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 domicile]; or

... [former para. (b) deleted in accordance with decision at A/CN.9/572, para. 126] ...

“(b) The [actual/contractual] place of receipt or the [actual/contractual] place of delivery; or

“[(c) the port where the goods are initially loaded on an ocean vessel; or

“(d) the port where the goods are finally discharged from an ocean vessel; or]

“[(e) Any additional place designated for that purpose in the transport document or electronic record.]”

*Chapeau of draft article 72*

112. While the Working Group was reminded that some held the view that jurisdiction provisions should not be included in the draft instrument, the general view was that the decision taken at the fourteenth session to include a chapter on jurisdiction should be maintained (see A/CN.9/572, para. 113). There was general agreement in the Working Group on the substance of the chapeau in draft article 72. However, there was support for the view that care should be taken in future discussions to ensure that draft article 72 did not restrict the ability of carriers to make claims against the cargo interests. In addition, the Working Group was invited to consider to what extent the jurisdiction rules in chapter 15 should apply to agreements that were excluded from the scope of application of the draft instrument, particularly in light of draft article 5 as set forth in A/CN.9/WG.III/WP.44, through which third parties to contracts excluded from the scope of application of the draft instrument nonetheless received protection under its provisions.

113. There was an exchange of views regarding the appropriate person to institute an action under draft article 72, given the decision in the previous session of the Working Group that this article should be limited to actions by the cargo claimant against the contracting carrier (see A/CN.9/572, para. 117). Some held the view that the “shipper or other cargo claimant” were the appropriate persons, while others felt that the “shipper, consignee or other cargo interest” or “holder of a transport document” were more appropriate, and still others were dissatisfied with the lack of precision of those terms. There was support for the proposal that the word “plaintiff” should be reinserted as the claimant in the chapeau, and that the insertion of the words “against the carrier” after the phrase “judicial proceedings” would avoid concerns regarding the carrier pre-empting the choice of jurisdiction by taking an action for declaration of non-liability (see A/CN.9/572, para. 118). One view was expressed that this might not achieve the purpose because an action for declaratory relief was not an action “against the carrier”.

*Conclusions reached by the Working Group regarding the chapeau of draft article 72*

114. After discussion, the Working Group decided that:

- The opening phrase of the provision should be amended to read “In judicial proceedings against the carrier relating to carriage of goods under this instrument, the plaintiff, at its option”;
- Consideration of the views of the Working Group as outlined in the paragraphs above should be taken into account in future adjustments to the chapeau.

*Draft paragraph 72 (a)*

115. It was suggested that the language in draft paragraph 72 (a) presented a profusion of different and confusing terms, and that given the short time for commencing an action, clarity was of the essence in the rules for choosing jurisdiction. It was suggested that text drawn from the Brussels I European Regulation (Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) presented a suitable and well-tested alternative. Despite some doubts raised concerning the recognition of the concept of “domicile” in certain jurisdictions, support was expressed in principle for a proposal made to simplify the text by deleting the language in the paragraph in favour of “the domicile of the defendant”, and by adding a definition of “domicile” to the definition section of the draft instrument as follows:



“‘Domicile’ means the place where: (a) a company or other legal person has its statutory seat or central administration or principal place of business, and (b) a natural person has its habitual residence.”

*Conclusions reached by the Working Group regarding the draft paragraph 72 (a)*

116. After discussion, the Working Group decided that:

- The text of draft paragraph 72 (a) should be revised as indicated in the paragraph above.

*Draft paragraph 72 (b) and proposed new definitions*

117. In connection with draft paragraph 72 (b), the following definitions were proposed for the consideration of the Working Group:

“Article 1 (xx)

“[Unless otherwise provided in the Instrument] ‘the time of receipt’ and ‘the place of the receipt’ means the time and the place agreed to in the contract of carriage or, failing any specific provision relating to the receipt of the goods in such contract, the time and place 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 place of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.”

“Article 1 (xxx)

“[Unless otherwise provided in the Instrument,] ‘the time of delivery’ and ‘the place of delivery’ means the time and the place agreed to in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, the time and place 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 place 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.”

118. There was continued support in the Working Group for the inclusion of the place of receipt and the place of delivery as connecting factors upon which to base jurisdiction (see A/CN.9/572, para. 127). It was noted that the definitions in the above paragraphs could assist in the clarification of this draft paragraph. It was suggested that these definitions could be unnecessary given draft paragraphs 7 (2), (3) and (4) in the draft instrument, however some doubt was expressed in this regard as the purpose of draft article 7 was to define the period of responsibility for the carrier, and it was thought to be insufficient for the purposes of draft article 72.

119. With regard to the issue of whether it was more appropriate to refer to the actual or the contractual place of receipt and delivery, some doubts were expressed regarding the actual places, since, for example, the actual place of delivery could be a port of refuge. It was thought that the contractual place of receipt and the contractual place of delivery were preferable in terms of predictability.

*Conclusions reached by the Working Group regarding the draft paragraph 72 (b)*

120. After discussion, the Working Group decided that:

- The definitions proposed should be introduced in the draft instrument for future discussion; and
- The text of draft paragraph 72 (b) should refer to the contractual place of receipt and the contractual place of delivery.

*Draft paragraphs 72 (c) and (d)*

121. The view was reiterated that the port of loading and the port of discharge should be included as appropriate connecting factors upon which to base jurisdiction (see A/CN.9/572, para. 128). In addition to the previous discussion in the last session of the Working Group, it was suggested that the inclusion of ports would be practical for a maritime plus convention that may be in need of a logical place to consolidate multiple actions. Practical factors in support of this proposal included that the ports were often the only place that the cargo interest could sue both the contracting carrier and the performing party, and that the witnesses and documents were also most likely to be concentrated in the ports, where the damage was most likely to occur. However, another view suggested that protection from a multiplicity of claims could instead be achieved by inserting an exclusive choice of forum clause into the contract of carriage. It was further thought that in order to be consistent throughout the draft instrument, continued reliance on the contractual approach would suggest that only the place of receipt and delivery were relevant. A further suggestion was made that if ports were included in these subparagraphs, the reference should be to contractual ports.

*Conclusions reached by the Working Group regarding draft paragraph 72 (c) and (d)*

122. After discussion, the Working Group decided that:

- The text of draft paragraph 72 (c) and (d) should be retained in square brackets in the draft instrument.

*Draft paragraph 72 (e)*

123. The view was expressed that draft paragraph 72 (e) setting out a designated place in the transport document as an additional means for choosing jurisdiction was closely related to the issue of exclusive jurisdiction clauses (see below paras. 156 to 168), and that a decision on the latter would necessarily affect the former. However, there was also support for the suggestion that the Working Group could decide on whether or not to include draft paragraph 72 (e) independently of its decision regarding an exclusive jurisdiction clause. In this vein, it was noted that the inclusion of draft paragraph 72 (e) should be an acceptable option as a possible forum, since it was simply one of the choices on the menu of options presented to the cargo claimant by draft article 72. An additional advantage was thought to be that since the jurisdiction designated would be a standard choice in the transport documents, it could present a means for reducing a multiplicity of possible jurisdictions that a carrier could face. A further suggestion was raised that the designated place in the draft paragraph could be limited to Contracting States. Support was expressed for draft paragraph 72 (e), provided its language did not attempt to override the menu of other choices of jurisdiction available in draft article 72, and provided that it purported to bind only parties to the agreement. A different view was expressed, however, that such a clause should also be valid for third parties.

*Conclusions reached by the Working Group regarding the draft paragraph 72 (e)*

124. After discussion, the Working Group agreed that:

- The square brackets around draft paragraph 72 (e) should be removed;
- Consideration could be given to replacing the word “designated” with “agreed upon” or similar language;
- Consideration could be given to limiting the operation of the provision to places in Contracting States;
- Matters relating to the position of third parties under this provision and to the interrelationship with exclusive choice of forum clauses should be further considered.

**Draft article 72 bis**

125. The Working Group considered the following text of draft article 72 bis proposed in accordance with the decision taken by the Working Group at its fourteenth session to have a separate provision in the draft instrument on the connecting factors necessary to establish jurisdiction in actions against maritime performing parties (see A/CN.9/572, para. 117):

“Article 72 bis

“In judicial proceedings by the shipper or other cargo interest against the maritime performing party relating to carriage of goods under this instrument, the claimant, at its option, may institute an action in a court in a State party 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/permanent] residence of the defendant; or
- (b) The place where the goods are [initially] received by the maritime performing party; or
- (c) The place where the goods are [ultimately] delivered by the maritime performing party”.

**General discussion**

126. It was suggested that the Secretariat should prepare a revised version of this provision bearing in mind the comments made to the similar language contained in draft article 72 (see above paras. 111 to 124).

127. However, it was further suggested that some of the connecting factors contained in draft article 72 bis would not apply to maritime performing parties. In particular, it was indicated that reference to contractual relationships would not be appropriate in the case of maritime performing parties, for whom the contract of carriage had less relevance. It was also indicated that draft paragraphs (b) and (c) regarding the place of receipt and delivery of the goods would not apply to those maritime performing parties who performed duties exclusively on the ship.

*Conclusions reached by the Working Group*

128. After discussion, the Working Group decided that:

- The Secretariat should be requested to make adjustments to the text of draft article 72 bis based on the views outlined in the above paragraphs.

## **Issue 2: Provisions relating to arrest—Draft articles 73 and 74**

### **Draft article 73**

129. The Working Group discussed the text of draft article 73 as contained in A/CN.9/WG.III/WP.32. The Working Group was reminded that at its fourteenth session it had decided to place the text of draft article 73 between square brackets pending further evaluation of its relationship with the International Convention Relating to the Arrest of Sea-Going Ships, 1952, and the International Convention on Arrest of Ships, 1999 (the “Arrest Conventions”) (see A/CN.9/572, para. 139).

130. The following alternative text of draft article 73 was also offered for the consideration of the Working Group:

“Article 73

“Nothing in this Chapter shall affect jurisdiction with regard to arrest [pursuant to applicable rules of the law of the state or of international law]”.

### **General discussion**

131. The Working Group agreed in principle to avoid any conflict between the draft instrument and the Arrest Conventions. It was indicated that the Arrest Conventions provided uniform rules to a number of State parties and represented a delicate balance of various and complex interests.

132. A large number of delegations expressed a preference for the alternative draft text, set out above in paragraph 130, since it appeared to better and more clearly achieve the goal of avoiding any conflict with the Arrest Conventions, particularly given the number of complex issues and potential areas of conflict that could arise.

133. The view was also expressed that avoidance of a conflict with the Arrest Conventions should be considered not only in a jurisdictional sense, but also in relation to any determination on the merits of the claim for the arrest. In this respect, it was suggested that it might be possible to broaden the avoidance of conflicts beyond jurisdiction conflicts by substituting the word “chapter” with “instrument”. The view was also expressed that due attention should be paid to coordinating the draft provision with certain existing provisions regarding jurisdiction on actions relating to liability arising from the use or operation of a ship, such as article 7 of the European Council Regulation (EC) No. 44/2001.

### *Reference to national legislation*

134. A number of delegations expressed preference for removing the brackets in the alternative text of draft article 73, thus referring both to national and international legislation. It was stated that States which did not adopt any international instrument relating to arrest had developed domestic rules on arrest, and that the draft instrument should also avoid interference with these domestic rules.

135. However, views were also expressed against referring to domestic legislation in draft article 73. It was suggested that the rationale for this provision should be to avoid conflicts between international instruments only. It was further stated that reference to

domestic law could be interpreted as creating new domestic jurisdiction on arrest with unforeseeable consequences. There was some support for the suggestion that a solution to this problem could be found by adjusting the phrase in issue to read “pursuant to applicable rules of law”.

*Conclusions reached by the Working Group*

136. After discussion, the Working Group decided that:

- Draft article 73 should be maintained in the draft instrument;
- The alternative text of draft article 73 should replace the text contained in A/CN.9/WG.III/WP.32;
- The Secretariat should be requested to clarify the text of draft article 73 with regard to claims underlying the arrest based on the views outlined in the above paragraphs;
- The words “[of the law of the state or]” should be kept in brackets for further consideration.

**Draft article 74**

137. The Working Group was reminded that it had most recently considered draft article 74 at its fourteenth session (see A/CN.9/572, paras. 140-141). The Working Group considered the text of draft article 74, Variant A, as contained in document A/CN.9/WG.III/WP.32.

**General discussion**

138. It was suggested that, especially for the benefit of clarity in some languages, the words “of courts” should be inserted after the words “the jurisdiction”. It was further suggested that clarification was needed as to whether draft article 74 was intended to cover measures available under certain national laws (e.g. “référé- provision”) the use of which might not always coextend to that of “protective” measure. However, it was also felt that such issues were better left to national legislation.

139. With a view to clarifying the notion of “provisional or protective measures”, it was suggested that a paragraph 2 should be inserted in draft article 74, containing a definition of provisional or protective measures, with the following text:

“[2. For the purpose of this article ‘provisional or protective measures’ means:

“(a) Orders for the preservation, interim custody, or sale of any goods which are the subject-matter of the dispute; or

“(b) An order securing the amount in dispute; or

“(c) An order appointing a receiver; or

“(d) Any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or

“(e) An interim injunction or other interim order.]”

140. While support was expressed for the insertion of paragraph 2 in draft article 74, the view was also expressed that any attempt to define “provisional or protective measures”

might entail numerous problems while not contributing to the clarity of the draft instrument. The Working Group was reminded of the work currently under way in UNCITRAL Working Group II on arbitration to define provisional measures.

141. It was suggested that draft article 74 should be merged with draft article 73 to clarify that the former provision referred only to protective measures of the shipper against the carrier for claims related to liability. However, it was also indicated that the first and the second sentence of draft article 74 related to different matters, the second sentence being intended to relate strictly to arrest of ships, and that the second sentence in draft article 74 should therefore be kept in a separate article. It was further suggested that the words “This article does not constitute” should be corrected by replacing them with the words “Nothing in chapter 15 constitutes”.

*Conclusions reached by the Working Group*

142. After discussion, the Working Group decided that:

- The text of the second sentence of draft article 74 should be corrected by replacing the phrase “This article does not constitute” with the phrase “Nothing in chapter 15 constitutes”;
- The text of draft article 74 should be retained for further consideration in light of the views expressed above, with particular regard to bringing the first sentence of the provision in line with draft article 73;
- The above-mentioned proposal for a paragraph 2 should be inserted in draft article 74 in square brackets for continuation of the discussion at a future session.

**Issue 3: *Concursus*, suits in *solidum*, *litis consortium* and *lis pendens* (proposed new articles 74 bis, 74 ter and draft article 75)**

**Proposal for the insertion of proposed new article 74 bis. *Concursus*.**

143. The Working Group was reminded that it had most recently considered the issue of *concursus*, or the concentration of multiple suits in a single forum, at its fourteenth session (see A/CN.9/572, paras. 120-121). It was reiterated that in the case of major incidents involving a high number of cargo claims, the carrier could be potentially sued in numerous jurisdictions. It was further indicated that these jurisdictions could be geographically very dispersed due to the interplay of the door-to-door regime of the draft instrument and the connecting factors to establish jurisdiction enumerated in draft article 72. Based on the consideration of this issue at the fourteenth session of the Working Group, it was therefore suggested that a provision on *concursus* should be introduced in the draft instrument to provide for removal of actions to the jurisdiction where the first action had been instituted. The following draft text was suggested for consideration by the Working Group:

“Article 74 bis

“If an action has been instituted under this instrument by a cargo claimant in a place listed in articles 72 and 72 bis, any subsequent action under this instrument relating to the same occurrence shall at the petition of the defendant be moved to the place where the first action was instituted.”

### General discussion

144. It was indicated that under the suggested provision, removal of actions could be invoked in any incident involving more than one claim, and while there was some sympathy for the problem in the case of multiple claims, it was thought that this threshold was too low. It was also suggested that the word “occurrence”, while common in the field of collision law, lacked clarity in this context. It was further indicated that the draft provision left a number of issues open, such as, for instance, the definition of “first action”, and the interplay between the removal of actions and actions by the carrier for declarations of non-liability and counter-claims. It was suggested that the problem could be rendered less troublesome by allowing the adoption of an exclusive jurisdiction clause by the parties. The view was also expressed that the suggested mechanism for removal of actions could add to the litigation costs of the defendant since it could only be triggered by the first action, while reversing the mechanism to request subsequent plaintiffs to sue in the forum nominated by the defendant would be preferable.

145. It was further suggested that *concursum* of actions was a general problem of litigation dealt with in all national legislation, whose rules the draft instrument should respect. It was suggested that the obligation for courts to remove subsequent actions was worded too strongly, and could conflict with a number of principles relating to judicial discretion. It was further indicated that, given that the first action would govern subsequent actions under proposed new article 74 bis, it could be open to forum-shopping and similar tactical jurisdictional choices by the carrier. In addition, it was pointed out that the matter had been discussed in other international forums without reaching a consensus, and that even with a well-drafted provision, an international legal scheme for the removal of actions between States would still be needed.

146. After discussion, the Working Group decided that:

- A provision on *concursum* of actions should not be inserted in the draft instrument.

### Proposal for the insertion of proposed new article 74 ter. Suits *in solidum*. *Litis consortium*.

147. The Working Group was reminded that it had considered the issue of whether the draft instrument should contain a provision on actions brought by cargo interests *in solidum* against the carrier and the maritime performing party at its fourteenth session (see A/CN.9/572, para. 149), and that it had also discussed the benefits of preventing the carrier from establishing jurisdiction by means of an action for declaration of non-liability (see A/CN.9/572, para. 118). Based on that discussion, the following draft text was proposed for consideration by the Working Group:

“Article 74 ter

“[1. If the cargo claimant institutes actions *in solidum* against the contracting carrier and the maritime performing party, this must be done in one of the places mentioned in article 72 bis, where actions can be instituted against the maritime performing party.]

“2. If the carrier or maritime performing party institutes an action under this instrument against the shipper or other cargo interest, then the claimant, at the petition of the defendant, must remove the action to one of the places referred to in articles 72 or 72 bis, at the choice of the defendant.”

*New article 74 ter(1): Actions brought in solidum against the carrier and the maritime performing party*

148. It was indicated that the draft instrument should not hinder the possibility of bringing suit against the carrier and the maritime performing party in the same forum, since this possibility might expedite the resolution of the dispute for the benefit of all parties involved. While the proposed text resolved the problem that the carrier and the maritime performing party may not have a common jurisdiction under draft articles 72 and 72 bis of the draft instrument by resorting to the places set out in proposed new article 72 bis, it was suggested that this matter could also be addressed by the introduction of ports as one of the connecting factors to establish jurisdiction. However, it was also felt that reference to ports as connecting factors to establish jurisdiction might not be fully in line with the “maritime plus” nature of the draft instrument (see, further, paras. 121 and 122 above). It was further suggested that the words “*in solidum*” should be deleted to extend the application of the provision to all actions brought jointly against the contracting carrier and the maritime performing party.

*Conclusions reached by the Working Group*

149. After discussion, the Working Group decided that:

- The proposed text for draft article 74 ter(1) should be inserted between square brackets in the draft instrument for continuation of the discussion at a future session.

*New article 74 ter(2): Declaratory actions brought by the carrier and the maritime performing party*

150. It was indicated that the proposed text for draft article 74 ter(2) was intended to prevent the carrier from seeking declaratory relief to circumvent the connecting factors used in the draft instrument to establish jurisdiction. However, it was also suggested that the provision should be limited to carrier actions for declaratory relief and that it should not prevent the carrier from instituting actions other than for declaratory relief, such as actions for the payment of freight, in the appropriate jurisdiction of its choosing. It was further suggested that the reference to the maritime performing party in draft article 74 ter(2) should be deleted, but the contrary view was also held. In addition, it was suggested that the proposed text should be clarified to indicate that subsequent actions should be removed exclusively to a jurisdiction among those indicated by the connecting factors enumerated in draft article 72.

151. The view was again expressed that, in absence of an established regime for the removal of actions between States, the proposed text for draft article 74 ter(2) might require additional clarification. In this context, it was indicated that the proposed text used language inspired, to some extent, from article 21 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (the “Hamburg Rules”). It was suggested that clarification was needed with respect to the possibility for the carrier to bring an action for declaratory relief in one of the jurisdictions established by the connecting factors under draft article 72, and for the cargo claimant to demand removal of such action to another of these jurisdictions.

*Conclusions reached by the Working Group*

152. After discussion, the Working Group decided that:



- The proposed text for draft article 74 ter (2) should be inserted in the draft instrument for further consideration in light of the opinions expressed above, in particular, limiting its application to declaratory relief sought by the carrier or the maritime performing party.

#### **Draft article 75. *Lis pendens*.**

153. The Working Group was reminded that it had most recently considered draft article 75 at its fourteenth session (see A/CN.9/572, paras. 142-144). The Working Group considered the text of draft article 75, Variant A, as contained in document A/CN.9/WG.III/WP.32.

#### **General discussion**

154. As discussed at the fourteenth session of the Working Group, it was suggested that draft article 75 of the draft instrument should be deleted, since a rule on *lis pendens* would be extremely difficult to agree upon, given the complexity of the subject matter and the existence of diverse approaches to *lis pendens* in the various jurisdictions. It was widely felt that the matter was better left to national laws, despite the desirability of a uniform provision regarding that issue.

155. After discussion, the Working Group decided that:

- Draft article 75 should be deleted from the draft instrument.

#### **Issue 4: Exclusive jurisdiction clauses**

##### **General discussion**

156. The Working Group was reminded that it had briefly considered at its fourteenth session (see A/CN.9/572, paras. 130-133) the issue of whether the draft instrument should allow for parties to agree in the contract of carriage to exclusive jurisdiction clauses. It was also recalled that there had been an exchange of views with respect to the relationship between exclusive jurisdiction clauses and draft paragraph 72 (e) regarding the designation in the transport document of a place of jurisdiction as an additional choice of forum (see above, paras. 123 to 124).

##### *Should the draft instrument allow for exclusive jurisdiction clauses?*

157. The Working Group considered the general question of whether the draft instrument should allow for parties to the contract of carriage to agree to an exclusive jurisdiction clause. There was strong support for the suggestion that the draft instrument should indeed allow for exclusive jurisdiction clauses, particularly if the possibility for the abuse of such clauses was tempered by addition of certain conditions that would have to be fulfilled in order for such clauses to be valid. The view was also expressed that exclusive jurisdiction clauses should be limited to cases of derogation by certain volume contracts from the provisions of the draft instrument pursuant to proposed new article 88a (see above, para. 52).

158. A smaller number of delegations expressed the strongly held view that the draft instrument should not allow parties to a contract of carriage to agree to exclusive jurisdiction clauses. It was suggested that it would be difficult to support an exclusive jurisdiction clause that might allow the carrier in some situations to dictate jurisdiction, particularly where a remote geographic location and the costs of litigating disputes could

put cargo interests at a disadvantage. Further, it was noted that this issue was of such importance in some jurisdictions that there were domestic provisions in place to override the operation of exclusive jurisdiction clauses.

159. In response to these concerns, it was noted that there were already several conventions in force, such as the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, that allow for exclusive jurisdiction, often without any conditions attached to prevent abuses, and it was suggested that to exclude exclusive jurisdiction clauses from the draft instrument would be unusual in the modern context. While it was admitted that there was a danger that exclusive jurisdiction clauses could pose a danger in adhesion contracts, it was submitted that when contracts were freely negotiated there were strong commercial reasons for making the choice of court provisions exclusive. It was suggested that exclusive jurisdiction clauses were quite common in the commercial context, since they provided a means to increase predictability and to reduce overall costs for the parties. Further, it was suggested that attaching conditions to prevent abuse would eliminate the possibility of surprise, which, it was submitted, was the key concern with respect to exclusive jurisdiction clauses in a commercial context. Additional advantages of providing for exclusive jurisdiction clauses in the draft instrument were said to be a potential reduction of the number of possible jurisdictions in the case of multiple suits, particularly in the absence of concursus provisions, and a reduction in the risk of forum-shopping. It was further suggested that the possibility of having to litigate a claim in a remote location was simply a known risk for parties engaged in the world of international trade.

160. A note of caution was raised regarding the possibility of overstating the importance of including or excluding exclusive jurisdiction clauses in the draft instrument. It was suggested that small claims are usually handled locally, regardless of jurisdiction clauses, and that larger claims are often dealt with on both the cargo and carrier side on a non-local basis by insurers. Of those larger claims, it was suggested that most settle, often to avoid the potentially huge litigation costs involved in pursuing a claim. While some doubts were raised regarding this proposition, there was support for the view that only a small proportion of shipments of goods result in claims, and that only a small proportion of these claims are actually litigated.

#### *Conditions for the validity of exclusive jurisdiction clauses*

161. It was suggested that provisions could be included in the draft instrument requiring that certain conditions be fulfilled prior to the valid exercise of an exclusive jurisdiction clause. The conditions suggested were as follows:

- The exclusive jurisdiction clause should contain the name and location of the chosen court;
- The chosen court would have to be in a Contracting State;
- The agreement would be required to indicate the exact name and address of the parties, so that the defendant could be notified of the proceedings against it; and
- The agreement would be required to state that the jurisdiction of the chosen court would be exclusive.

162. An additional condition suggested for inclusion in this regard was that the contract of carriage should be individually or mutually negotiated, such that it would be distinguishable from an adhesion contract. Another view was that it would be more

accurate for the requirement to state that the contract must be mutually agreed, rather than mutually negotiated. Further, it was suggested that the other requirements for derogation from the draft instrument set out under proposed new article 88a should also be fulfilled in order to allow for the valid operation of exclusive jurisdiction clauses (see above, para. 52).

163. Views were expressed regarding the suggested conditions, which were, in general, favourably viewed. It was suggested that the requirement that an exclusive jurisdiction clause be expressly agreed might negate the perceived need to limit their validity to proposed new article 88a volume contracts. Further, it was noted that the name and address of the carrier were already required in the contract particulars pursuant to draft article 34 of the draft instrument, and that including that information as necessary for the validity of an exclusive jurisdiction clause would provide an additional incentive for the carrier to comply. However, concern was raised that this requirement could be seen as a hidden “identity of carrier” clause, which was said not to be upheld in many jurisdictions. It was suggested that this requirement could be limited to the name and address of the carrier.

*Should exclusive jurisdiction clauses be enforceable against third parties?*

164. The view was expressed that, in a commercial context such as that governed by the draft instrument, providing for the application of exclusive jurisdiction clauses to third parties would be justifiable in that it would greatly assist predictability for the parties to the contract, and that the imposition of certain conditions would protect the third party from suffering any hardship. In this vein, it was suggested that the following conditions were appropriate:

- The parties to the initial contract of carriage should expressly agree that they would extend the exclusive jurisdiction clause to the third party;
- The contract of carriage should meet the requirements of proposed new article 88a;
- The third party to be bound should have written or electronic notice of the place where the action could be brought;
- The forum should be one of those specified in draft article 72; and
- The place selected should be in a Contracting State.

165. The view was expressed that the application of exclusive jurisdiction clauses to third parties should not be limited to the context of proposed new article 88a volume contracts, but that the principle should extend to all contracts of carriage. In this connection, it was pointed out that, in order to be effective, an exclusive jurisdiction clause must bind third parties. It was thought that in situations where it was found acceptable for jurisdiction to be exclusive, it should be exclusive for all purposes under the contract of carriage, regardless of who is claiming the benefit under the contract. It was suggested that the third-party consignee is actually a part of the transaction due to the contract of sale, pursuant to which the consignee is free to negotiate conditions favourable to it, and that to argue that such a party is in need of protection is somewhat artificial. The suggestion was made that thought could be given to a provision along the lines of draft article 77 of the draft instrument, which concerns the application of arbitration provisions to the holder of a negotiable transport document or a negotiable electronic transport record.

166. The contrary view was expressed, that exclusive jurisdiction clauses should never apply to third parties, since they were not parties to the contract. Concern was raised that

the application of exclusive jurisdiction clauses to third parties would unfairly take away their right to choose the forum from the options in draft article 72. It was observed that those opposed to exclusive jurisdiction clauses were generally opposed to their application to third parties, and that those in favour of their inclusion in the draft instrument were also generally in favour of extending them to third parties, perhaps with additional conditions. It was also suggested that the discussion in this regard could be somewhat more nuanced, since depending on what type of transport document was issued, a consignee could in some jurisdictions actually be bound by the contract of carriage.

167. It was suggested that the conditions proposed could provide for the building of a compromise position between those firmly opposed to and those firmly in favour of the application of exclusive jurisdiction clauses to third parties. Some reservations were raised with respect to the conditions, such as the timing of the notice, and of its effectiveness if it were included in a bill of lading that arrived after the cargo. In response to this latter point, it was observed that the consignee had no obligation to accept the cargo. In addition, it was said that written notice was both difficult to define and, if it were given in the bill of lading, it could cause difficulties when the bill of lading was repeatedly transferred, such that the ultimate holder might be forced to litigate in a location far away. Further it was suggested that the notice to the third party should be required to be given by the shipper.

*Conclusions reached by the Working Group regarding exclusive jurisdiction clauses*

168. After discussion, the Working Group decided that:

- Further consideration should be given to the issue of whether exclusive jurisdiction clauses should be allowed pursuant to the draft instrument, and whether they should apply with respect to third parties;
- The attachment of certain conditions to protect parties and third parties from hardship in the face of exclusive jurisdiction clauses could assist the Working Group in coming to a consensus on this issue;
- The Secretariat was requested to prepare draft text on exclusive jurisdiction clauses, bearing in mind the discussion and concerns set out in paragraphs 156 to 167 above.

**Issue 5: Agreement on jurisdiction following a dispute—Draft article 75 bis**

**Draft article 75 bis**

169. The Working Group next considered the text of draft article 75 bis as slightly modified from A/CN.9/WG.III/WP.32 following discussion at its fourteenth session (see A/CN.9/572, para. 150) by the addition of square brackets around the phrase “[after a claim under the contract of carriage has arisen,]”.

170. Support was expressed for the principle in this provision. There was support for the suggestion that the word “claim” should be deleted, and that the following phrase should be added after the word “parties”: “to the dispute under the contract of carriage after the dispute has arisen,” in order to ensure that it was clear that any agreement on jurisdiction should not be reached until after both parties had notice of the dispute. Further, it was observed that the word “agreement” in draft article 75 bis covered both express and implied agreement. It was suggested that this provision should be revisited once the Working Group has made its decision regarding exclusive jurisdiction clauses.

*Conclusions reached by the Working Group regarding the draft article 75 bis*

171. After discussion, the Working Group decided that:

- A provision along the lines of draft article 75 bis should be included in the draft instrument;
- The Secretariat should consider whether the text of draft article 75 bis should be modified by deleting the word “claim”, and by adding after the word “parties” the following phrase: “to the dispute under the contract of carriage after the dispute has arisen”.

**Issue 6: Recognition and enforcement****General discussion**

172. It was suggested that, given the decision of the Working Group to include in the draft instrument provisions with respect to jurisdiction, the inclusion of provisions on recognition and enforcement would be desirable in order to reinforce the likelihood that resort could predictably be had to the jurisdiction provisions. While there was support for this view, it was suggested that experience had shown in the context of other negotiations on international instruments that agreement was difficult to reach with respect to provisions on recognition and enforcement. There was support for the concern expressed that reaching consensus on provisions on recognition and enforcement in the context of the draft instrument would require a great deal of time, and that it would further encumber the draft instrument, which was already regulating matters in a large number of areas. In addition, it was said that provisions on recognition and enforcement were not considered a commercial necessity.

173. Another view was expressed that the cargo claimant, in choosing its jurisdiction pursuant to draft article 72, would be aware of the rules on recognition and enforcement applicable in the various possible jurisdictions, and could decide accordingly on which jurisdiction to choose for the greatest likelihood of enforcement. It was also observed that other considerations should be taken into account before a decision is made on whether to include provisions on recognition and enforcement, such as whether or not the Working Group would include exclusive jurisdiction clauses, which could have an impact on recognition and enforcement provisions, and the pragmatic decision that the cargo claimant would often make to commence action in the jurisdiction where the defendant has sufficient assets. However, the view was expressed that this latter point was less relevant, since assets could be moved quickly from one jurisdiction to the next. Other concerns were expressed that if a rule with respect to recognition and enforcement were introduced with respect to jurisdiction, a similar rule would likely be necessary regarding arbitration, and that this could touch upon sensitive issues in the context of international arbitration rules.

174. It was also suggested that negotiation of rules on recognition and enforcement could be easier in the context of the draft instrument, since it dealt only with the narrow topic of “maritime plus” carriage of goods, rather than trying to find consensus on rules to cover the entire range of commercial matters, which had proven so difficult in other negotiations. In this context, it was suggested that provisions on enforcement in numerous other conventions already in existence with respect to maritime law, such as the Athens Protocol of 2002 (to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974), might be instructive to the Working Group.

*Conclusions reached by the Working Group regarding recognition and enforcement*

175. After discussion, the Working Group decided that:

- While no decision had yet been made regarding whether or not to include in the draft instrument provisions on recognition and enforcement, the Working Group would examine any text proposed in order to assist it in making that decision.

**Arbitration—Chapter 16****General discussion**

176. The Working Group next considered draft chapter 16. The Working Group was reminded that it had most recently considered draft chapter 16 at its fourteenth session (see A/CN.9/572, paras. 151-157). The discussion at the fifteenth session was conducted on the basis of a note by the Secretariat (A/CN.9/WG.III/WP.45).

177. At its fourteenth session, the Working Group held a general discussion on the desirability of provisions on arbitration in the draft instrument. The view was expressed that parties should have complete freedom to conclude arbitration clauses and to rely on their application. However, concern was also expressed that recourse to arbitration might hinder the application of the rules of the draft instrument on exclusive jurisdiction. It was further suggested that the regime of the draft instrument should be in line with common trade practices in this field. It was also pointed out that the draft instrument should be in line with arbitration-related UNCITRAL instruments.

178. With a view to reconciling the above views, a proposal was made for a possible solution that would entail the deletion of draft chapter 16 on arbitration of the draft instrument, the application of chapter 15 on jurisdiction of the draft instrument to liner trade only, and the insertion in the draft instrument of a provision allowing the parties to refer any dispute to arbitration, as well as to agree on any jurisdiction, but only after the dispute had arisen. It was observed that this approach would preserve the existing practice in non-liner trade where recourse to arbitration under charter parties and charter party bills of lading was not uncommon, ensure uniformity of rules, and favour freedom of contract while preventing possible circumvention of jurisdiction rules under the draft instrument. It was further observed that, while in principle under this approach arbitration clauses contained in bills of lading would be unenforceable, specific exemptions should be foreseen for special liner trades.

*Conclusions reached by the Working Group on draft chapter 16*

179. After discussion, the Working Group decided that:

- A new draft of chapter 16 based on the suggestion expressed above should be submitted for the consideration of the Working Group at a future session.

**Revised provisions on electronic commerce**

180. The Working Group heard that a joint meeting of experts of Working Group III on transport law and of Working Group IV on electronic commerce was held in February 2005. Following those discussions, the joint meeting of experts suggested that the provisions of the draft instrument with respect to electronic commerce, as they

appeared in A/CN.9/WG.III.WP.32, should be slightly revised. The Working Group considered those proposed revised provisions on electronic commerce as they appeared in A/CN.9/WG.III.WP.47.

### **Definitions (draft article 1)**

#### *Draft article 1 (f) “Holder”*

181. Concerns were expressed with respect to the identity of the “holder” in draft article 1 (f), and that the definition seemed to include parties who were not always holders. The view was expressed that any drafting difficulties could be resolved, but that the intention of the definition was that subparagraph (i) dealt with paper documents and covered all parties, while subparagraph (ii) concerned electronic transport records, where the issue was not physical possession, but control, and which could include the shipper and the consignee. It was observed that general drafting improvements could be made to subparagraph (ii), such as the inclusion of certain holders such as the documentary shipper in draft article 31. It was also suggested that draft article 1 (f)(ii) should specifically indicate to whom the electronic transport record would be transferable.

#### *Draft article 1 (o) “Electronic transport record”*

182. Support was expressed in the Working Group for the definition of “electronic transport record”. A suggestion was made that the last paragraph could be simplified.

#### *Draft article 1 (p) “Negotiable electronic transport record”*

183. In response to a question, it was clarified that the phrase “consigned to the order of the shipper or to the order of the consignee” in subparagraph (i) was intended to include the situation where goods were consigned to a named party. A drafting suggestion was made to substitute the phrase “including, but not limited to” for the phrase “that indicates” in subparagraph (i).

#### *Draft article 1 (q) “Non-negotiable electronic transport record” and draft article 1(r) “Contract particulars”*

184. The Working Group had no comment on draft articles 1 (q) or (r).

#### *Conclusions reached by the Working Group on the definitions in draft articles 1 (f), (o), (p), (q) and (r)*

185. After discussion, the Working Group decided that:

- There was general support for the definitions in draft articles 1 (f), (o), (p), (q) and (r), subject to the drafting suggestions set out above in paragraphs 181 to 184.

## **Chapter 2: Electronic communication**

### **Draft article 3**

186. The Working Group next considered draft article 3. It was explained that paragraph 2 of this draft article was a new provision that was intended to explicitly state what was implicit in the draft instrument, that issuance, possession and transfer of a negotiable document had the same effect as the issuance, control and transfer of an electronic

transport record. The Working Group agreed to change the word “communication” to “communications” in paragraph (a), pursuant to footnote 19.

*Conclusions reached by the Working Group on proposed draft article 3*

187. After discussion, the Working Group decided:

- To change the word “communication” to “communications” in paragraph (a), and to otherwise accept the text of draft article 3 for inclusion and further discussion in the draft instrument.

**Draft article 4**

188. The Working Group next considered draft article 4. In response to a question, it was clarified that, if more than one original of the negotiable transport document was issued, all of them would have to be collected before the negotiable electronic transport record could be issued in substitution.

*Conclusions reached by the Working Group on proposed draft article 4*

189. The Working Group approved of the text for further discussion and for inclusion in the draft instrument.

**Draft article 5**

190. The Working Group next considered draft article 5. There was support for the view that the list of articles which contained references to notices and consents should not be considered closed, since other provisions might have to be included, such as draft articles 88a and 61 bis.

*Conclusions reached by the Working Group on proposed draft article 5*

191. The Working Group approved of the text for further discussion and for inclusion in the draft instrument, subject to the insertion of additional articles referring to notices and consents.

**Draft article 6**

192. The Working Group next considered draft article 6 of the draft instrument.

*Draft article 6 (1)—Inclusion of registry systems in the draft instrument*

193. The Working Group considered the issue set out in footnote 31 of A/CN.9/WG.III/WP.47, where it was suggested that the Working Group might wish to add, after the word “shall” in the chapeau, the phrase “or of the rights represented by or incorporated into that record”. This change was suggested in light of concerns that draft article 6, when read with the relevant definitions, envisaged the use of a technology whereby the electronic transport record would be transferred along the negotiation chain, thereby potentially excluding some non-token technologies such as registry systems.

194. There was general agreement in the Working Group that, as a principle, it did not wish to exclude registry systems from the draft instrument. However, concerns were raised that the inclusion of the suggested phrase risked confusing the concepts of transfer of



documents under draft article 59, and transfer of rights under draft article 62. There was support for that view.

195. It was suggested that an avenue for bringing registry systems and other non-token technologies clearly within the application of the draft instrument could be to employ the notion of transfer of control of an electronic transport record as the equivalent of the transfer of the record itself. Other possibilities for compromise were suggested, such as adjusting the relevant definitions in draft article 1.

#### *Security*

196. A suggestion was raised to add into draft article 6 (1) language to the effect that a secure or a reliable method should be used for the transfer. However, the view was expressed that adding text of this sort to the provision could generate unnecessary case law to interpret it, and that the concept of security was already implicit in the text of the draft article. Some concern was expressed regarding whether, in light of this explanation, the word “assurance” should be used in paragraph (1)(b). By way of further explanation, it was thought that the word “assurance” referred to the integrity of the record, rather than to the system that controlled it, and that it would not, therefore, cause ambiguity.

#### *Conclusions reached by the Working Group on draft article 6 (1)*

197. After discussion, the Working Group agreed that:

- A small drafting group should be struck to amend the existing text of draft article 6(1), taking into account the above discussion regarding possible methods to render the provision technologically neutral.

#### *Draft article 6 (2)*

198. Support was expressed for draft article 6 (2). The Working Group heard that the phrase “readily ascertainable” had been used in order to indicate without excessive detail that the necessary procedures must be available to those parties who have a legitimate interest in knowing them prior to entering a legal commitment. It was suggested that providing further detail in the draft instrument was unnecessary, since a more detailed definition would depend upon the type of system and the type of electronic record used, and that it could thus impede future technological development.

#### *Conclusions reached by the Working Group on draft article 6 (2)*

199. The Working Group approved of the text of draft article 6 (2) for further discussion and for inclusion in the draft instrument.

### **Chapter 8: Transport documents and electronic records**

#### **Draft article 33—Issuance of the transport document or electronic transport record**

200. The Working Group next considered draft article 33, on which it had no comment.

#### **Draft article 35—Signature**

201. The Working Group next considered draft article 35. A number of questions were raised in respect of this provision of the draft instrument.

*Definition of “electronic signature”*

202. The view was expressed that there should be a specific definition of “electronic signature” in the draft instrument, and a view was expressed that, otherwise, States that did not have national law on this topic could have a legal vacuum. It was felt that the definition “electronic signature” in draft article 35 did not add anything to the concept set out in other international instruments, nor did it deal in any specific fashion with transport law. It was suggested that, in the interests of uniformity, the draft instrument should adopt a definition of “electronic signature” based on other UNCITRAL instruments such as the Model Law on Electronic Signatures (2001) and the Model Law on Electronic Commerce (1996). However, a better starting point was thought to be the more modern approach taken in article 9 (3) of the recently-concluded draft convention on the use of electronic communications in international contracts (annex to A/CN.9/577).

203. Other views were expressed that the term “electronic signature” should not be defined, and that it should be left to national law. However, it was suggested that leaving the matter to national law could lead to disharmony, and that an effort should be made to find a unifying international standard. Further, it was thought that, in order to be commercially practicable, a definition of “electronic signature” should be uncomplicated and inexpensively met in practice. It was proposed that the best policy would be to have a functional definition of “electronic signature”, rather than to lock in to a specific definition, and to leave the exact standard to national law or to the commercial parties themselves, as long as the functional requirements were met. There was support for this proposal, particularly in light of ensuring future flexibility for technology that had not yet emerged.

*Which law should govern?*

204. It was suggested that, if national law was the applicable law, rules would have to be established to determine the choice of law to govern the electronic signature. One view was expressed that this should be the law governing the place of the document, while another view suggested that the proper applicable law would be the one governing the procedures in draft article 6.

*Conclusions reached by the Working Group on proposed draft article 35*

205. After discussion, the Working Group decided that:

- A small drafting group should be struck to consider revising the existing text of draft article 35, taking into account the concerns expressed above.

**Draft articles containing electronic commerce aspects****Right of Control—Draft article 54, Transfer of rights—Draft article 59, Transfer of rights—Draft article 61 bis**

206. The Working Group next considered only the electronic commerce aspects of draft article 54 with respect to the right of control, and draft articles 59 and proposed article 61 bis regarding the transfer of rights. The Working Group did not have any specific comment relating to the electronic commerce aspects of these draft articles as they appeared in A/CN.9/WG.III/WP.47.

### Proposed redraft of certain provisions pertaining to electronic commerce

207. Based upon the discussion in the Working Group (see above, paras. 180 to 205), an informal drafting group composed of a number of delegations prepared a revised version of certain of the provisions relating to electronic commerce as they appeared in A/CN.9/WG.III/WP.47. Draft article 1 (f) was revised to delete the enumeration of persons in subparagraph (ii) in favour of the phrase “the person”, and the phrase “issued or” was added prior to the word “transferred”. Further, it was thought that the closing sentence of draft article 1 (o) could not be shortened without losing its necessary content. Draft article 6 (1)(a) was deleted in favour of the following phrase, “(a) the method to effect the issuance and the transfer of that record to an intended holder”, and the word “consignee” in draft article 6 (1)(d) was deleted in favour of “holder”. In addition, the second sentence of draft article 35 was deleted in favour of the sentence, “Such signature must identify the signatory in relation to the electronic transport record and indicate the carrier’s authorization of the electronic transport record.” Further, the word “other” was deleted from draft article 61 bis (2). Finally, in addition to the consequential changes to draft article 6 (1)(a) noted above, in order to address the issue raised with respect to ensuring technological neutrality (see above, paras. 192 to 195), the following new definition was proposed for inclusion in draft article 1:

“Article 1(xx)

“The issuance and the transfer of a negotiable electronic transport record means the issuance and the transfer of exclusive control over the record. [A person has exclusive control of an electronic transport record if the procedure employed under article 6 reliably establishes that person as the person who has the rights in the negotiable electronic transport record.]”

208. It was further explained that the informal drafting group inserted square brackets around the closing sentence in proposed article 1 (xx) to indicate only that further thought must be given to the wording of the text, but not to indicate any uncertainty regarding the necessity of its inclusion.

209. The Working Group made general comments with respect to the redrafted provisions. The view was expressed that further thought should be given to the question of whether the second part of draft article 1 (f)(ii) with respect to “exclusive control” was necessary. It was also thought that the intention behind proposed draft article 1 (xx) should be explained in an explanatory note to the draft instrument. Support was expressed for the approach taken in the redraft of article 35 as being flexible and accommodating many different legal systems.

### *Conclusions reached by the Working Group on proposed redraft of electronic commerce provisions*

210. The Working Group approved the approach taken in the proposed revisions to the electronic commerce provisions for inclusion in the draft instrument.

### Right of control

211. The Working Group heard a brief report on the informal intersessional consultations held on the issue of the right of control in the draft instrument (draft articles 53 to 58 in A/CN.9/WG.III/WP.32) as an introduction to the Working Group’s consideration of those

provisions at its next session. It was explained that the Working Group would have to consider a number of different issues. It was indicated that different views had emerged with respect to the nature and the extent of the right of the controlling party to give instructions to the carrier. It was suggested that the draft text did not provide sufficient distinction between the right of the controlling party to give instructions to the carrier and the right to amend the contract of carriage. It was further suggested that the definition of controlling party and of how to designate another entity as a controlling party required further reflection, and it was generally felt that the carrier should be notified of any change in the controlling party. It was observed that other matters open for discussion included the time of cessation of the right of control, the formal requirements for giving instructions in the case of non-negotiable transport documents and non-negotiable electronic transport records, and the obligation of the carrier to follow the instructions of the controlling party, as well as the carrier's liability in this respect.

### **Transfer of rights**

212. The Working Group also heard a brief report on the informal intersessional consultations held on the transfer of rights in the draft instrument (draft articles 59 to 62 in A/CN.9/WG.III/WP.32 and draft article 61 bis in A/CN.9/WG.III/WP.47, para. 12) as an introduction to the Working Group's consideration of provisions on transfer of rights at its next session. Five items relating to transfer of rights were indicated as being of particular importance for future discussion: the regime that should be applicable to the nominative document not issued "to order"; whether to adopt a "general statement" or an "enumerated list" approach to third-party liability; rights exercised by third parties without the assumption of liability; the applicable law; and notification to the carrier of transfer of rights. Moreover, it was indicated that the Working Group could consider at its current session the proposed new text of draft article 61 bis, contained in A/CN.9/WG.III/WP.47, paragraph 12, and begin a discussion on contractual obligations transferable to third parties without their consent.

#### *Conclusions reached by the Working Group on transfer of rights*

213. After discussion, the Working Group decided:

- Draft article 61 bis as contained in A/CN.9/WG.III/WP.47, paragraph 12 should be inserted in the draft instrument for consideration at a future session, subject to any drafting suggestion with respect to electronic commerce.

## **III. Other business**

### **Scheduling of sixteenth and seventeenth sessions**

214. It was noted that, subject to approval by the Commission at its the thirty-eighth session (Vienna, 4-15 July 2005), the sixteenth session of the Working Group would be held in Vienna, at the Vienna International Centre, from 28 November to 9 December 2005, and the seventeenth session of the Working Group would be held in New York, at United Nations Headquarters, from 3 to 13 April 2006.

**Planning of future work**

215. With a view to structuring the discussion on the remaining provisions of the draft instrument the Working Group adopted the following tentative agenda for completion of its second reading of the draft instrument:

*Sixteenth session (Vienna, 28 November to 9 December 2005, subject to approval)*

- Right of control
- Transfer of rights
- Jurisdiction and Arbitration
- Delivery of goods, including period of responsibility, draft article 11 (2) and draft articles 46-52
- Shipper's obligations

*Seventeenth session (New York, 3-13 April 2006, subject to approval)*

- Scope of application and Freedom of contract
- Rights of suit and Time for suit
- Limitation levels
- Transport documents
- Pending issues, including issues relating to maritime performing parties (draft article 15), national law (draft article 8) and special limitations (draft article 18 (2))

*Methods of work*

216. The view was expressed in the Working Group that great progress had been achieved during its fifteenth session, as it had during its fourteenth session, and that starting in May 2004 (see A/CN.9/552, para. 167), that progress was due in large part to the informal consultation work that occurred among delegations between sessions. This informal intersessional work was said to have been extremely useful for educational purposes, exchanging views and narrowing contentious issues. It was said to be essential to the successful completion of the draft instrument that that informal intersessional work continue, bearing in mind the need to ensure that the quantity of documents produced by that process should be compatible with the production by the Secretariat of official documents in all official languages for presentation to the Working Group. The view was also expressed that the use of small drafting groups within the Working Group had been enormously helpful for the Working Group as a whole. There was full support in the Working Group for the above views.

217. The issue of concluding work on the draft instrument was reassessed in light of earlier discussions on this topic in the Working Group (see A/CN.9/552, para. 168). A number of delegations supported the view that, while the completion of work at the end of 2005 was unlikely, with the valuable assistance of the informal consultation process, the Working Group could complete its work at the end of 2006.

**G. Note by the Secretariat on the preparation of a draft instrument  
on the carriage of goods [wholly or partly] [by sea] -  
Scope of application provisions, submitted to  
the Working Group on Transport Law  
at its fifteenth session**

**(A/CN.9/WG.III/WP.44) [Original: English]**

During its fourteenth session (Vienna, 29 November to 10 December 2004), Working Group III considered certain provisions of the draft instrument on the carriage of goods [wholly or partly] [by sea] pertaining to the scope of application of the draft instrument (A/CN.9/572, paras. 83 to 96). Based upon that discussion in the Working Group, an informal drafting group composed of a number of delegations prepared a redraft of the core provisions regarding the scope of application of the draft instrument. The informal drafting group presented the redrafted provisions to the Working Group (A/CN.9/572, paras. 105-106), and the Working Group agreed that the redraft represented a sound text upon which to base future discussions on scope of application, once further reflection and consultations had taken place (A/CN.9/572, para. 109). This note contains those redrafted provisions presented by the informal drafting group as they appeared in the report of the fourteenth session (A/CN.9/572, para. 105), plus a brief commentary prepared by the informal drafting group following each of the articles presented.

**ANNEX**

**SCOPE OF APPLICATION PROVISIONS**

**Introduction**

1. During the fourteenth session of Working Group III, an informal drafting group discussed the joint drafting suggestions of Finland, Italy, Japan, the Netherlands, Sweden, and the United States, which were intended to reflect the general consensus in the Working Group (A/CN.9/572, para. 89) regarding which types of transactions should fall within the mandatory scope of the draft instrument on the carriage of goods [wholly or partly] [by sea]. Based on these discussions, the informal drafting group proposed to the Working Group during its fourteenth session a series of new provisions regarding the scope of application of the draft instrument. These new provisions are reproduced as they appeared in para. 105 of A/CN.9/572, with the addition of a brief commentary prepared by the informal drafting group following each provision. These new provisions do not address the issue of Ocean Liner Service Agreements (OLSAs) (see A/CN.9/WG.III/WP.34 and A/CN.9/WG.III/WP.42), and will need to be reconsidered in light of the Working Group's decision in that regard. In addition, further examination of draft articles 88 and 89, which also address freedom of contract issues, will be necessary. While renumbering of the provisions will clearly have to occur should the following articles become part of the draft instrument, for ease of reference in this note, the series of new provisions below will be referred to as the "scope-of-application draft articles", while the existing provisions of the draft instrument will be referred to as the "draft articles".

“Article 1

“(a) “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. This undertaking must provide for carriage by sea and may provide for carriage by other modes of transport prior to or after the sea carriage. [A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage provided that the goods are actually carried by sea.]

“[(--) “Liner service” means a maritime transportation service that

- (i) is available to the general public through publication or otherwise; and
- (ii) is performed on a regular basis between specified ports in accordance with announced timetables or sailing dates.]

“[(--) “Non-liner service” means any maritime transportation service that is not a liner service.]”

2. *Commentary on scope-of-application draft article 1 (a) definition of “contract of carriage”, including the proposed definitions of “liner service” and “non-liner service”:* Scope-of-application draft article 1 (a) was intended to clarify the definition of “contract of carriage” in draft article 1 (a) of the draft instrument as contained in para. 6 of A/CN.9/WG.III/WP.36. The requirement of an international sea leg, which was included in that A/CN.9/WG.III/WP.36 definition, has been included in scope-of-application draft article 2, along with reference to the internationality of the overall carriage. The bracketed language at the end of scope-of-application draft article 1 (a) is substantially the same as draft paragraph 1 (bis) of article 2 as contained in para. 6 of A/CN.9/WG.III/WP.36. It was suggested in the informal drafting group that the bracketed text is superfluous, but it was thought by some that, given that the provision was controversial and that it had been included in brackets in para. 6 of A/CN.9/WG.III/WP.36, it should be preserved for further discussion. In addition, definitions of “liner service” and “non-liner service” were proposed for inclusion in the definition section at article 1 of the draft instrument in order to clarify scope-of-application draft article 3, below. These proposed definitions were intended to serve as a basis for further discussion in the Working Group.

“Article 2

“1. Subject to Articles 3 to 5, this Instrument applies to contracts of carriage in which the [contractual] place of receipt and the [contractual] place of delivery are in different States, and the [contractual] port of loading and the [contractual] port of discharge are in different States, if

“(a) the [contractual] place of receipt [or [contractual] port of loading] is located in a Contracting State, or

“(b) the [contractual] place of delivery [or [contractual] port of discharge] is located in a Contracting State, or

“(c) [the actual place of delivery is one of the optional places of delivery [under the contract] and is located in a Contracting State, or]

“(d) the contract of carriage provides that this Instrument, or the law of any State giving effect to it, is to govern the contract.

“[References to [contractual] places and ports mean the places and ports provided under the contract of carriage or in the contract particulars.]

“[2. This instrument applies without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.]”

3. *Commentary on scope-of-application draft article 2:* Scope-of-application draft article 2 (1) requires the internationality of the overall carriage as well as the internationality of the sea leg. The requirement for the internationality of the overall carriage was included in draft article 3.1 of the draft instrument as contained in A/CN.9/WG.III/WP.21 and draft article 2 (1) of the draft instrument as contained in A/CN.9/WG.III/WP.32, but was omitted from draft article 2 (1) of A/CN.9/WG.III/WP.36. Sub-paragraphs (a) to (d) of the scope-of-application draft are taken directly from draft article 2 (1) of A/CN.9/WG.III/WP.32 and A/CN.9/WG.III/WP.36. The question remains whether a provision such as paragraph (2) of scope-of-application draft article 2, set out above, is still necessary; it was once thought to be required and thus it was included in Article X of Hague-Visby Rules.

“Article 3

“1. This Instrument does not apply to

“(a) subject to Article 5, charter parties, whether used in connection with liner services or not; and

“(b) subject to Article 4, volume contracts, contracts of affreightment, and similar contracts providing for the future carriage of goods in a series of shipments, whether used in connection with liner services or not; and

“(c) subject to paragraph 2, other contracts in non-liner services.

“2. This Instrument applies to contracts of carriage in non-liner services under which the carrier issues a transport document or an electronic record that

(a) evidences the carrier’s or a performing party’s receipt of the goods; and

(b) evidences or contains the contract of carriage,

except in the relationship between the parties to a charter party or similar agreement.”

4. *Commentary on scope-of-application draft article 3:* While scope-of-application draft article 2 was intended to reflect the Working Group’s preference for the contractual approach in defining the draft instrument’s scope of application (A/CN.9/572, paras. 89), it was recognized that it was necessary to supplement the contractual approach with further clarifications. Scope-of-application draft article 3 (1) was intended to avoid the situation that a pure contractual approach would create in including transactions that the Working Group had agreed to exclude from the scope of application of the draft instrument. Scope-of-application draft article 3 (1) (a) and (b) refer to liner services as well as to non-liner services because certain forms of charter parties (such as slot charters and space charters) and volume contracts are regularly used in liner services. Scope-of-application draft article 3 (2) was intended to ensure that transactions covered by the Hague and Hague-Visby Rules would continue to be governed by the draft instrument, so that the draft instrument would not reduce the current level of coverage. In particular, common carriage transactions in non-liner trades in which a bill of lading is issued should continue to be



governed by the draft instrument. [*Secretariat note*: The Working Group may wish to consider whether it is necessary to provide further clarification of the terms and concepts used in scope-of-application draft article 3, particularly paragraphs 1 (b) and 2 thereof. Such clarification could be achieved by way of text in the draft instrument, or by way of commentary on the draft instrument in accompanying explanatory material. Also, as a matter of drafting, there could be problems with the drafting technique employed by placing at the end of scope-of-application draft article 3 (2) the phrase “except in the relationship between the parties to a charter party or similar agreement.” The Working Group may wish to consider whether this phrase could be relocated, perhaps to the opening of the chapeau of that paragraph, in order to avoid errors that could be caused by changes in formatting.]

“Article 4

“If a contract provides for the future carriage of goods in a series of shipments, this Instrument applies to each shipment in accordance with the rules provided in Articles 2, 3 (1) (a), 3 (1) (c), and 3 (2).”

5. *Commentary on scope-of-application draft article 5*: Scope-of-application draft article 4 is substantially the same as draft article 2 (5) as contained in previous versions of the draft instrument.

“Article 5

“If a transport document or an electronic record is issued pursuant to a charter party or a contract under Article 3 (1) (c), then such transport document or electronic record shall comply with the terms of this Instrument and the provisions of this Instrument apply to the contract evidenced by the transport document or electronic record from the moment at which it regulates the relationship between the carrier and the person entitled to rights under the contract of carriage, provided that such person is not a charterer or a party to the contract under Article 3 (1) (c).”

6. *Commentary on scope-of-application draft article 5*: Scope-of-application draft article 5 is substantially the same as draft article 2 (4) as contained in previous versions of the draft instrument, except that: (i) it has been extended in the scope-of-application provision to cover all transport documents and electronic records (not just negotiable transport documents and electronic records), as agreed by the Working Group (A/CN.9/572, paras. 94 and 106); and (ii) it includes a proviso to ensure that it does not apply as between the immediate parties to a contract otherwise excluded from the operation of the draft instrument.

**H. Note by the Secretariat on the preparation of a draft instrument  
on the carriage of goods [wholly or partly] [by sea] -  
Arbitration: Uniform international arbitration practice and  
the provisions of the draft instrument, submitted to  
the Working Group on Transport Law  
at its fifteenth session  
(A/CN.9/WG.III/WP.45) [Original: English]**

During its fourteenth session, Working Group III on Transport Law considered the arbitration provisions of the draft instrument on the carriage of goods [wholly or partly] [by sea] as contained in chapter 16 of A/CN.9/WG.III/WP.32. As noted in the report from that session, draft chapter 16 was incorporated from the Hamburg Rules, which were drafted in 1978, before the wide acceptance of uniform standards for international arbitration (A/CN.9/572, para. 153). Following the discussion at that session, the Secretariat was requested by the Working Group to explore the possible conflicts between the draft instrument and uniform international arbitration practice, as reflected in UNCITRAL instruments and model laws (A/CN.9/572, para. 157). The following note was prepared pursuant to that request in two parts: firstly, by identifying the possible conflicts as requested, and secondly, by identifying core principles of international arbitration which are not reflected in the draft instrument.

**I. Possible conflicts between the draft instrument and uniform international practice, as reflected in UNCITRAL instruments and model laws**

**A. Article 76 of Variants A and B of the draft instrument**

1. Draft article 76 of the draft instrument provides that the agreement to arbitrate shall be “evidenced in writing”. That expression may be understood in the sense that the written form of the arbitration agreement is required *ad probationem* [i.e. for the purposes of proof] and not *ad validitatem* [for the purposes of validating the arbitration agreement].
2. The requirement that an arbitration agreement be in writing is contained under article 7, paragraph (2) of the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”), and article II, paragraph (2) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”). The form requirement aims at providing certainty as to the intent of the parties and at facilitating subsequent evidence of the will of the parties to submit their disputes to arbitration.
3. Article 7, paragraph (2) of the Model Law states as follows:

“(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The

reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.”

4. Article II, paragraph (2) of the New York Convention states as follows:

“2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”

5. Contrary to the Model Law and the New York Convention, article 76 of the draft instrument does not include a definition of the “writing” requirement. It has been argued that this could be problematic, since, in recent years, with the increased emergence of modern means of communication, this requirement has become a controversial aspect of arbitration law. Questions could arise as to whether that requirement has been fulfilled in certain situations where the answer could raise serious problems, such as with respect to certain brokers’ notes, bills of lading and other negotiable instruments, or contracts transferring rights or obligations to non-signing third parties (i.e., third parties who were not party to the original agreement). Lack of clarity regarding the writing requirement in these types of situations has given rise to rather disparate decisions. A writing requirement, without being further defined, could be interpreted in a way which would not be in accord with international trade practice. On the other hand, the Working Group may wish to consider that providing a special definition of writing in the draft instrument has the disadvantage of introducing a difference in the form requirement between the law of the carriage of goods and general arbitration law. As indicated below (see paragraphs 22-26), the Working Group may wish to encourage States that envisage ratifying the draft instrument to consider also enacting the UNCITRAL Model Law on International Commercial Arbitration.

6. Another crucial question with respect to the arbitration provisions in the draft instrument is whether an arbitration agreement, concluded in a manner consistent with draft article 76, would be enforceable under Article II (2) of the New York Convention, as set out in paragraph 4 above. Those requirements for the conclusion of a valid arbitration agreement under the New York Convention may be considered to be narrower than the requirement under article 76 of the draft instrument. However, it may be noted that Working Group II (Arbitration and Conciliation) has not yet concluded its consideration of the relation between article II of the New York Convention and the provision on the form of the arbitration agreement contained in other laws.

7. Further, Working Group II has taken note that it is important to work towards facilitating a more flexible interpretation of the strict form requirement of the arbitration agreement, so as not to frustrate the expectations of the parties when they agreed to arbitrate. At its thirty-sixth session (New York, 4-8 March 2002), Working Group II proposed a revised text of article 7 of the Model Law, as follows:

“Article 7. Definition and form of arbitration agreement

“(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

“(2) The arbitration agreement shall be in writing. ‘Writing’ includes any form that provides a [tangible] record of the agreement or is [otherwise] accessible as a data message so as to be usable for subsequent reference.

“[(3) ‘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.]

“(4) For the avoidance of doubt, the writing requirement in paragraph (2) is met if the arbitration clause or arbitration terms and conditions or any arbitration rules referred to by the arbitration agreement are in writing, notwithstanding that the contract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing.

“(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

“(6) The reference in a contract to a text containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

“[(7) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.]”

8. With the same concern for clarity of the writing requirement contained in article II (2) of the New York Convention and other requirements for written communications in the text of the New York Convention, Working Group II expressed support for the inclusion of a reference to the New York Convention in article 19 of the draft convention on the use of electronic communications in international contracts recently proposed by Working Group IV (Electronic Commerce) (reproduced in the annex to A/CN.9/571).

9. In order to enhance the legal certainty as to the validity of the arbitration agreement and to minimize the risks that an award be denied enforcement on the ground of non-existence or invalidity of the arbitration agreement, Working Group III may wish to consider whether it would be preferable to align the definitions of the written form requirement in the draft instrument with the most recent work of Working Group II. However, in order not to duplicate the regulation of the issue of form with the Model Law (the consideration of which has not been concluded), Working Group III may wish to conclude that the purpose of the arbitration provisions in the draft instrument should be simply to provide the parties with the freedom to opt for arbitration (which in view of some national laws on the carriage of goods by sea would be beneficial), then draft article 76 could be drafted in more general terms.

## **B. Article 77 of Variants A and B of the draft instrument**

10. The first sentence of draft article 77 provides that “if a negotiable transport document or a negotiable electronic record has been issued, the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference.” Incorporation of an arbitration clause or agreement by reference has given

rise to diverging interpretations by courts, and the definition of the conditions whereby an arbitration clause or agreement would be considered as valid when it is only incorporated by reference should be defined.

11. The revised draft of article 7, paragraph (6) of the Model Law (see above, para. 8, as well as the current text of article 7 of the Model Law) are concerned with a contract including a reference to a document which contains an arbitration clause. The provisions that the main contract be in writing and that the reference be “such as to make that clause part of the contract” arise from problems and divergent court decisions on this issue in the context of the New York Convention. Therefore, in order to enhance certainty and uniformity at the enforcement stage, Working Group III may wish to take into account the revised provisions of the Model Law concerning the incorporation of an arbitration clause by reference (either by aligning the draft instrument with the Model Law to be revised or by leaving the issue to be covered by the Model Law).

### **C. Article 78 of Variants A and B of the draft instrument**

12. Draft article 78, Variant A proposes a definition of the place where the arbitration proceedings shall be instituted, while Variant B is silent on that matter.

13. Article 20 of the Model Law deals with the question of the place where the arbitration proceedings shall be carried out in the following way:

“(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.”

14. The trend in international arbitration is to recognize the freedom of the parties to agree on the place of arbitration; failing such agreement, the place of arbitration shall be determined by the arbitral tribunal. The place of arbitration is of legal relevance, as it determines the arbitration law governing the arbitration and is one of the possible factors establishing the international character of arbitration. The place of arbitration is the place of origin of the award, and as such, it is relevant in the context of recognition and enforcement proceedings.

15. Draft article 78, Variant A limits the permissible forums for arbitrating claims to certain places. If Working Group III considers it appropriate to include a determination of the possible forums for claims, it should be noted that the place where a substantial part of the obligations of the relationship is to be performed, or the place with which the subject matter of the dispute is more closely related are criteria more commonly used than “the place where the contract was made”, as used under draft article 78 (a) (ii). Of course, the rationale for the decision of Working Group III to delete the place of the contract as a basis for establishing jurisdiction in chapter 15 of the draft instrument (A/CN.9/572, para. 126) would probably extend to this provision of the arbitration chapter, as well.

## D. Article 79 of Variants A and B of the draft instrument

16. Variants A and B of draft article 79 provide that “the arbitrator or the arbitral tribunal shall apply the rules of this instrument.”

17. In comparison, the Model Law grants the parties full autonomy to determine the substantive rules to be applied, and failing such agreement, entrusts the arbitral tribunal with that determination. The recognition of the party’s autonomy is widely accepted in international arbitration.

18. Article 79 of the draft instrument, while apparently providing for the mandatory nature of the instrument, appears to be contrary to the widely accepted principle of private international law according to which the parties are free to agree on the applicability of the law of a State (including its mandatory provisions). Working Group III may wish to consider deleting draft article 79 (thereby leaving the issue of the applicable law to the general law of arbitration) or aligning the draft instrument with the general arbitration and ensuring the respect of mandatory provisions of the draft instrument in line with the general principles governing arbitration. The carefully drafted article 28 of the Model Law reads:

### Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

19. The Model Law, as well as the UNCITRAL Arbitration Rules, allow the arbitral tribunal to decide *ex aequo et bono* or as *amiable compositeur*, provided that the parties have expressly authorised the tribunal to do so. Both instruments include a provision that “in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction”.

## E. Article 80 of Variant A of the draft instrument

20. Draft article 80 of Variant A renders mandatory the incorporation of articles 77 and 78 in all arbitration agreements. The Working Group may wish to consider the implications of this provision for party autonomy and whether the objectives of the draft instrument could be achieved in a way more consistent with party autonomy.

**F. Article 80 bis of Variant A and article 80 of Variant B of the draft instrument**

21. Working Group III may wish to consider whether the principle expressed in draft article 80 bis of Variant A and draft article 80 of Variant B would be better reflected under draft article 76, by adding the words “or that have arisen” after the words “that may arise”.

**II. Core principles of international arbitration which are not reflected in the draft instrument**

22. The Working Group may wish to consider several core principles of international arbitration which are not currently reflected in the draft instrument. It may be the preference of the Working Group that the draft instrument should remain silent with respect to these principles. An alternative could be to make general reference to the applicable law of arbitration. This would not provide complete uniformity in every detail. Further, the Working Group may wish to consider whether more work is needed in the area of maritime arbitration in order to achieve greater uniformity. The Working Group may also wish to encourage States that envisage ratifying the draft instrument to consider also enacting the UNCITRAL Model Law on International Commercial Arbitration.

23. The first such core principle is that of party autonomy, whereby the law on arbitration defines general default rules, leaving the parties free to shape the rules of the process by agreement, within the scope of internationally accepted mandatory rules. Most of the provisions of the Model Law and of modern legislation on arbitration are conceived as default rules, applying unless otherwise agreed by the parties.

24. Another principle which has been enunciated in most arbitration-supporting instruments of law is an article similar to Article 8 of the Model Law, which establishes the relationship between courts and arbitral tribunals, when substantive claims which could be subject to arbitration have been raised before a court.

25. The Working Group may also wish to consider the current work of Working Group II with respect to a set of rules applicable to interim measures of protection ordered by arbitral tribunals, and to the recognition and enforcement of interim measures of protection ordered by arbitral tribunals and by courts.

26. Finally, the Working Group may wish to consider whether explicit reference to the New York Convention should be made under chapter 18 of the draft instrument, so as to be consistent with its requirements and thus to allow for recognition and enforcement of arbitral awards pursuant to that convention.

**I. Preparation of a draft instrument on the carriage of goods  
[wholly or partly] [by sea] - Comments from the UNCTAD  
Secretariat on freedom of contract, submitted  
to the Working Group on Transport Law  
at its fifteenth session  
(A/CN.9/WG.III/WP.46) [Original: English]**

On 17 February 2005, the Secretariat received comments regarding the issue of freedom of contract from the United Nations Conference on Trade and Development. Those comments, which have been circulated informally during previous sessions of the Working Group, are reproduced in Annex I in the form in which they were received by the Secretariat.

**ANNEX I**

**COMMENTS FROM THE UNCTAD SECRETARIAT ON FREEDOM OF  
CONTRACT UNDER THE DRAFT INSTRUMENT**

**Introductory remarks**

1. The draft instrument focuses to a considerable extent on matters of liability, i.e. on the regulation of liability arising in connection with the carriage of goods. Clearly, the draft instrument is intended to provide a modern successor to existing international liability regimes in the field of carriage of goods by sea (i.e. the Hague, Hague-Visby and Hamburg Rules). Moreover, the working assumption is that the draft instrument would also apply to multimodal contracts that include a sea-leg. Against this background, it appears appropriate to recall some of the common elements, which, despite their differences, all existing unimodal liability regimes for the carriage of goods by sea, land and air (i.e. The Hague, Hague-Visby and Hamburg Rules, the CMR, COTIF/CIM, Warsaw Convention (as amended), Montreal Convention) share namely:

First, **all existing international regimes establish minimum levels of carrier liability, which apply mandatorily**, that is to say the relevant substantive rules on liability of the carrier may not be contractually modified to the detriment of the shipper or consignee.

Secondly, **the mandatory scope of application of the relevant regimes extends to contracts of carriage which are not individually negotiated between the parties**, but are conducted on the carrier's standard terms of contract as typically contained in or evidenced by a transport document issued by the carrier.

2. The main purpose of this approach, common to all existing international liability regimes, is to reduce the potential for abuse in the context of contracts of adhesion, used where parties with unequal bargaining power contract with one another. By establishing minimum levels of liability, which apply mandatorily and may not be contractually modified, existing liability regimes seek to ensure the protection of cargo interests with little bargaining power, i.e. small shippers and third party consignees, against unfair contract terms unilaterally introduced by the carrier in its standard terms of contract.



3. Thus, a central feature of existing international liability regimes is a restriction of freedom of contract with the legislative intent to ensure the protection of small parties against unfair standard contract terms.
4. A central question which arises for consideration of the Working Group is whether and to which extent the draft instrument should follow the same approach as existing international liability regimes.
5. In this context, the treatment in the draft instrument of so-called service contracts or "Ocean Liner Service Agreements" (as described in UNCITRAL A/CN.9/WG.III/WP.34, paras. 19-22) may be of particular and considerable significance. It has been reported that in some trades, 80-90 per cent of liner carriage is conducted under this type of contract and that with the increasing trend towards concentration in the liner shipping industry and the emergence of alliances in the global freight-forwarding industry, the use of this type of contract is likely to become more prevalent at the global level. Any decision on the treatment of such contracts may, in consequence, also affect the deliberations on substantive liability provisions.
6. Against this background, the following comments are offered to facilitate the discussion.

## **I. Non-mandatory application of the draft instrument to service contracts/OLSAs**

7. It has been suggested that OLSAs, as described (in WP.34), should not be excluded altogether from the scope of application of the draft instrument, but should be exempt from its mandatory application. This would mean that when cargo is carried under a service contract, **the draft instrument liability regime would apply by default, but all or only some of its provisions could be contracted out of or be contractually modified.** When assessing the potential consequences of such an approach, consideration should be given to the following situations.

### **(a) Service contracts involving large shippers**

8. Clearly, in relation to contracts of carriage concluded between parties of broadly equal bargaining power, this approach would not give rise to public policy concerns. Large shippers are just as able to effectively safeguard their interests in contractual negotiations, as are large carriers. Often, the big shippers are themselves carriers, namely freight forwarders, who do not operate any vessels, but have contracted with smaller shippers to transport the cargo from door-to-door. Freight forwarders may thus be both carrier (vis-à-vis the smaller shipper) and shipper (vis-à-vis a unimodal carrier, such as a sea carrier).
9. Nevertheless, it should be noted that if the draft instrument were to apply by default, albeit not mandatorily, a contracting party with more detailed knowledge of all the terms of the complete set of rules may find itself at an advantage. This in particular if, as proposed, the parties may selectively exclude or modify individual provisions, rather than the entire framework. Unless both contracting parties pay due attention to all of the potentially applicable provisions of the draft instrument, as modified, excluded or supplemented contractually, one or other of the contracting parties may find itself "by default" to have agreed to potentially disadvantageous terms. More generally, the potential

benefits associated by commercial parties with a predictable internationally uniform liability regime may, in the longer run, fail to materialize.

10. In any event, however, there is no need to protect parties with equal bargaining power by way of mandatory legislation, provided always that third parties who acquire rights and obligations under these contracts would be protected by the mandatory application of the liability regime.

**(b) Service contracts involving small shippers**

11. The situation is markedly different if parties with clearly unequal bargaining power contract with one another. It is in this context that **concerns arise about the potential use of service contracts as devices to circumvent otherwise applicable mandatory liability rules.**

12. Current practice suggests that service contracts, which account for more than 80 per cent of liner carriage in some trades, may be used not only as between large shippers and carriers, but also for the carriage of very small quantities, such as 10-20 TEUs or even 1 TEU. It is clear that in this context, the contracting parties are not of equal bargaining power. A contract concluded between the shipper of 2 containers—or of 25 containers—and one of the world's top 25 liner companies—in control of almost 80 per cent of global TEU carrying capacity (*Source: Dyna Liners 06/2004, 6.2.2004*)—is not likely to be conducted on the basis of individually negotiated terms. Rather, the carrier's standard terms of contract, as also contained in or referred to in transport documents, such as a bill of lading or sea waybill, will be incorporated into the service contract.

13. In this context it should be recalled that current practice only serves to indicate certain trends, but that future developments at the global level may actually depend on the degree to which the draft instrument does or does not safeguard against abuse of "freedom of contract" by parties with stronger bargaining power.

14. If, in the draft instrument, service contracts are exempt from the mandatory scope of application of the liability regime without any safeguards to ensure that small shippers are effectively protected against unfair contract terms, it is possible that in future most international liner carriage could be conducted on the carrier's standard terms as incorporated into service contracts and thus not subject to mandatory minimum standards of liability.

15. The provisional definition of the characteristics of OLSAs, as set out in WP.34, does not at present ensure that notional agreement of an OLSA may not be used as a contractual device to circumvent otherwise applicable mandatory liability rules to the detriment of the small shipper.

## **II. The relationship between scope of application and substantive liability regime**

16. As has been pointed out at the outset, by establishing mandatory minimum levels of liability, existing liability regimes seek to ensure the protection of cargo interests with little bargaining power, i.e. small shippers and third party consignees, against unfair contract terms unilaterally introduced by the carrier in its standard terms of contract. There appears to be general agreement that this approach remains appropriate in relation to so-called

contracts of adhesion, i.e. contracts concluded on the carrier's standard terms as contained in or evidenced by a transport document (or electronic equivalent).

17. At the same time, it is apparent that in relation to the drafting of the substantive content of the liability regime, these considerations are less prevalent than is the case with existing regimes. Rather than being primarily geared to protecting shippers and third-party consignees, the draft instrument, based on the assumption that market conditions have changed somewhat over the years, appears to aim for a substantive liability regime to regulate the relationship between shippers and carriers as equal negotiating partners. Under the present draft, the parties may, for instance, agree that the shipper is responsible for some of the carrier's functions (art. 11(2)) and/or that the carrier acts in respect of some parts of a transport as freight forwarding agent only (art. 9). Similarly, it has been proposed that the obligations of the shipper, which are much more extensive and detailed than under existing maritime liability regimes, shall be mandatory.

18. However, it is important to note that while the substantive content of the draft instrument is to a considerable degree geared towards contracting partners of equal bargaining power, individually negotiated contracts by such parties may, depending on the outcome of discussions on freedom of contract and scope of application, not be governed by the draft instrument.

19. Questions of scope and substance are linked and should therefore be considered more in context. If individually negotiated contracts are excluded from the draft instrument or are not covered by its mandatory scope, then the substantive liability regime applies mandatorily only to what may be called contracts of adhesion. In relation to these contracts, however, there is no room for adopting an approach less protective of shippers and third-party consignees than existing maritime liability regimes.

20. Thus, in the light of discussions on the mandatory scope of application of the draft instrument, the substantive content of liability provisions may need to be reconsidered.

**J. Note by the Secretariat on the preparation of a draft instrument  
on the carriage of goods [wholly or partly] [by sea] -  
Proposed revised provisions on electronic commerce,  
submitted to the Working Group on  
Transport Law at its fifteenth session  
(A/CN.9/WG.III/WP.47) [Original: English]**

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## **Introduction**

1. During its fourteenth session, Working Group III heard that, given the areas of complementarity and mutual interest both in the draft convention on the use of electronic communications in international contracts (annex to A/CN.9/577) and in the draft instrument, the work of Working Group III could be assisted by the holding of an intersessional informal meeting of experts from both the electronic commerce and transport law fields. The Working Group agreed to that suggestion (A/CN.9/572,

para. 162). This informal joint meeting of experts from Working Group IV (Electronic Commerce) and Working Group III (Transport Law) took place in London on 23 February 2005 and considered the provisions of the draft instrument relating to electronic commerce. Following discussions during the meeting, and given the passage of time as well as changes made to the original version of the draft instrument, the experts suggested a revised drafting of those articles of the draft instrument relating to electronic commerce as presented for the consideration of the Working Group in sections I to V below.

2. The joint meeting of experts on transport law and on electronic commerce underlined the complementary approach to electronic commerce of the draft instrument and of the draft convention on the use of electronic communications in international contracts (annex to A/CN.9/577) and concluded that there was no major obstacle to the approach to electronic commerce adopted in the draft instrument. It was also noted that, while bills of lading themselves were excluded from the scope of application of the draft convention on the use of electronic communications in international contracts, in accordance with its draft article 2, paragraph 2, electronic communications relating to bills of lading fell within its scope of application.

## **I. Chapter 1: General provisions**

### **A. Definitions (draft article 1)**

3. The joint meeting of experts considered draft article 1 of the draft instrument as it appeared in A/CN.9/WG.III/WP.32.<sup>1</sup> Following the discussion, the following provisional revised version of draft article 1, letters (f), (o), (p), (q) and (r), was suggested:

“Article 1. Definitions

“For the purposes of this instrument:”

[...]

“(f) “Holder” means

(i) a person that is for the time being in possession of a negotiable transport document and

(a) 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

(b) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(ii) the shipper, the consignee, or the person to whom a negotiable electronic transport<sup>2</sup> record has been transferred and who has exclusive control of that negotiable electronic transport<sup>3</sup> record.”<sup>4</sup>

<sup>1</sup> For ease of reference, the draft provisions of the draft instrument are referenced here following the numbering of the revised text of the draft instrument contained in A/CN.9/WG.III/WP.32.

These provisions will be renumbered at the end of the second reading of the draft instrument, when the Secretariat will prepare a new consolidated draft of the draft instrument.

<sup>2</sup> See footnote 5.

<sup>3</sup> See footnote 5.

<sup>4</sup> The joint meeting of experts suggested that while draft letter (f) of draft article 1 in the text in

“(o) “Electronic transport<sup>5</sup> 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

- (i) evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage, or
  - (ii) evidences or contains a contract of carriage,
- or both.

It includes information logically associated with the electronic transport<sup>6</sup> record by attachments or otherwise linked to the electronic transport<sup>7</sup> record contemporaneously with or subsequent to its issue by the carrier or a performing party, so as to become part of the electronic transport<sup>8</sup> record.”<sup>9</sup>

“(p) “Negotiable electronic transport<sup>10</sup> record” means an electronic transport<sup>11</sup> record

- (i) that indicates, by statements such as ‘to order’, or ‘negotiable’, or other appropriate<sup>12</sup> statements recognized as having the same effect by the law governing the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”, and
- (ii) the use of which meets the requirements of article 6(1).”<sup>13</sup>

“(q) “Non-negotiable electronic transport<sup>14</sup> record” means an electronic transport<sup>15</sup> record that does not qualify as a negotiable electronic transport<sup>16</sup> record.”

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A/CN.9/WG.III/WP.32 included “[access to]” and “[control of]” as alternatives, there was strong agreement that “control” should be used, since it was considered to be the electronic equivalent of “possession” of a document. It was thought that repetition of the phrase “control of that negotiable electronic transport record” would render its use sufficiently clear.

<sup>5</sup> The joint meeting of experts suggested the insertion of the qualifying term “transport” between the words “electronic” and “record” to avoid any confusion with the generic term “electronic record”, already widely in use in various domestic legislation.

<sup>6</sup> See footnote 5.

<sup>7</sup> See footnote 5.

<sup>8</sup> See footnote 5.

<sup>9</sup> The joint meeting of experts suggested the insertion of the phrases “logically associated with the electronic transport record by” and “so as to become part of the electronic transport record” for clarification that the intention was to encompass all possible cases of information, logically associated with attachment or otherwise linked to the record, which could become part of the electronic record.

<sup>10</sup> See footnote 5.

<sup>11</sup> See footnote 5.

<sup>12</sup> The Working Group may wish to consider whether the word “appropriate” is necessary in light of the use of the phrase “recognized as having the same effect”. The Working Group may also wish to consider whether similar language in draft article 1(l) should be aligned accordingly.

<sup>13</sup> The joint meeting of experts felt that, due to the suggested addition of a draft paragraph 2 to draft article 6, the reference to such article from draft article 1, letter (p)(ii) should be limited to its paragraph 1. It was also suggested that all substantive requirements be incorporated in the revised draft article 6, and deleted from draft article 1, letter (p)(ii).

<sup>14</sup> See footnote 5.

<sup>15</sup> See footnote 5.

“(r) “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is<sup>17</sup> in a transport document or an electronic transport<sup>18</sup> record.

## II. Chapter 2: Electronic communication

### A. Draft article 3

4. The joint meeting of experts considered draft article 3 of the draft instrument, as it appeared in A/CN.9/WG.III/WP.32. It was noted that while it was clear that the draft instrument created an electronic equivalent of the bill of lading, that is, an electronic transport document with the same legal effect as a paper-based bill of lading, given the experience of the electronic commerce experts, it would be valuable for greater certainty to include an express statement of that principle. Draft article 3(b) was added for this purpose. In addition, it was noted that the principle of implied consent to electronic communications was common to the draft convention on the use of electronic communications in international contracts (annex to A/CN.9/577, para. 8(2)). After discussion, the following provisional redraft was suggested:

“Article 3

“Subject to the requirements set out in this convention,

(a) 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<sup>19</sup> instead of by means of the transport document, provided the issuance and subsequent use of an electronic transport<sup>20</sup> record is with the express or implied consent of the carrier and the shipper; and

(b) the issuance, control, or transfer of an electronic transport<sup>21</sup> record shall have the same effect as the issuance, possession, or transfer of a transport document.”

### B. Draft article 4

5. The joint meeting of experts considered draft article 5 of the draft instrument as it appeared in A/CN.9/WG.III/WP.32, and suggested the following provisional redraft:

“Article 4

“1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport<sup>22</sup> record,

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<sup>16</sup> See footnote 5.

<sup>17</sup> The joint meeting of experts suggested, to avoid misinterpretation of the requirements of the provision, the replacement of the word “appears” with “is”.

<sup>18</sup> See footnote 5.

<sup>19</sup> The Working Group may wish to consider whether the word “communications” should be used instead of “communication” to clarify that reference is made in the article to the act of communicating and not to the individual communication.

<sup>20</sup> See footnote 5.

<sup>21</sup> See footnote 5.

<sup>22</sup> See footnote 5.

- (a) the holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier; and
- (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,

whereupon the negotiable transport document ceases to have any effect or validity.

2. If a negotiable electronic transport<sup>23</sup> record has been issued and the carrier and the holder agree to replace that electronic record by a negotiable transport document,

- (a) the carrier shall issue to the holder, in substitution for that electronic transport<sup>24</sup> record, a negotiable transport document that includes a statement that it is issued in substitution for the negotiable electronic transport<sup>25</sup> record; and
- (b) upon such substitution, the electronic transport<sup>26</sup> record ceases to have any effect or validity.”

### C. Draft article 5

6. The joint meeting of experts considered draft article 5 of the draft instrument, as it appeared in A/CN.9/WG.III/WP.32. It was noted that the purpose of the provision was to prevent the use of oral communications in the cases enumerated, and to allow for the use of electronic communications subject to consent. It was further noted that the term “writing” included both electronic and written communications in some jurisdictions, and it was suggested that the text as it appeared in A/CN.9/WG.III/WP.32 could be confusing in those jurisdictions. Consequently, it was suggested that the intention of the provision could be more universally understood if it were slightly redrafted as follows:

“Article 5

“The notices and confirmation referred to in articles 20(1), 20(2), 20(3), 34(1)(b) and (c), 47, 51, [61bis(2),]<sup>27</sup> the declaration in article 68, and the agreement as to weight in article 37(1)(c) shall be made in writing. Electronic communication may be used for these purposes, provided the use of such means is with the express or implied consent of the party by which it is communicated and of the party to which it is communicated.”

### D. Draft article 6

7. The joint meeting of experts considered draft article 6 of the draft instrument as it appeared in A/CN.9/WG.III/WP.32. A redrafted version of draft article 6 was suggested in order to clarify it as follows:

“Article 6

<sup>23</sup> See footnote 5.

<sup>24</sup> See footnote 5.

<sup>25</sup> See footnote 5.

<sup>26</sup> See footnote 5.

<sup>27</sup> The Working Group may wish to consider the insertion of a reference to draft article 61 bis (2), subject to the outcome of its deliberations on that article.



“1. The use of a negotiable electronic transport<sup>28</sup> record shall<sup>29</sup> be subject to procedures<sup>30</sup> which provide for:

- (a) a method to effect the exclusive transfer of that record<sup>31</sup> to an intended holder;
- (b) an assurance that the negotiable electronic transport<sup>32</sup> record retains its integrity;
- (c) the manner in which the holder is able to demonstrate that it is the holder; and
- (d) the way in which confirmation is given that delivery to the consignee has been effected; or that, pursuant to articles 4(2) or 49(a)(ii), the negotiable electronic transport<sup>33</sup> record has ceased to have any effect or validity.

2. The procedures in paragraph 1 must be referred to in the contract particulars and be readily ascertainable.”<sup>34</sup>

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<sup>28</sup> See footnote 5.

<sup>29</sup> It was felt that the phrase “adequate provisions” in draft article 6 of A/CN.9/WG.III/WP.32 could lead to uncertainty. It was suggested that, instead, draft article 6 should include the minimum requirements to bring such a record within the scope of the draft instrument.

<sup>30</sup> The term “procedures” was substituted for “rules of procedure” as was used in A/CN.9/WG.III/WP.32 so as to avoid setting out precisely-defined rules which could be circumvented by creative parties.

<sup>31</sup> The Working Group may wish to consider whether it would be appropriate to insert here the phrase “or of the rights represented by or incorporated into that record” in light of concerns that the draft provision, when read in conjunction with the definition of “electronic transport record” in draft article 1(o) and of “negotiable electronic transport record” in draft article 1(p) might imply the use of a technology whereby the electronic record would be “passed” along the negotiation chain. It has been suggested that such an interpretation may not offer the same legal recognition to other business models where this does not occur, such as registry systems where rights are transferred by exchanges of communications between the parties and the registry, rather than, for instance, by transfer of a token or other particular from one party to the other. An alternative approach which the Working Group may also consider could be to leave the text of draft article 6 as is, but to include a clarification in an explanatory note or a commentary accompanying the draft instrument.

<sup>32</sup> See footnote 5.

<sup>33</sup> See footnote 5.

<sup>34</sup> The term “readily ascertainable” was used to indicate without excessive detail that the necessary procedures must be available to those parties who have a legitimate interest in knowing them prior to entering a legal commitment based upon the validity of the negotiable electronic transport record. It was further noted that the system envisaged would function in a manner not dissimilar to the current availability of terms and conditions of bills of lading. The Working Group may wish to consider whether related detail should be specified in a note or a commentary accompanying the draft instrument.

### III. Chapter 8: Transport documents and electronic records

#### A. Issuance of the transport document or electronic transport record (draft article 33)

8. The joint meeting of experts considered draft article 33 of the draft instrument, as it appeared in A/CN.9/WG.III/WP.32. After discussion, the following provisional redraft was suggested:

“Article 33. Issuance of the transport document or electronic transport<sup>35</sup> record

“Upon delivery of the goods to the carrier or performing party

(a) the consignor is entitled to obtain a transport document or, if the carrier so agrees, an electronic transport<sup>36</sup> record evidencing the carrier’s or performing party’s receipt of the goods;

(b) the shipper or, if the shipper so indicates to the carrier, the person referred to in article 31, 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 3 the carrier and the shipper have agreed to the use of an electronic transport<sup>37</sup> record, the shipper is entitled to obtain from the carrier a negotiable electronic transport<sup>38</sup> record unless they have agreed not to use a negotiable electronic transport<sup>39</sup> record or it is the custom, usage or practice in the trade not to use one.”

#### B. Signature (draft article 35)

9. The joint meeting of experts considered draft article 35 of the draft instrument, as it appeared in A/CN.9/WG.III/WP.32. After discussion, the following provisional redraft was suggested:

“Article 35. Signature.

“1. A transport document shall be signed by the carrier or a person having authority from the carrier.

2. An electronic transport<sup>40</sup> record shall include<sup>41</sup> 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

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<sup>35</sup> See footnote 5.

<sup>36</sup> See footnote 5.

<sup>37</sup> See footnote 5.

<sup>38</sup> See footnote 5.

<sup>39</sup> See footnote 5.

<sup>40</sup> See footnote 5.

<sup>41</sup> The joint meeting of experts noted that the use of the term “authenticated” with respect to signatures was avoided in the UNCITRAL Model Law on Electronic Signatures (2001) because it raised questions concerning who was entitled to authenticate the signature. To avoid such an outcome, the replacement of the phrase “be authenticated” with the word “include” was suggested.

otherwise logically associated with, the electronic transport<sup>42</sup> record and that is used to identify the signatory in relation to the electronic transport<sup>43</sup> record and to indicate the carrier's authorization of the electronic transport<sup>44</sup> record.”

## IV. Chapter 11: Right of control

### A. Draft article 54

10. The joint meeting of experts considered the electronic commerce aspects of draft article 54 of the draft instrument, as it appeared in A/CN.9/WG.III/WP.32. After discussion, the following provisional redraft was suggested:

“Article 54.

“1. When no negotiable transport document or no negotiable electronic transport<sup>45</sup> record is issued, the following rules apply:

(a) 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] [designates the consignee or another person as the controlling party].

(b) 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.

(c) When the controlling party exercises the right of control in accordance with article 53, it shall produce proper identification.

[(d) The right of control [terminates] [is transferred to the consignee] when the goods have arrived at destination and the consignee has requested delivery of the goods.]

2. When a negotiable transport document is issued, the following rules apply:

(a) 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.

(b) The holder is entitled to transfer the right of control by passing the negotiable transport document to another person in accordance with article 59, 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.

(c) 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 [except those that the

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<sup>42</sup> See footnote 5.

<sup>43</sup> See footnote 5.

<sup>44</sup> See footnote 5.

<sup>45</sup> See footnote 5.

carrier already holds on behalf of the person seeking to exercise a right of control] shall be produced, failing which the right of control cannot be exercised.

(d) Any instructions as referred to in article 53(b), (c) and (d) given by the holder upon becoming effective in accordance with article 55 shall be stated on the negotiable transport document.

3. When a negotiable electronic transport<sup>46</sup> record is issued:

(a) The holder is the sole controlling party and is entitled to transfer the right of control to another person by transferring<sup>47</sup> the negotiable electronic transport<sup>48</sup> record in accordance with the procedures<sup>49</sup> referred to in article 6, upon which transfer the transferor loses its right of control.

(b) In order to exercise the right of control, the holder shall, if the carrier so requires, demonstrate, in accordance with the procedures<sup>50</sup> referred to in article 6, that it is the holder.

(c) Any instructions as referred to in article 53(b), (c) and (d) given by the holder upon becoming effective in accordance with article 55 shall be stated in the electronic transport<sup>51</sup> record.

4. Notwithstanding article 62, a person, not being the shipper or the person referred to in article 31, 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.”

## V. Chapter 12: Transfer of rights

### A. Draft article 59

11. The joint meeting of experts considered the electronic commerce aspects of draft article 59 of the draft instrument, as it appeared in A/CN.9/WG.III/WP.32. After discussion, the following provisional redraft was suggested:

“Article 59

“1. If a negotiable transport document is issued, the holder is entitled to transfer the rights incorporated in such document by transferring<sup>52</sup> such document to another person,

<sup>46</sup> See footnote 5.

<sup>47</sup> The joint meeting of experts noted that the word “transfer” was used in a consistent technical meaning in the draft instrument and suggested its insertion to replace the word “passing” here and in any other similar provisions of the draft instrument.

<sup>48</sup> See footnote 5.

<sup>49</sup> In order to be consistent with the change suggested to draft article 6, it is suggested that the words “rules of procedure” be replaced with the word “procedures”. The Working Group may also wish to consider changing the reference to draft article 6 to draft paragraph 6(1) in order to be consistent with the language of draft article 1 letter (p)(ii) (see footnote 13 above).

<sup>50</sup> See footnote 49.

<sup>51</sup> See footnote 5.

<sup>52</sup> See footnote 47.

- (a) if an order document, duly endorsed either to such other person or in blank, or,
  - (b) if a bearer document or a blank endorsed document, without endorsement, or,
  - (c) 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.
2. If a negotiable electronic transport<sup>53</sup> 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 transferring<sup>54</sup> the electronic record in accordance with the procedures referred to in article 6.”<sup>55</sup>

## B. Draft article 61 bis

12. The joint meeting of experts considered the electronic commerce aspects of draft articles 61 and 62 of the draft instrument, as they appeared in A/CN.9/WG.III/WP.32, and the alternate text of draft article 61 bis suggested in footnote 207 of A/CN.9/WG.III/WP.32. The joint meeting of experts found the alternative text of draft article 61 bis to be clearer and to be preferable to draft articles 61 and 62. After discussion, the following provisional redraft of draft article 61 bis was suggested:

### “Article 61 bis

- “1. If no negotiable transport document and no negotiable electronic transport<sup>56</sup> record is issued, the transfer of rights under a contract of carriage is subject to the law governing the contract for the transfer of such rights or, if the rights are transferred otherwise than by contract, to the law governing such transfer. [However, the transferability of the rights purported to be transferred is governed by the law applicable to the contract of carriage.]
- 2. Regardless of the law applicable pursuant to paragraph 1, the transfer may be made by electronic means. In any event, the transfer must be notified to the carrier by the transferor or, if other applicable law permits, by the transferee.<sup>57</sup>
- 3. If the transfer includes 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.”

<sup>53</sup> See footnote 5.

<sup>54</sup> See footnote 47.

<sup>55</sup> See footnote 49.

<sup>56</sup> See footnote 5.

<sup>57</sup> It was noted in the joint meeting of experts that, while notification of the transfer by the transferor was a common rule, some jurisdictions require the notification of the transfer to be accomplished by the transferee. It was therefore suggested to substitute the phrase “either by the transferor or the transferee” with the phrase “by the transferor or, if other applicable law permits, by the transferee”, so as to set the burden of notification on the transferor, while preserving the possibility of a notification by the transferee, where permissible.

## V. SECURITY INTERESTS

### A. Report of the Working Group on Security Interests on the work of its sixth session (Vienna, 27 September – 1 October 2004)

(A/CN.9/570) [Original: English]

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### I. Introduction

1. At its present session, Working Group VI continued its work on the preparation of a legislative guide on secured transactions pursuant to a decision taken by the Commission at its thirty-fourth session, in 2001.<sup>1</sup> The Commission's decision to undertake work in the

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<sup>1</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 358. For a history of the project, see

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>

## II. Organization of the session

2. The Working Group, which was composed of all States members of the Commission, held its sixth session in Vienna from 27 September to 1 October 2004. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Belgium, Brazil, Canada, China, Colombia, Croatia, Czech Republic, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lebanon, Lithuania, Mexico, Morocco, Nigeria, Paraguay, Poland, Republic of Korea, Russian Federation, Rwanda, Spain, Sweden, Thailand, Tunisia, Turkey, United States of America and Venezuela (Bolivarian Republic of).

3. The session was attended by observers from the following States: Antigua and Barbuda, Bolivia, Hungary, Indonesia, Ireland, Peru, Philippines, Senegal, Slovakia, Somalia, Ukraine and Yemen.

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

(a) *United Nations system*: International Monetary Fund and World Bank; and

(b) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Center for International Legal Studies (CILS), Commercial Finance Association (CFA), EUROPAFACTORING, International Federation of Insolvency Practitioners (INSOL), International Insolvency Institute (III), International Law Institute (ILI), Max-Planck-Institute for Foreign and Private International Law, the European Law Student's Association (ELSA) and the Federation of Latin American Banks (FELABAN).

5. The Working Group elected the following officers:

*Chairman*: Ms. Kathryn SABO (Canada)

*Rapporteur*: Mr. Madhukar Rangnath UMARJI (India).

6. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.9/Add.1 (Basic approaches to security), Add.4 (Pre-default rights and obligations), and Add.8 (Transition), A/CN.9/WG.VI/WP.11/Add.1 (Introduction and key objectives) and Add.2 (Creation), A/CN.9/WG.VI/WP.13 and Add.1 (Recommendations), as well as A/CN.9/WG.VI/WP.14 (Effectiveness against third parties), Add.1 (Priority), Add.2 (Default and enforcement) and Add.4 (Conflict of laws).

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A/CN.9/WG.VI/WP.12, paras. 6 to 16. The reports of the first to the fifth sessions of the Working Group are contained in documents A/CN.9/512, A/CN.9/531, A/CN.9/532, A/CN.9/543 and A/CN.9/549. The reports of the first and the second joint sessions of Working Group V (Insolvency Law) and VI (Security Interests) are contained in documents A/CN.9/535 and A/CN.9/550. The consideration of those reports by the Commission is reflected in documents A/57/17 (paras. 202-204), A/58/17 (paras. 217-222) and A/59/17 (paras. 75-78).

<sup>2</sup> Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 455, and *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 347.

7. The Working Group adopted the following agenda:
  1. Opening of the session and scheduling of meetings.
  2. Election of officers.
  3. Adoption of the agenda.
  4. Preparation of legislative guide on secured transactions.
  5. Other business.
  6. Adoption of the report.

### **III. Deliberations and decisions**

8. The Working Group considered chapters I and II (Introduction and key objectives), III (Basic approaches to security), IV (Creation), V (Effectiveness against third parties), VII (Pre-default rights and obligations), IX (Default and enforcement), X (Conflict of laws) and XI (Transition). The deliberations and decisions of the Working Group are set forth below in chapters IV and V. The Secretariat was requested to revise those chapters to reflect the deliberations and decisions of the Working Group.

### **IV. Preparation of a legislative guide on secured transactions**

#### **Chapter III. Basic approaches to security (A/CN.9/WG.VI/WP.9/Add.1, paras. 53-62)**

9. In order to have a more focused discussion and make as much progress as possible within the current session, the Working Group decided to skip the general remarks of chapter III on approaches to security (A/CN.9/WG.VI/WP.9/Add.1, paras. 1-52) and to consider the summary and recommendations (A/CN.9/WG.VI/WP.9/Add.1, paras. 53-62).

10. It was agreed that paragraphs 53 to 62, which included both a summary of the general remarks and recommendations, should be reformulated in terms of clear recommendations. It was also agreed that paragraphs 55 and 56, which dealt with non-possessory security rights and rights in intangibles, should be placed first in view of their importance. In addition, it was agreed that recommendation 57 should be revised to reflect the agreement of the Working Group to treat transfer of title for security purposes as a security device.

#### **Chapter VII. Pre-default rights and obligations (A/CN.9/WG.VI/WP.9/Add.4, paras. 46-60, and A/CN.9/WG.VI/WP.13/Add.1, Recs. 55-57)**

11. The Working Group considered the recommendations of chapter VII on pre-default rights and obligations contained in A/CN.9/WG.VI/WP.13/Add.1 (recommendations 55-57). As to the formulation of those recommendations, a number of suggestions were made including that: recommendation 56 should be revised to refer to “public policy or the protection of third parties”; and recommendation 57 (d) should be revised to read along the



following lines: “secure the discharge of a security right once the obligation that it secures has been performed”.

12. With respect to recommendation 57 (c), in response to a question, it was noted that, in the absence of contrary agreement, the grantor should be able to operate its business that included using, disposing or commingling encumbered assets with other assets.

13. Subject to the changes referred to above (see para. 11), the Working Group approved the substance of recommendations 55 to 57.

## **Chapter XI. Transition (A/CN.9/WG.VI/WP.9/Add.8, paras. 15-22, and A/CN.9/WG.VI/WP.13/Add.1, Recs. 86-93)**

14. The Working Group considered the recommendations of chapter XI on transition contained in A/CN.9/WG.VI/WP.13/Add.1 (recommendations 86-93). In response to a suggestion that the purpose section (paragraph 86) could be reformulated as a recommendation, it was noted that the purpose section prefacing each set of recommendations was intended to explain the overall objectives of those recommendations. It was also noted that the recommendations that the law should specify an effective date and include transitional rules were included in the recommendations following paragraph 86.

15. It was agreed that recommendation 87 should be revised to reflect a different approach, namely that the law, instead of specifying the effective date, could set a mechanism for specifying the effective date. It was also agreed that another consideration that might be taken into account in the determination of the effective date would be the need to give parties sufficient time to prepare for the new legislation (e.g. educate themselves, adjust their documents, etc.).

16. With respect to recommendation 93 and the relevant commentary (see A/CN.9/WG.VI/WP.9/Add.8, para. 14), on the question of whether the old regime should apply to disputes in litigation at the effective date of the new regime, it was stated that reference should be made not just to litigation but to any formal step taken towards enforcement of a security right (e.g. giving notice of default, filing a notice of enforcement in the relevant registry, etc.). In response, it was observed that such an approach might cause uncertainty since, while litigation was a determinable activity, it would be difficult to ascertain what step constituted enforcement. After discussion, it was agreed that the recommendation should be reformulated in broader terms, without referring to specific enforcement steps.

17. In the discussion, the suggestion was made that additional recommendations be included to deal with the transition from the old regime, which might not provide for registration, to the new regime, which would require registration for a security right to be effective against third parties. It was also suggested that a recommendation be included that the transition from the old to the new regime should not entail any cost other than the cost of registration.

18. Subject to the changes referred to above (see paras. 15-17), the Working Group approved the substance of recommendations 86 to 93.

## **Chapters I and II. Introduction and key objectives (A/CN.9/WG.VI/WP.11/Add.1, paras. 1-40, and A/CN.9/WG.VI/WP.13, Recs. 1-5)**

### **A. Purpose (paras. 1-8)**

19. It was suggested that one of the purposes of the draft Guide should be to accommodate the public policy of the enacting State with respect to debtor-creditor relations, in particular in the case of insolvency, and to codify the obligation of the parties to act in good faith and in a commercially reasonable manner (which was referred to in the purpose section of the recommendations on enforcement; see A/CN.9/WG.VI/WP.13/Add.1, para. 58 (e)). That suggestion was objected to. It was observed that, if the intention was to provide new protection, the matter could be addressed in the key objective referring to the need to balance the interests of affected persons. If, on the other hand, the intention was to avoid impairing existing public policy, that was an issue of the enacting State integrating the secured transactions law into its national system, which would, in any case, be done by the enacting State. After discussion, the Working Group agreed that the principle of public policy should be reflected in the appropriate places in the draft Guide but not in the discussion of the purpose of the draft Guide.

### **B. Scope (paras. 9-16)**

20. With respect to paragraph 10, it was agreed that it should distinguish among categories of assets excluded and explain the reasons for their exclusion. The first category suggested for exclusion was real estate on the basis that it was not movable property. The second category that should be excluded was securities because, although they were movable property, they were subject to other law. The third category related to ships and aircraft that could be included as long as the special regimes existing were not interfered with. Another category might relate to exclusions for reasons of public policy (e.g. wages). With respect to paragraph 11, it was suggested that a reference should be included to the United Nations Convention on the Assignment of Receivables in International Trade (hereinafter referred to as “the Assignment Convention”) as an example of a text prepared by UNCITRAL that provided for the creation of rights in future assets without any additional steps.

### **C. Terminology (para. 17)**

21. With respect to the definition of “purchase money security right”, it was agreed that the reference to transfer of title should be deleted to avoid inadvertently giving the impression that the main purpose of transfer of title was to provide credit for the purchase of assets.

22. With respect to the definition of “proceeds”, it was agreed that a reference should be included to collections of receivables. It was also suggested that “proceeds” should refer only to proceeds received by the grantor as the secured creditor would have a right to follow the encumbered assets in the hands of a third party and a right in the proceeds received by the grantor, while it would be difficult for third parties to find out about holders of security rights that were prior to the person from whom they received a right in the assets. After discussion, it was agreed that that question should be addressed in the recommendations dealing with proceeds rather than in the definitions (see paras. 39-41).

23. With respect to the definition of “possessory security right”, it was agreed that reference should be made to tangible assets in order to clarify that negotiable instruments and negotiable documents, which were included in the definition of “tangibles”, could be subject to a possessory security right.

24. With respect to the definition of “negotiable instrument” and “negotiable document”, it was agreed that reference should be made also to the negotiability under the relevant law.

#### **D. Examples of financing practices (paras. 18-28)**

25. It was agreed that examples should be added of other financing practices that took various forms, including the form of transfer of title, lease or sale and leaseback arrangements. It was also agreed that paragraph 28 should focus on equipment rather than on real estate which was outside the scope of the draft Guide.

#### **E. Key objectives (paras. 29-40)**

26. There was general support in the Working Group for the key objectives in chapter II. There was also broad support in the Working Group for prefacing the recommendations of the draft Guide with a reference to the key objectives as a statement of the general principles underlying the recommendations.

27. It was also agreed that the key objective relating to the harmonization of secured transactions laws should be expanded or a new key objective should be added to refer to the need to provide conflict-of-laws rules. It was widely felt that, to the extent complete harmonization of national secured transactions laws might not be achieved, conflict rules would be particularly useful to facilitate cross-border transactions. It was also observed that conflict-of-laws rules would be useful, in any event, in order, for example, to assist parties in determining where to file.

#### **F. Recommendations on scope (A/CN.9/WG.VI/WP.13, Recs. 1-5)**

28. As to recommendation 2, it was stated that the reference to whether an obligation to be secured was determined or determinable should not be mentioned as an element defining the security rights covered by the draft Guide.

29. There was general support in the Working Group for recommendation 3 providing that the scope of the draft Guide should be as broad and comprehensive as possible.

30. With respect to recommendation 4 (b), it was stated that reference should be made to “property” rights to avoid inadvertently covering personal rights securing an obligation, such as a guarantee or suretyship.

31. With respect to recommendations 4 (c) and (d), it was stated that there was duplication as well as inconsistency between them since they both referred to all assets and recommendation 4 (c) was subject to certain exceptions while recommendation 4 (d) was not.

32. With respect to recommendation 4 (e), it was agreed that the square brackets should be deleted. It was widely felt that the draft Guide should not only take a unitary approach, covering a broad range of assets, security rights, obligations and parties but also a functional approach, covering all types of transactions performing a security function irrespective of the form of those transactions. It was stated that, unless substance prevailed

over form, parties could circumvent the regime based on the recommendations of the draft Guide even with respect to the rights of third parties. It was also observed that, while a decision with respect to retention of title devices was pending, the Working Group had agreed that transfer of title and other transactions that were functionally equivalent to secured transactions should be covered.

33. In the discussion of recommendation 4, it was stated that sales of receivables might also need to be covered in some respects. It was noted that, under the Assignment Convention (see art. 2 (a)), the same rules applied to outright assignments, outright assignments for security purposes and assignments by way of security.

34. With respect to recommendation 5, it was agreed that securities should be excluded from the scope of the draft Guide as they were the subject of a convention being prepared by the International Institute for the Unification of Private Law (Unidroit) and a Convention that had been prepared by the Hague Conference on Private International Law. It was stated that, as the convention being prepared by Unidroit might not cover all relevant issues, the draft Guide might apply to issues not covered by the Unidroit convention. In response, it was noted that, as the Unidroit convention and the draft Guide were being prepared at the same time, it would be difficult to determine in time which issues might not be addressed in the Unidroit convention so that they might be addressed in the draft Guide. It was also noted that Unidroit might address issues that might not be covered in the convention being prepared in a set of principles or model legislative provisions.

35. It was also agreed that real estate should be added to the types of assets excluded in recommendation 5 from the scope of the draft Guide.

36. With respect to ships and aircraft, it was agreed that, as long as the special regimes dealing with security rights in such assets and registration was not interfered with, there was no need to exclude them from the scope of the draft Guide. It was also agreed that the commentary on the exclusions should specify the reasons for those exclusions.

37. Subject to the changes referred to above (see paras.28-36), the Working Group approved the substance of recommendations 1 to 5.

#### **Chapter IV. Creation (A/CN.9/WG.VI/WP.11/Add.2, paras. 1-65, and A/CN.9/WG.VI/WP.13, Recs. 6-13)**

##### **A. General remarks (A/CN.9/WG.VI/WP.11/Add.2, paras. 1-65)**

38. With respect to paragraph 9, it was stated that, in the absence of concrete examples of obligations subject to conditions subsequent or precedent in secured transactions, it might not be easy to understand. With respect to paragraph 30, it was agreed that a reference should be added to collections of receivables as was done in the definition of the term “proceeds” (see para. 22).

39. With respect to paragraph 41, differing views were expressed as to whether the security right should be extended to proceeds of proceeds of the encumbered assets. One view was that the right to proceeds should be limited to proceeds received by the grantor or the secured creditor and not be extended to proceeds received by transferees. It was stated that, in the case of a sale of the encumbered assets by the grantor outside its ordinary course of business without the consent of the secured creditor, the secured creditor would

have a right to follow the assets in the hands of any transferee and a right in all proceeds received by the grantor and any transferee. It was asserted that, where the secured creditor was under-secured, that would mean a windfall for the secured creditor. It was observed that the means of preventing such a windfall would be to have a rule that would limit the cumulative value of the secured creditor's rights to the value of the original encumbered assets at the time of the event giving rise to the proceeds. Another problem that was asserted was that third parties obtaining a right in the proceeds by any of the transferees would not be able to easily ascertain the existence of a previously filed security right as any filing would be under the name of the initial grantor, not its transferees.

40. Another view, however, was that the security right should extend to any proceeds of the encumbered assets whether received by the grantor or any other party. It was stated that, as a matter of logic and consistency of the system, the security right that followed the asset in the case of unauthorized dispositions should also extend to proceeds as that was the only way to ensure adequate protection for the secured creditor who, in any case, would not receive more than what was owed. It was also observed that such an approach did not disadvantage creditors of transferees of the assets since the rule on preservation of the security right in the case of an unauthorized sale of encumbered assets put on them the burden to investigate about rights of other parties in assets offered as security, which they did as a matter of standard practice. Most importantly, it was said that if the right in proceeds were limited to proceeds received by the grantor, security rights could be undermined by a further sale of encumbered assets by a transferee receiving the assets from the grantor. A compromise proposal made to extend the security right to proceeds received from the grantor or its immediate transferees was said to raise the same problem, in particular since often the first sale of the encumbered assets was made by a grantor in distress and did not generate sufficient value, while the second or third disposition generated real value. It was also stated that the rule proposed could not work in particular in the case of a security right in receivables where, if one of the transferees collected the receivables, the secured creditor would lose both the encumbered assets and the proceeds. In response, it was observed that, where the proceeds formed part of the encumbered assets, the secured creditor would retain the right to reclaim the proceeds in the hands of the grantor or the current owner.

41. While some interest was expressed in the proposed limitation of the right in proceeds, the Working Group was not ready to make a decision. It was therefore agreed that the proposed rule should be formulated as a recommendation in square brackets with some comments for the continuation of the discussion.

#### **B. Recommendations (A/CN.9/WG.VI/WP.13, Recs. 6-13)**

42. The Working Group went on to consider the recommendations with respect to the creation of security rights on the basis of revised recommendations in document A/CN.9/WG.VI/WP.13 (Recs. 6-13).

43. With respect to recommendation 10 dealing with the requirement of a signed writing for the security agreement, it was agreed that, while possession was sufficient for the creation of possessory security rights, a writing signed by the grantor should be required for the creation of non-possessory security rights (with respect to retention of title devices the decision was postponed for a later stage). It was stated that a requirement for a writing signed by the grantor was necessary to put the grantor on notice as to the important remedies of the secured creditor with respect to the encumbered assets. It was also

observed that a writing should be required to prevent post-default or post-insolvency collusion of the grantor with a creditor or the insolvency administrator.

44. It was widely felt that, in view of the minimum contents of the security agreement, as described in recommendation 9, such a form requirement would not place an undue burden on parties. In order to ensure that result, it was also agreed that the writing requirement could be met by a data message, as defined in article 6 of the UNCITRAL Model Law on Electronic Commerce, and the signature requirement could be met by a method linking the author of a message with the message, as defined in article 7 of the Model Law.

45. As to whether failure to meet the requirement for a signed writing would result in the security agreement being ineffective or impossible to prove, the Working Group decided that that matter should be left to the law of each enacting State, taking into account that the difference between those two approaches was conceptual rather than practical, since in either case the secured creditor could not exercise its rights as a secured creditor. In any case, it was agreed that failure to meet the form requirements for the security agreement did not affect the underlying secured obligation.

46. There was support in the Working Group for recommendation 12 dealing with the assets that could be encumbered and the obligations that could be secured. It was agreed, however, that more detailed recommendations should be prepared on fixtures, accessions, commingled goods and proceeds.

47. With respect to fixtures, accessions and commingled goods, it was agreed that the recommendation should be that the security right should be preserved even after they were attached to immovable or movable property, or commingled with other assets. It was also agreed that the relative rights of competing claimants should be addressed as an issue of priority. With respect to proceeds, it was suggested that the recommendations should be that: (i) unless otherwise agreed by the parties, the security right in the encumbered assets should extend to any proceeds; (ii) proceeds had to be identifiable; and (iii) tracing rules should be introduced.

48. While there was agreement in the Working Group in principle as to the right in proceeds, the concern was expressed that, in view of the fact that the term “proceeds” was defined very broadly to include even revenue flowing from the encumbered assets, the proposed rule could not only come as a surprise to the grantor but most importantly inadvertently deprive the grantor of any economic interest in its assets. In order to address that concern, it was suggested that at least some types of revenue from the encumbered assets should be subject to the security right in the assets, only if so provided in the security agreement. It was stated that the specificity in the description of such revenue would depend on the specificity in the description of the encumbered assets (if the encumbered assets were described as “all present and after-acquired assets” or “inventory, receivables and proceeds”, there would be no need for any additional reference to proceeds).

49. In the discussion, it was noted that there might be some inconsistency between the definition of the term “grantor” (see A/CN.9/WG.VI/WP.11/Add.1, para. 17 (f)), which implied that the grantor was the owner of the encumbered assets, and recommendation 12, which suggested that the grantor did not need to be the owner of the encumbered assets.

50. With respect to recommendation 13, it was agreed that the reference to the term “control” needed to be clarified by reference to its technical meaning.

51. Subject to the changes or additions mentioned above (see paras. 43, 44 and 47-50), the Working Group approved the substance of recommendations 6 to 13.

## **Chapter VIII. Default and enforcement (A/CN.9/WG.VI/WP.14/Add.2, paras. 1-33, and A/CN.9/WG.VI/WP.13/Add.1, Recs. 57-72)**

### **A. General remarks (A/CN.9/WG.VI/WP.14/Add.2, paras. 1-33)**

52. With respect to paragraphs 18 and 19, it was agreed that some discussion should be added to emphasize that acceptance of the encumbered assets in satisfaction of the secured obligation was particularly useful since it could save time and cost and thus maximize the realization value of the encumbered assets. It was also agreed that the need for transparency to protect the rights of the grantor and third parties should be emphasized. With respect to paragraph 20, it was agreed that the term “redemption of the encumbered assets” that was known only in some legal systems should be replaced by the more neutral term “release of the encumbered assets from the security right” by reason of the payment of the secured obligation, including interest and costs, in full.

53. With respect to paragraph 21, it was agreed that it should clarify that the source of the right of the grantor to dispose of the encumbered assets within a limited time period after default could be an agreement with the secured creditor or a rule of law. With respect to paragraph 24, it was agreed that the reference to various methods should be recast in terms of the situation in the law of various States rather than as a recommendation. It was also agreed that paragraph 24 should refer also to collections of intangibles and negotiable instruments. With respect to paragraph 28, it was agreed that, in the case of a third-party grantor, any surplus should be returned to the grantor and not to the debtor. It was also agreed that discussion should be added with respect to the intersection of movable and immovable property law (see para. 65). With respect to paragraph 31, it was agreed that the term “require” should be substituted for the term “inform”.

### **B. Recommendations (A/CN.9/WG.VI/WP.13/Add.1, Recs. 58-72)**

54. The Working Group went on to consider the recommendations with respect to default and enforcement on the basis of revised recommendations in document A/CN.9/WG.VI/WP.13/Add.1 (Recs. 58-72).

55. Broad support was expressed in the Working Group for the statement of the purpose of the recommendations on default and enforcement. The importance of ensuring expeditious realization of the value of encumbered assets, balance between efficiency and due process, flexibility for parties to agree on the appropriate enforcement mechanisms, protection of the rights of third parties and finality upon completion of enforcement proceedings were particularly emphasized. It was also widely felt that, in the absence of a credible judicial system, no enforcement procedure could work well, a point that should be made in the commentary. With respect to paragraph 58 (e), it was agreed that the reference to good faith, commercially reasonable standards and public policy should be expanded to apply to the exercise of rights and the performance of obligations of all parties.

56. With respect to recommendation 59, differing views were expressed as to whether it should be retained. One view was that it should be retained. It was stated that: as the secured creditor had a panoply of remedies based on contract and property law, the grantor (in particular individual grantors and consumers) needed to know how to cure the default

and stop enforcement; notice of enforcement should be given to third parties as well (although the details of the debt might not need to be disclosed to third parties); such notice should be required at least in the case of extra-judicial enforcement; and the right of the grantor and other parties to be given notice was indispensable since it might involve the right to due process protected even under constitutional law.

57. Another view was that recommendation 59 should be deleted. It was observed that: notice of default and enforcement was a matter of contract law; the debtor knew of its default and should not be given an opportunity to delay or derail enforcement procedures; it was not advisable to establish by law cumbersome mechanisms that could have a negative impact on the realization value of encumbered assets; the nature and the details of notices might differ depending on the type of encumbered assets and security rights involved; a specific notice of disposition that had the effect of cutting off the grantor's rights in the encumbered assets should be sufficient; and consumers would not be adversely affected since consumer-protection legislation would always prevail.

58. In the discussion, various suggestions were made, including that: the notice should be in a language that was reasonably expected to be understood by its recipient (see article 16 (1) of the Assignment Convention); and that, for the purpose of informing third parties, the notice of enforcement should be registered in the secured transactions registry (that suggestion was objected to).

59. After discussion, it was agreed that: (i) recommendation 59 should be retained in square brackets as a notice of enforcement (not default which was a contractual matter to be left to contract law); (ii) its scope should be limited to extra-judicial enforcement; (iii) the legal consequences of insufficient or erroneous notices should also be addressed; and (iv) exceptions might be included to cover cases in which no notice could be given without jeopardizing the realization value of encumbered assets. It was also agreed that the commentary should discuss the advantages and disadvantages of such a general notice of enforcement.

60. With respect to recommendation 60 (b), it was agreed that the phrase "court or other authorities" should be substituted for the phrase "official State institutions".

61. With respect to recommendation 64, it was agreed that it should be recast to refer to a right to pay the secured debt, including interest and cost, in full and to release the encumbered assets from the security right. It was also agreed that a right of reinstatement of the security right through payment of the part of the debt that was due at the time of default should not be recommended since such a right could inadvertently result in delaying and complicating the enforcement process. It was agreed, however, that the right of reinstatement could be discussed in the commentary, where reference could also be made to the limits in the exercise of such right under the laws of various countries and to reinstatement under consumer-protection law which would prevail over legislation based on the recommendations of the draft Guide. It was also agreed that the commentary should discuss the effect of payment by a third party with respect to the security right (subrogation).

62. With respect to recommendation 65, it was agreed that reference should be made to the need that any notice system should be simple, efficient, quick, inexpensive and reliable so as to avoid having a negative impact on the realization value of the encumbered assets and thus on the availability and the cost of credit. It was also agreed that the notice system should be aimed at providing protection for the grantor, but also for third parties.



63. With respect to recommendation 66, it was agreed that, instead of setting forth various procedures, it should emphasize the need for flexibility in regulating the disposition of encumbered assets subject to an independent standard, such as commercial reasonableness. It was also agreed that the commentary should discuss the right of the secured creditor to buy the encumbered asset subject to certain rules aimed at the protection of the grantor's rights.

64. As to recommendation 67, it was agreed that it should permit the secured creditor to control the collection of intangibles and negotiable instruments subject to flexible rules and the standard of commercial reasonableness.

65. With respect to recommendation 68, it was agreed that it should be recast in broader terms to deal with the intersection of movable and immovable property law and to emphasize the need for special enforcement rules that should be formulated in accordance with immovable property law and promote key objectives of movable property law, such as the need for a flexible enforcement regime and the need to promote secured credit. It was stated that the recommendation should address several questions, including: the question of whether a security right in fixtures should be enforced in accordance with movable or immovable property law; and the question of whether, in the case of security right in movable property (e.g. plant) and a mortgage in the land on which the movable property was located, enforcement of the security right in the movable property should take place in accordance with the law of movable or immovable property. It was also agreed that some discussion should be added in the commentary on recommendation 68.

66. With respect to recommendation 69, it was agreed that it should refer to the distribution of proceeds to secured creditors with a security right in the same encumbered assets as the enforcing secured creditor and a lower priority ranking than the enforcing secured creditor. It was also agreed that the commentary could usefully explain that, in the case of doubt as to whom to turn over any surplus, the enforcing secured creditor should be entitled to make use of relevant domestic law mechanisms of the enacting State, such as payment to a public deposit fund. In addition, it was agreed that a new recommendation should be added to clarify that the exercise of remedies under secured transactions law should not prevent the secured creditor from exercising its remedies under contract law.

67. With respect to recommendation 70, it was suggested that it be revised to provide that, in the case of extra-judicial enforcement initiated by the secured creditor, any security rights with lower priority ranking than that of the enforcing secured creditor would be purged, and that a secured creditor with a higher priority ranking than that of the enforcing secured creditor should have the right to take over the enforcement procedure. As to judicial enforcement, it was suggested that all security rights should be purged and the buyer of the encumbered assets should acquire them free of any security right.

68. It was also suggested that the recommendations dealing with the disposition of encumbered assets and the taking of encumbered assets in satisfaction of the secured obligation be recast along the following lines: (i) advance notice about a non-judicial disposition or a proposal for the secured creditor to take the encumbered assets in satisfaction of the secured obligation should be given to the grantor, the debtor, secured creditors on record or in possession of the encumbered assets and any other person with rights in the encumbered assets that had notified the enforcing secured creditor; (ii) the grantor, subordinate secured creditors or other persons with subordinate rights in the encumbered assets should have a right to object to a proposal for the secured creditor to take the encumbered assets in satisfaction of the secured obligation; (iii) transferees of

encumbered assets and the secured creditor who had taken the encumbered assets in satisfaction of the secured obligation should acquire the assets free of the rights of the grantor, the enforcing secured creditor, subordinate secured creditors and any person with subordinate rights in the assets; (iv) any surplus remaining after disposition must be paid to subordinate secured creditors or other subordinate claimants and, if there is a balance, to the grantor; (v) in the case of a judicial disposition of the encumbered assets, the title of the transferee and the distribution of the proceeds should be determined by the law governing enforcement proceedings by creditors generally; (vi) the first-ranking secured creditor could take control of the enforcement process; and (vii) the debtor or other person owing payment of the secured obligation should be liable for any deficiency after disposition of the encumbered assets, collection of an intangible by the secured creditor or acceptance of the encumbered assets in total or partial satisfaction of the secured obligation.

69. In response to a statement that disposition by a subordinate secured creditor would not result in clean title (i.e. free of any security rights) for the transferee and would thus not yield the maximum possible value, it was stated that the Working Group had to counterbalance the need to maximize realization value and the need to preserve the right of the first-ranking secured creditor to control the timing and manner of the enforcement of its security rights. Expressing interest in these suggestions, the Working Group requested the Secretariat to include appropriate language in the next version of the recommendations on default and enforcement.

70. With respect to recommendation 71, it was agreed that civil procedure law should not change the priority ranking secured creditors had under secured transactions law.

71. As to recommendation 72, it was agreed that the reference to transfer of title for security purposes could be deleted on the understanding that the draft Guide would make it clear that such a transfer of title should be treated in all respects as a security right.

72. Subject to the changes or additions mentioned above (see paras. 55-71), the Working Group approved the substance of recommendations 58 to 72.

## **Chapter X. Conflict of laws (A/CN.9/WG.VI/WP.14/Add.4, paras. 1-32, and A/CN.9/WG.VI/WP.13/Add.1, Recs. 73-85)**

### **A. General remarks (A/CN.9/WG.VI/WP.14/Add.4, paras. 1-32)**

73. With respect to paragraph 18, it was suggested that the law of the country where the goods were located should govern security rights in negotiable documents of title. That suggestion was objected to. It was widely felt that both the commentary and the recommendation on that matter (referring to the location of the document) were appropriately formulated to protect the negotiability of the document and to accommodate market needs.

74. With respect to paragraphs 21 to 25, it was stated that the commentary and the relevant recommendations needed to: (i) clarify the meaning of the reference to the law of a location at “the time when an issue arises”; (ii) specify the grace period within which a secured creditor could take any steps to preserve the effectiveness of its right against third parties in the new jurisdiction to which the goods were moved; and (iii) clarify whether the term “place of destination” meant ultimate destination only or intermediate stops as well.

**B. Recommendations (A/CN.9/WG.VI/WP.13/Add.1, Recs. 73-85)**

75. The Working Group went on to consider the recommendations with respect to conflict of laws on the basis of revised recommendations in document A/CN.9/WG.VI/WP.13/Add.1 (Recs. 73-85). At the beginning of its deliberations, the Working Group took note with interest of an oral report of a joint UNCITRAL-Hague Conference on Private International Law expert group meeting on applicable law issues in security interests, which was held in Vienna from 2 to 3 September 2004. Pending submission of revised versions of certain recommendations suggested by the experts, the Working Group decided to defer consideration of the relevant recommendations (77, 79, 80 and 82) until it had the opportunity to consider a revised text of those recommendations.

76. In the context of the discussion of the purpose of the recommendations on conflict of laws, the concern was expressed that the term “creation” might be confusing in countries where creation of a security right produced effects against all. In order to address that concern, the suggestion was made that the term “creation as between the parties” should be used. The Working Group noted that drafting suggestion and decided to defer its consideration until it had an opportunity to consider the chapter on creation.

77. With respect to recommendation 74, the question was raised as to whether the extinction of a security right should also be addressed. In response, it was stated that the extinction of a security right could be the result of the extinction of the secured obligation, which was a matter outside the scope of the draft Guide, or the result of application of property law and could be addressed in the draft Guide. It was agreed that that matter could be explained in the commentary with appropriate examples.

78. With respect to recommendation 75 dealing with security rights over intangible property, it was suggested that the law applicable should be the law governing the relevant claim. That suggestion was objected to. It was widely felt that such an approach would be inconsistent with the approach followed in article 22 of the Assignment Convention, which referred third party effectiveness and priority to the law of the assignor’s (i.e. the grantor’s) location. It was also generally felt that an approach based on the law governing the claim would be unworkable in a wide range of financing transactions that involved a multiplicity of assets, including after-acquired assets. For reasons of consistency with the Assignment Convention and in view of the importance of certainty with respect to the rights of third parties, it was also agreed that the term “location” of the grantor should be defined by reference to article 5 (h) of the Assignment Convention.

79. In response to a question, it was noted that the relevant time for the determination of the location of the grantor was addressed in recommendation 78. In response to another question, it was noted that the law applicable to security rights in certain intangible assets, such as deposit accounts, letters of credit and intellectual property rights, remained to be discussed once a decision had been reached by the Working Group as to whether they should be covered in the draft Guide (see A/CN.9/WG.VI/WP.14/Add.4, note to para. 18).

80. With respect to recommendation 76, in order to clarify that it was not designed to apply to goods in transit, it was agreed that a cross-reference should be made to recommendation 80. With respect to recommendation 80 on goods in transit, it was noted that it would be supplemented by another recommendation relating to goods intended for export.

81. While support was expressed for recommendation 78, it was agreed that its impact could be usefully explained further in the commentary. It was stated that recommendation 78 was appropriate in stating that a security right that had been created without having been made effective against third parties in State A could be made effective against third parties in State B to which the goods might have been moved.

82. It was agreed that recommendation 81 should be recast as a rule prohibiting derogation from the rules set forth in the recommendations on conflict of laws as they addressed property matters. It was also agreed that a new recommendation should be added to provide for party autonomy with respect to the mutual rights and obligations of the secured creditor and the grantor. It was further agreed that a new recommendation should be added to ensure that reference to applicable law meant reference to the material law, not the conflict of laws rules, of a State (i.e. no *renvoi*).

83. With respect to recommendation 83, a concern was expressed regarding the distinction made between substantive and procedural matters, which was a very difficult distinction to make and, in any case, would be a matter for the law of the State where enforcement took place (*lex fori*). In order to avoid that distinction, it was suggested that reference should be made to mandatory and non-mandatory law matters and that the distinction should be left to the law of the *forum*. While some interest was expressed in the suggestion, doubt was also expressed as to whether it enhanced certainty and promoted the application of the substantive recommendations of the draft Guide on enforcement. In any case, it was stated that, as the recommendations on conflicts would most likely not be implemented by States without the substantive law recommendations of the draft Guide, the mandatory law of enacting States should be in line with the recommendations of the draft Guide on enforcement.

84. With respect to recommendation 84, it was agreed that the term “occurrence of insolvency” would be replaced by the term “commencement of insolvency proceedings in respect of the grantor”.

85. Subject to the changes or additions mentioned above (see paras. 77-84), the Working Group approved the substance of recommendations 73 to 85.

## **Chapter V. Effectiveness against third parties (A/CN.9/WG.VI/WP.14, paras. 1-75, and A/CN.9/WG.VI/WP.13, Recs. 14-32)**

### **A. General remarks (A/CN.9/WG.VI/WP.14, paras. 1-75)**

86. The Working Group considered the general remarks of the chapter on the effectiveness of security rights against third parties (paras. 1-75) and requested the Secretariat to make the necessary changes. In particular, it was agreed that: the issue of confidentiality and the extent to which the secured creditor might be required to provide information to third parties should be treated with particular caution and that, for the time being, no recommendation should be made; the question whether the various methods of achieving third-party effectiveness were alternative or exclusive would need to be further clarified; and that the question of integration of the general secured transactions registry with the specialized title registries should be further discussed.

**B. Recommendations (A/CN.9/WG.VI/WP.13, Recs. 14-32)**

87. The Working Group went on to consider the recommendations with respect to the effectiveness of security rights against third parties on the basis of revised recommendations in document A/CN.9/WG.VI/WP.13 (Recs. 14-32).

88. While there was support in the Working Group for the statement of the purpose of the recommendations, it was agreed that some additional language was necessary to explain that, for a security right to be effective against third parties some additional step was necessary to the steps required for its creation as between the secured creditor and the grantor.

89. With respect to recommendation 15 on methods of achieving third-party effectiveness, it was agreed that subparagraph (c) would remain in square brackets until the Working Group had reached a final decision as to whether the intangibles obligations with respect to which third-party effectiveness could be achieved by control would be included in the scope of the draft Guide. It was also agreed that a new paragraph should be added to indicate that there might be additional methods of achieving third-party effectiveness.

90. With respect to recommendation 17 about a general secured transactions registry, some doubt was expressed as to its necessity. With respect to recommendation 18 on the content of the notice, it was agreed that the notice should be required to include only the information set forth in recommendation 17. It was also agreed that, with respect to the duration of registration, States should be given an option to specify the duration or permit the parties to specify the duration in the notice (see Recs. 18 (c) and 25). In response to a question, it was observed that a fixed duration of registration was required to address the concern that the secured creditor would not discharge the registration in a timely manner, as well as to avoid overburdening parties and registries with unnecessary information.

91. As to whether the maximum amount for which the security right could be enforced should be mentioned in the notice, differing views were expressed. One view was that the maximum amount should be specified in the notice. It was stated that such an approach would enhance the information value of the registry and facilitate credit by subordinate creditors. Another view was that no maximum amount should be set forth in the notice. It was observed that in that way lending by the first-ranking secured creditor would be facilitated, lower-ranking creditors could lend on the basis of inter-creditor agreements and the registry would not be burdened with unnecessary information. It was also said that, if parties had to include maximum amounts in the notice, they would be inclined to inflate the relevant amounts, thus limiting the value of security available for potential lower-ranking creditors. In response, it was observed that the risk of inflated amounts was usually not an issue for equipment financing and similar specific-asset financing transactions.

92. In recognition of the merits of both views, it was suggested that the commentary on recommendation 18 (d) should discuss the advantages and disadvantages of both approaches and that the recommendation should include alternatives for States to choose from. After discussion, the Working Group decided to retain recommendation 18 (d) within square brackets for further discussion, and requested the Secretariat to elaborate further on the possible approaches in the commentary.

93. With respect to recommendation 23 on advance registration, in response to a question it was noted that advance registration could take place even at a time when the existence of a security right was in dispute. Once the existence of the right was confirmed,

it would be considered as having become effective against third parties as of the time it had been registered.

94. With respect to recommendation 26 on the discharge of registration, it was agreed that the commentary should explain the meaning of “full payment or performance of the secured obligation”. It was also agreed that a new recommendation should be included providing for the discharge of registration by agreement of the secured creditor and the grantor.

95. As to whether registrations should be discharged after a summary proceeding, while there was agreement in the Working Group that there should be a speedy and effective judicial remedy for the grantor to obtain a discharge of a registration, differing views were expressed as to whether discharge should be possible by way of administrative summary proceedings. One view was that the grantor should not have to take the time and cost to go to court where it was clear that there was no security agreement or debt. Another view was that, while in the case of an administrative process with fact-finding and law-deciding capability such an approach would be acceptable, it would not be appropriate to burden clerical staff and registrars with such responsibilities, in particular since, to minimize cost and maximize efficiency, modern registries increasingly tended to rely on computerization and a minimum of staff.

96. After discussion, the Working Group agreed that the commentary should explain that an administrative summary proceeding could be acceptable if appropriate safeguards were in place, including that the secured creditor needed to be notified and be given a right to object (in which case adjudication of the matter would be necessary). It was also stated that additional safeguards might include a statement under oath by the grantor that the debt did not exist or was paid.

97. With respect to recommendation 27, it was agreed that: discussion on recommendation 27 (a) should be postponed; recommendation 27 (b) should refer to “right” and not to “title”; recommendation 27 (b) (ii) should be retained outside square brackets; recommendation 27 (b) (v) should be deleted as the Working Group had agreed that transfer of title for security purposes should be treated as a security right; and recommendations 27 (b) (i), (iii) and (iv) should be presented as options for States. It was also agreed that the commentary would elaborate on all these points.

98. With respect to recommendation 28, it was agreed that the statement about the need for actual, not constructive, fictive or symbolic, dispossession should be strengthened and that the matter should be further elaborated in the draft Guide.

99. With respect to recommendation 29, it was agreed that the title should be corrected to refer to negotiable documents of title and that the language of the recommendation should be aligned with the definition of negotiable documents in the terminology section (see A/CN.9/WG.VI/WP.11/Add.1, para. 17 (y)). It was also agreed that the commentary would include additional explanations.

100. Pending a decision as to whether deposit accounts would be covered in the draft Guide, the Working Group agreed to postpone the discussion of recommendations 30 and 31.

101. With respect to recommendation 32, it was agreed that its formulation should be revised to conform to the distinction made in the draft Guide between the creation of a security right as between the parties and its effectiveness against third parties.

102. Subject to the changes and additions mentioned above (see paras. 87-101), the Working Group approved the substance of recommendations 14 to 32.

## **V. Report of the Drafting Group**

103. The Working Group requested a drafting group established by the Secretariat to review the terminology of the draft Guide (A/CN.9/WG.VI/WP.11/Add.1, para.17). At the close of its deliberations, the Working Group considered and approved the report of the drafting group. It was agreed that the definition of “security agreement” in Spanish should be aligned with the English version (i.e. the word “real” should be deleted).

## **VI. Future work**

104. The Working Group noted that its seventh session was scheduled to take place in New York from 24 to 28 January 2005. It also noted that its eighth session was scheduled to take place in Vienna from 5 to 9 September 2005, those dates being subject to approval by the Commission at its thirty-eighth session, which was scheduled to take place in Vienna from 4 to 22 July 2005.

## A/CN.9/WG.VI/WP.13

**B. Report of the Secretary General on recommendations  
of the draft legislative guide on secured transactions,  
submitted to the Working Group on  
Security Interests at its sixth session**

(A/CN.9/WG.VI/WP.13 and Add.1) [Original: English]

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## Recommendations of the draft Legislative Guide on Secured Transactions

### I. Scope

#### Purpose

1. The purpose of the scope provisions of the secured transactions law (hereinafter referred to as “the law”) should be to specify the parties, the security rights, the secured obligations and the assets to which the law applies.

#### Security rights

2. The law should deal with security rights in movable property and fixtures securing payment or other performance of one or more obligations, present or future, determined or determinable.

#### Parties, security rights, secured obligations and assets covered

3. The scope of the law should be as broad as possible with respect to the parties, and the types of security rights, secured obligations and encumbered assets covered. Any exceptions should be limited and clearly stated in the law.

4. In particular, the law should apply to:

(a) Legal and natural persons, including consumers;

(b) Rights created contractually to secure all types of obligations, including future obligations, fluctuating amounts of obligations and obligations described in a generic way;



(c) All types of movable assets and fixtures, tangible or intangible, not specifically excluded in the law, including inventory, equipment and other goods, receivables, [cheques, promissory notes, deposit accounts, letters of credit and intellectual property rights], as well as proceeds of those assets; [*Note to the Working Group: If the Working Group decides that such types of asset should be covered in the draft Guide, it may wish to review the recommendations to ensure that they are appropriate for those assets as well and to add special recommendations where necessary.*]

(d) Rights in all assets of a grantor; and

(e) Security by way of transfer of title [and all other types of rights securing the payment or other performance of one or more obligations, irrespective of the form of the relevant transaction and whether ownership of the encumbered assets is held by the secured creditor or the grantor]. [*Note to the Working Group: The Working Group may wish to consider: (i) including retention of title in the legislative regime recommended and give it preferential treatment for priority or other purposes; (ii) exclude at least simple retention of title from the legislative regime recommended but subject it, with some exceptions, to registration for the purpose of addressing priority conflicts; (iii) exclude at least simple retention of title, from the legislative regime recommended. See also Recommendations 10, 27, 43, 72, 76, 82 and 86.*]

5. The law should not apply to security rights in:

(a) Securities; and

(b) [...].

## II. Creation

### Purpose

6. The purpose of the provisions of the law dealing with creation is to specify the way in which a security right in movable property is created as between the grantor and the secured creditor.

### Security agreement

7. The law should specify that a security right is created as between the grantor and the secured creditor by security agreement.

### Delivery of possession

8. The creation of a possessory security right requires, in addition to agreement, the delivery of possession of the assets to be encumbered to the secured creditor or another third party who holds the assets on behalf of the secured creditor (other than the grantor or an agent or employee of the grantor) (see recommendation 28).

### Minimum contents of the security agreement

9. The law should provide that the security agreement must, at a minimum, identify the secured creditor and the grantor and reasonably describe the secured obligation and the assets to be encumbered. A generic description of the secured obligation and the encumbered assets should be sufficient.

**Form**

10. The law should provide that the security agreement must be in writing which need not be signed as long as the intention of the grantor to grant a security right is clearly reflected in the document [*Note to the Working Group: The Working Group may wish to limit the writing requirement to non-possessory security. The Working Group may also wish to exclude simple retention of title, from the writing requirement.*]

11. The law should specify that a data message may satisfy the requirement of a writing provided that the information contained therein is accessible so as to be usable for subsequent reference (see article 6 of the UNCITRAL Model Law on Electronic Commerce). “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 (see article 2 (a) of UNCITRAL Model Law on Electronic Commerce).

**Assets and obligations subject to a security agreement**

12. The law should make it possible to secure all types of obligations, including future obligations and fluctuating amounts of obligations. It should also make it possible to provide security in all types of asset, including fixtures and accessions, as well as in assets which the grantor may not own or have the power to dispose of, or which may not exist at the time of the security agreement, and in proceeds. Any exceptions to these rules should be limited and described clearly in the law.

**Time of creation**

13. The law should provide that a possessory security right is created at the time the grantor delivers possession or control of the assets to be encumbered to the secured creditor or another third person who holds the assets on behalf of the secured creditor (other than the grantor or an agent or employee of the grantor), unless the parties otherwise agree. A non-possessory security right is created at the time the security agreement is made, unless the parties otherwise agree. A security right in future property is created at the time the debtor or other grantor acquires rights in such property.

### **III. Third party effectiveness**

**Purpose**

14. The purpose of the provisions of the law requiring an additional step before a security right may be asserted against competing claimants is:

- (a) To alert third persons dealing with the movable assets of the grantor of the risk that those assets may be encumbered by a security right; and
- (b) To provide a temporal event for ordering priority among secured creditors and between a secured creditor and other classes of competing claimants.

**Methods for achieving third party effectiveness**

15. The law should provide that a security right may be asserted against a competing claimant only when one of the following events occurs:

- (a) Registration of a notice of the security right in a general security rights registry;
- (b) Dispossession of the grantor if the encumbered assets are specific items of tangible movable property;
- [(c) Transfer of control to the secured creditor if the encumbered assets are [certain intangible obligations, other than receivables, owing to the grantor by a third person] [a deposit account];]
- (d) Registration of a notice of the security right in a specialized title registry if the encumbered assets are specific items of movable property for which title is established, under other law of the enacting State, by registration in such a registry; or
- (e) Entry of a notation of the security right on the title certificate if the encumbered assets are specific items of tangible movable property for which, under other law of the enacting State, title is evidenced by a title certificate.

16. The law should confirm that different methods for achieving third party effectiveness may be used for different items or kinds of encumbered assets whether or not they are encumbered by the same security agreement or by separate security agreements.

#### **Establishment and characteristics of a general security rights registry**

17. The law should provide for the establishment of a general security rights registry having the following characteristics:

- (a) Registration is effected by filing a notice of the security right as opposed to a copy of the security documentation;
- (b) The record of the registry is centralized; that is, it contains all notices of security rights registered under the secured transactions law of the enacting State;
- (c) The registration system is set up to permit the indexing and retrieval of notices according to the name of the grantor or according to some other reliable identifier of the grantor;
- (d) The registry is open to the public;
- (e) Reasonable public access to the registry is assured through such measures as:
  - (i) Setting fees for registration and searching at a cost-recovery level; and
  - (ii) Making available remote modes or points of access;
- (f) The registration system is administered and organized to facilitate efficient registration and searching. In particular:
  - (i) A notice may be registered without verification or scrutiny of the sufficiency of its content;
  - (ii) Subject to the financial and infrastructural capacity of the enacting State, notices are stored in electronic form in a computer data base;
  - (iii) Subject to the financial and infrastructural capacity of the enacting State, registrants and searchers have electronic access to the registry record, or telephone or telecopy access; and

(g) The law provides rules on the allocation of liability for loss or damage caused by an error in the administration or operation of the registration and searching system

#### **Required content of registered notice**

18. To constitute a legally effective registration, the law should require the registered notice to contain [only]:

(a) The names (or other reliable identifiers) of the grantor and the secured creditor, and their addresses;

(b) A description of the movable property covered by the notice;

[(c) The term of the registration [if the State elects to allow registrants to self-select the number of years for which the registration is to be effective] [see Recommendation 25]; and

[(d) A statement of the maximum monetary amount for which the security right may be enforced.]

#### **Legal sufficiency of grantor name in a registered notice**

19. The law should provide that the name or other identifier of the grantor entered on a registered notice is legally sufficient if the notice can be retrieved by searching the registry record according to the correct legal name or other identifier of the grantor. For this purpose, the law should specify rules for determining the correct legal name or other identifier of individuals and entities.

#### **Legal sufficiency of description of assets covered by a registered notice**

20. The law should provide that a description of the assets covered by a registered notice is legally sufficient if it enables a third person to identify the assets covered by the notice separate from other assets of the grantor.

21. If the assets covered by the notice consist of a generic category or categories of movable property, the law should confirm that a generic description is legally sufficient.

22. If the assets covered by the notice are all the present and after-acquired movable property of the grantor, the law should confirm that it is legally sufficient to describe the charged assets as “all movable property” or by using equivalent language.

#### **Advance registration**

23. The law should confirm that a registration may be made before or after the creation of the security right to which it relates.

#### **One registration for multiple security agreements**

24. The law should confirm that a single registration is sufficient for security rights created by all security agreements entered into between the same parties to the extent they cover items or kinds of movable property that fall within the description contained in the registered notice.

**Duration and renewal of registration**

25. The law should specify the duration of registration or permit the duration to be selected by the registrant at the time of registration. The law should provide for the right to successively renew the term of a registration.

**Discharge of registration**

26. The law should adopt a summary procedure to enable the grantor to compel discharge of a registration if no security agreement has been completed between the parties or if the security right has been terminated by full payment or performance of all of the secured obligations.

**[Additional rights subject to registration]**

27. The law should provide that the following rights may be asserted against third parties only if notice of the right is registered in the general security rights registry:

[(a) The title of a creditor who retains title to goods to secure payment of the purchase price of the goods or its economic equivalent under an agreement of sale or a financing lease;] and

[(b) The title of:

(i) A lessor under a lease that is not a financing lease but which extends for a term of more than one year;

(ii) An assignee under an outright assignment [sale] of receivables;

(iii) A consignor under a commercial consignment in which the goods are consigned to a consignee as agent for sale other than an auctioneer and other than a consignee who does not act as a consignee in the ordinary course of business;

(iv) A buyer under a sale of goods outside the ordinary course of the seller's business where the seller remains in possession of the goods for more than [thirty] [sixty] [ninety] days; and

(v) A transferee under a transfer of title for security purposes.]

**Dispossession of the grantor**

28. The law should provide that:

(a) Dispossession of the grantor is sufficient only if an objective third person can conclude that the encumbered assets are not in the actual possession of the grantor; and

(b) Possession by a third person constitutes sufficient dispossession only if the third person is not an agent or employee of the grantor and holds possession for or on behalf of the secured creditor.

**Negotiable instruments**

29. The law should provide that dispossession of a negotiable document of title constitutes dispossession of the assets represented by the document during the time that the assets are covered by the document.

**[Transfer of Control over [Intangible Obligations] [Deposit Accounts]**

30. The law should provide that a [person who owes a certain intangible obligation to the grantor] [a depository institution with whom the grantor has a deposit account] is required to respond, within a [prescribed] [reasonable] time, to a written demand from a creditor of the grantor for confirmation of whether control over [the performance of the intangible obligation] [the deposit account] has been transferred to a creditor of the grantor.

31. If the secured creditor and the [person owing the intangible obligation] [the depository institution] are the same person, the law should confirm that the secured creditor acquires control as soon as the security right is created.]

**Security rights in proceeds**

32. Where the law recognizes a statutory security right in the identifiable proceeds of the originally encumbered assets, the law should provide that the security right takes effect against third parties as soon as the proceeds arise provided that:

(a) The proceeds take the form of money, negotiable instruments, negotiable documents of title, or receivables [including] [and] deposit accounts;

(b) The proceeds are covered by the description contained in a notice registered in the general security rights registry; or

(c) The security right in the proceeds is independently made effective against third parties by one of the methods referred to in recommendation 15 within [...] days after the proceeds arise.

## **IV. Priority**

**Purpose**

33. The purpose of the provisions of the law on priority is to:

(a) Enable a potential secured creditor to determine, in an efficient manner and with a high degree of certainty prior to extending credit, the priority that the security rights would have relative to competing claimants; and

(b) Enable grantors to create more than one security right in the same asset and to thereby use the full value of their assets to facilitate obtaining credit.

**Scope of priority rules**

34. The law should have a complete set of priority rules covering all possible priority conflicts.

**Secured obligations affected**

35. The law should provide that the priority accorded to a security right:

(a) Extends to all secured monetary and non-monetary obligations owed to the secured creditor [up to a maximum monetary amount set forth in the registered notice] and secured by the security right, including principal, costs, interest and fees; and

(b) Is unaffected by the date on which an advance or other obligation secured by the security right is made or incurred (i.e. a security right may secure future advances under a credit facility with the same priority as advances made under the credit facility contemporaneously with the creation or completion of the security right).

#### **Priority in after-acquired property**

36. The law should specify that a security right in after-acquired or after-created assets of the grantor has the same priority as a security right in assets of the grantor owned or existing at the time the security right is made effective against third parties.

#### **Priority in proceeds**

37. The law should provide that a secured creditor's priority with respect to an encumbered asset extends to the proceeds of the asset subject to the requirements of recommendation 32.

#### **Priority in the case of a change in method for achieving third party effectiveness**

38. The law should provide that if, while a security right is made effective against third parties by one method, it is also made effective against third parties by another method, priority dates as of the time the first method is completed [provided that there was no time gap between completion of the first and the second method].

#### **Priority of security rights that are not effective against third parties**

##### **Unsecured creditors**

39. The law should provide that a secured creditor with a security right that is not effective against third parties has [no right other than an unsecured creditor] [priority over unsecured creditors unless the unsecured creditor has taken steps to reduce its claim to a judgement or the grantor has become insolvent].

##### **Secured creditors**

40. The law should provide that:

(a) A security right that is not effective against third parties is subordinate to a security right in the same encumbered assets that is effective against third parties, without regard to the order in which the security rights were created; and

(b) Priority among security rights that are not effective against third parties is determined by the order in which they were created.

#### **Priority of security rights that are effective against third parties**

##### **Unsecured creditors**

41. The law should provide that a security right that is effective against third parties has priority over the rights of unsecured creditors.

##### **Secured creditors**

42. The law should provide that:

(a) As between two security rights in the same encumbered asset that are effective against third parties, except as provided in recommendation 4, priority is determined by the order in which their respective third party effectiveness steps occurred, even if one or more of the requirements for the creation of a security right was not satisfied at such time. If one of the security rights is made effective against third parties by possession of the encumbered asset, the holder of that security right will have the burden of establishing when it obtained possession;

(b) A security right made effective against third parties by control has priority over a security right made effective against third parties by any other method;

(c) With respect to negotiable instruments, negotiable documents and money, a security right made effective against third parties by possession or control has priority over a security right made effective against third parties by registration.

### **Purchase money security rights**

43. The law should provide that:

(a) A purchase money security right in goods that has been made effective against third parties by registration within a short specified period after the grantor obtains possession of the goods has priority over a competing non-purchase money security right in the same goods that has been made effective against third parties by prior registration[. Retention of title arrangements should be subject to the same requirements as purchase money security rights]; and

[(b) If the goods subject to a purchase money security right consist of inventory, then, in addition to registration, the law should require that the purchase money creditor give notice before delivery of the goods to the grantor to all other creditors who have previously registered a security right in the same goods in order to obtain priority over those creditors.]

### **Judgement creditors**

44. The law should provide that, if applicable law gives a judgement creditor rights in assets of the judgement debtor in recognition of the legal steps the judgement creditor has taken to enforce its claims, a security right that is effective against third parties has priority over the right of the judgement creditor that is registered after the security right has become effective against third parties, except with respect to amounts advanced by the secured creditor subsequent to a specified number of days after the date on which the judgement creditor registers a notice of its rights.

### **Buyers of encumbered assets**

45. The law should provide that the right of a buyer of goods is subject to a security right that has become effective against third parties before the sale, unless the secured creditor authorized the sale, except that a buyer of inventory who buys encumbered assets in the ordinary course of business of the seller (and anyone whose rights to the encumbered assets derive from that buyer) takes free of a security right that is effective against third parties in those assets, even if such buyer has knowledge of the existence of the security right.



**Reclamation claims**

46. If the law provides that suppliers of goods have the right to reclaim the goods within a specified time after the grantor becomes insolvent, the law should also provide that such specified time is short, and that the right to reclaim the goods is subordinate to security rights in such goods that are effective against third parties.

**Lessees**

47. The law should address the priority of a security right in an asset that is effective against third parties as against the rights of a lessee of such asset.

**Holders of promissory notes and negotiable documents**

48. The law should provide that the rights of a [person who by other law takes rights in a promissory note or negotiable document free of claims to it] [holder in due course of a promissory note or negotiable documents] takes such asset free of a security right that is effective against third parties.

**Holders of rights in money**

49. The law should provide that the rights of a person who gives value for money and has possession of the money takes the money free of a security right in the money that is made effective against third parties only by registration.

**Statutory (preferential) creditors**

50. The law should limit, both in number and amount, preferential claims that have priority over security rights that are effective against third parties, and to the extent preferential claims exist, they should be described in the law in a clear and specific way.

**Holders of rights in assets for improving and storing assets**

51. If applicable law gives rights equivalent to security rights to a creditor who has added value to goods (e.g. by repairing them) or preserved the value of goods (e.g. by storing them), such rights should be limited to the goods whose value has been improved or preserved that are in the possession of such creditor, and should be effective against the holders of security rights in the goods that are effective against third parties only to the extent that the value added by the improvement or preservation directly benefits the holders of the pre-existing security rights. [*Note to the Working Group: The Working Group may wish to consider whether registration should be required.*]

**Fixtures**

52. The law should set forth rules governing the relative priority of a holder of a security right in fixtures vis-à-vis persons who hold rights with respect to the related immovable property, such as a person (other than the grantor) who has an ownership interest in the immovable property, a purchaser of such property or a creditor whose security rights extend to the immovable property as a whole.

**Insolvency representatives**

53. The law should provide that a secured creditor's priority should continue unimpaired in an insolvency proceeding of the grantor, subject to applicable provisions of the insolvency laws pertaining to preferential claims and avoidance actions.

**Subordination agreements**

54. The law should recognize agreements that alter the priority of security rights, provided that they affect only the persons who actually consent to such alterations. Such agreements should be binding on such persons even in the case of the insolvency of the grantor of the security rights.

## A/CN.9/WG.VI/WP.13/Add.1

**Report of the Secretary General on recommendations  
of the draft legislative guide on secured transactions,  
submitted to the Working Group on  
Security Interests at its sixth session**

## ADDENDUM

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## V. Pre-default rights and obligations of the parties

### Purpose

55. The purpose of the provisions of the law on pre-default rights and obligations of the parties is to:

- (a) Provide rules on additional terms for a security agreement with a view to rendering secured transactions more efficient and predictable;
- (b) Reduce transaction costs by eliminating the need to negotiate and draft terms to be included in the security agreement where the rules provide an acceptable basis for agreement;
- (c) Reduce potential disputes;
- (d) Provide a drafting aid or check list of issues the parties may wish to address at the time of negotiation and conclusion of the security agreement; and
- (e) Encourage party autonomy.

### Party autonomy

56. The law should allow the parties to waive or vary their rights and obligations unless such waiver or variation is against public policy and the protection of third parties.

**Suppletive rules**

57. The law should include suppletive, non mandatory rules that would apply in the absence of contrary agreement of the parties. Such rules should, *inter alia*:

- (a) Provide for the care of the encumbered assets by either the grantor or the secured creditor in possession of the encumbered assets;
- (b) Preserve the security rights, including the right to proceeds or civil fruits derived from the encumbered asset;
- (c) Provide for the right to use, commingle and dispose of the encumbered assets by the grantor in the ordinary course of business; and
- (d) Secure the discharge of a secured obligation once it has been performed.

**VI. Default and enforcement****Purpose**

58. The purpose of the provisions of the law on default and enforcement is to:

- (a) Provide clear and simple procedures for the enforcement of security rights upon debtor default in a predictable and efficient manner;
- (b) Maximize the realization value of the encumbered assets;
- (c) Provide transactional finality upon compliance with the enforcement procedure;
- (d) Define clearly the extent to which the secured creditor and the grantor may agree on the enforcement procedure;
- (e) Provide that the secured creditor in enforcing its rights must act in good faith, follow commercially reasonable standards and not violate public policy; and
- (f) Coordinate the enforcement rights and procedures of the secured transactions regime with the rights and procedures of other parties under other law, including insolvency law.

**Notice of default and enforcement**

59. [The law should:

- (a) Address whether notice of the default and enforcement should be given and to whom;
- (b) State the minimum contents of the notice, the manner in which it is to be given, and its timing;
- (c) State that the notice should also contain the secured creditor's calculation of the amount owed as a consequence of default; and
- (d) Detail the steps the debtor or the grantor may take to cure the default or recover the encumbered assets.]

**Judicial and extra-judicial enforcement**

60. The law should provide options to the secured creditor following default to:

- (a) Resort to court or other authorities to enforce its security right; or
- (b) Enforce its security right without resorting to official State institutions.

61. If the debtor, the grantor or other interested parties (e.g. a junior secured creditor, a guarantor, a co-owner of the encumbered assets, or a new secured creditor) object to actions of the secured creditor in enforcing its rights, the law should provide them with an opportunity to have judicial or administrative review of acts of the secured creditor. Safeguards should be built into the process to discourage the debtor, the grantor or other interested third parties from making unfounded claims to delay the enforcement.

#### **Party autonomy**

62. The law should permit parties to the security agreement to agree on the procedure of enforcement of security rights as between the parties, provided that the agreement conforms to the general rules of contract law and to recommendation 58 (e). The person challenging the agreement on the procedure of enforcement has the burden of showing that the agreement does not meet the foregoing requirements.

#### **Acceptance of the encumbered assets in satisfaction of the secured obligation**

63. The law should provide a procedure whereby the debtor, the grantor and the secured creditor can agree that the secured creditor will accept the encumbered assets in full or partial satisfaction of the secured obligation. The law should provide protection for other interested parties.

#### **Cure of default**

64. Following default and until a disposition of the encumbered assets by the secured creditor, the debtor, the grantor or other interested parties should be permitted to satisfy the obligation secured by the encumbered assets by paying the outstanding secured obligation, including interest and the costs of enforcement up to the time of cure of default. The law should specify that the effect of such payment is to terminate the enforcement proceeding.

#### **Disposition of the encumbered assets and distribution of proceeds**

65. The law should provide clear rules regarding notices, where required, and procedures relating to the disposition of encumbered assets by the secured creditor and distribution of proceeds.

66. General procedures for the disposition of the encumbered assets should include the method of advertising a proposed disposition, whether disposition would take place by public auction or sale, and whether it includes the right of the secured creditor to sell, lease, license or, in the case of intangibles and negotiable instruments, collect the encumbered assets.

#### **Collection of intangibles and negotiable instruments**

67. The law should have special rules for the collection of intangibles and negotiable instruments, including the right to require the person obligated to make any payments owed to pay directly to the secured creditor.

#### **Fixtures**

68. The law should have special rules on how a secured creditor is to proceed when a single transaction includes security rights in both movable and immovable assets.

**Surplus and shortfall**

69. Any surplus remaining after the disposition of the encumbered assets and satisfaction of the secured obligation should be returned to the grantor, unless the secured creditor is required to distribute proceeds to other creditors. Any deficiency should be recoverable from the debtor as an unsecured claim.

**Finality**

70. The law should specify that, upon disposition of the encumbered assets, the rights of the grantor and the secured creditor in the encumbered assets terminate and that the buyer or other person acquiring title to the encumbered assets receives title free of any interest of the grantor, the secured creditor, and any secured creditor with a lower priority status than the secured creditor.

**Coordination with other law**

71. The law should be coordinated with general civil procedure law to provide a right for secured creditors to intervene in court proceedings initiated by other creditors of the grantor to protect security rights and to ensure the same priority status of claims as under the law.

**Transfer of title and retention of title**

72. The law should provide that the transferee of title for security purposes should be entitled to enforce its rights in the same way as any other secured creditor. [The holder of a simple retention of title should be entitled to enforce its rights [as an owner of the encumbered assets] [in the same way as any other secured creditor.]]

**VII. Insolvency**

*[Note to the Working Group: The recommendations on insolvency will be included after the Commission has finalized the Insolvency Guide.]*

**VIII. Conflict of laws****Purpose**

73. The purpose of conflict of laws rules is to determine the law applicable to the creation, third party effectiveness, priority and enforcement of a security right.

**Possessory security rights over tangible property**

74. The law should provide that the creation, third party effectiveness and priority of a possessory security right over tangible property are governed by the law of the State in which the encumbered asset is located.

**Non-possessory security right over intangible property**

75. The law should provide that the creation, third party effectiveness and priority of a non-possessory security right over intangible property are governed by the law of the State in which the grantor is located.

**Non-possessory security right over tangible property**

76. The law should provide that the creation, third party effectiveness and priority of a non-possessory security right over tangible property are governed by the law of the State in which the encumbered asset is located, except for tangible assets ordinarily used in more than one State, in which case such issues are governed by the law of the State in which the grantor is located.

**Proceeds**

77. The law should provide that the conflict of laws rules applicable to proceeds are the same as the rules applicable to a security right in original encumbered assets of the same kind as the proceeds [except that the creation of a security right in proceeds should be governed by the law applicable to the creation of the right in the original encumbered asset from which the proceeds arose].

**Changes in location**

78. The law should provide that the reference to the location of the assets or of the grantor in recommendations 73 to 75 refers, for creation issues, to that location at the time of the creation of the security right and, for third party effectiveness and priority issues, to that location at the time the issue arises.

79. The law should also provide that a security right made effective against third parties under the laws of the applicable State continues to be effective against third parties in another State after the location of the assets or of the grantor changes to the other State, if the requirements to make the security right effective against third parties in that other State are complied with within a specified period.

**Goods in transit**

80. The law should provide that a security right over [goods] [tangible property] in transit may be validly created and made effective against third parties under the law of the State of destination, provided that they are moved to that State within a certain specified time period.

**No party autonomy**

81. The law should provide that the parties to a security agreement cannot derogate from the rules set forth in recommendations 73 to 79.

**Enforcement matters**

82. The law should provide that:

**Alternative A**

Substantive matters affecting the enforcement of a security right are governed by the law of the State where enforcement takes place.

**Alternative B**

Substantive matters affecting the enforcement of a security right are governed by the law governing the priority of the right, subject however to the rules of the State where enforcement takes place that are mandatory irrespective of the law otherwise applicable.

**Alternative C**

Substantive matters affecting the enforcement of a security right are governed by the law governing the contractual relationship of the secured creditor and the grantor, subject however to the rules of the State where enforcement takes place that are mandatory irrespective of the law otherwise applicable.

**Procedural matters**

83. The law should provide that procedural matters relating to enforcement of security rights are governed by the law of the State where enforcement takes place.

**Impact of insolvency on conflict rules**

84. The law should provide that the occurrence of insolvency does not displace the conflict-of-laws rules applicable to the creation and third party effectiveness of a security right. With respect to priority, the law determined pursuant to the applicable conflict-of-laws rules should continue to govern, subject to the mandatory provisions of the insolvency regime of the enacting State.

**Enforcement in insolvency proceedings**

85. The law should provide that the insolvency law of the State in which insolvency proceedings are commenced (*lex fori concursus*) applies to all aspects of the enforcement of a security right in the insolvency proceedings (see Recs. 179-184 of the Insolvency Guide).

**IX. Transition****Purpose**

86. The purpose of transition provisions of the law is to provide a fair and efficient transition from the regime before the enactment of the law to the regime after the enactment of the law.

**Effective date**

87. The law should specify a date, subsequent to its enactment, as of which it will enter into force (the “effective date”) in view of:

(a) The impact of the effective date on credit decisions and in particular the maximization of benefits to be derived from the law;

(b) The necessary regulatory, institutional, educational and other arrangements or infrastructure improvements to be made by the State; the status of the pre-existing law and other infrastructure;

(c) The harmonization of the law with other legislation; and

(d) The content of constitutional rules with respect to pre-effective date transactions; and standard or convenient practice for the entry into force of legislation (e.g. on the first day of a month).



**Transition period**

88. The law should provide a period of time after the effective date (the “transition period”), during which creditors with security rights effective against the grantor and third parties under the previous regime may take steps to assure that those rights are effective against the grantor and third parties under the law. If those steps are taken during the transition period, the law should provide that the effectiveness of the creditor’s rights against those parties is continuous.

**Priority**

89. The law should provide clear rules for resolving:

- (a) Which law applies to the priority between post-effective date security rights;
  - (b) Which law applies to the priority between pre-effective date security rights;
- and
- (c) Which law applies to the priority between pre-effective date and post-effective date security rights.

90. The law should provide that priority between post-effective date security rights is governed by the law.

91. The law should provide generally that priority between pre-effective date security rights is governed by the former legal regime. The law should also provide, however, that application of those former rules will occur only if no event occurs after the effective date that would have changed the priority under the former regime. If such an event occurs, the law should determine priority.

92. With respect to priority between pre-effective date security rights and post-effective date security rights, the law should provide that it will apply as long as the holder of a pre-effective date right may, during the transition period, ensure priority under the law by taking whatever steps are necessary under the law. During the transition period, the priority of the pre-effective date right should continue as though the law had not become effective. If the appropriate steps are taken during the transition period, the holder of the pre-effective date right should have priority to the same extent as would have been the case had the law been effective at the time of the original transaction and those steps had been taken at that time.

93. When a dispute is in litigation (or a comparable dispute resolution system) at the effective date of the law, the law should specify that it does not apply to the rights and obligations of the parties.

## A/CN.9/WG.VI/WP.14

**C. Report of the Secretary General on the draft  
legislative guide on secured transactions,  
submitted to the Working Group on  
Security Interests at its sixth session**

**(A/CN.9/WG.VI/WP.14 and Add.1-2 and Add.4) [Original: English]**

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## V. Effectiveness against third parties

### A. General remarks

#### 1. Introduction

1. Secured transactions regimes typically require a secured creditor to take some additional step before its security right in the encumbered assets takes effect against third parties. The purpose of this additional requirement is twofold. First, it serves to protect third parties dealing with the movable assets of the grantor against the risk that those assets may be encumbered by a security right. Second, it provides a temporal event for ordering priority among secured creditors and between a secured creditor and other competing claimants.

2. This chapter focuses on the five most widely accepted methods for ensuring that a security right acquires proprietary effect against third persons. The first is available only in respect of specific tangibles and involves removing possession of the encumbered assets from the grantor. The second is an extension of the idea of dispossession and involves giving the secured creditor control over the value of intangible obligations owed to the grantor by a third party. The third method is available only if the encumbered assets are specific items of movable property for which the enacting State has established a title registry for recording title and encumbrances against title. The fourth method requires entry of a notation of the security right on a title certificate. Again, this method is available only if the encumbered assets are specific items of tangible movable property for which, under other law of the enacting State, title is evidenced by a title certificate.

3. The fifth and most comprehensive method involves filing a simple notice of the security right in a general security rights registry. Notices are indexed by reference to the identity of the grantor, not the specific asset. This means that a single notice can be used to give third party effect to a security right granted in any item or kind of tangible or intangible movable, whether presently owned or after acquired. The filing of a notice does not constitute positive evidence of the existence of the grantor's title to the encumbered assets or even of the existence of the security right. However, registration is a precondition to the effectiveness of any security right that may have been granted against third parties. In the absence of a registered notice, third parties are not bound.

4. The filing of a notice is not merely a pre-condition to the third party effectiveness of a non-possessory security right. Filing also contributes to positive priority ordering. Most obviously, registration establishes an objectively verifiable temporal event for ordering priorities among secured creditors and between a secured creditor and competing claimants.

5. Priority is the topic of a separate chapter in this Guide (see A/CN.9/WG.VI/ WP.14/Add.1). However, the link between registration and priority is a continuing theme in this chapter, and the two chapters should be read in conjunction with each other.

## **2. Dispossession**

### **(a) General considerations**

6. Although removing the encumbered assets from the possession of the grantor does not positively evidence the existence of a security right, it does minimize the risk that creditors and other parties will be misled by the grantor's apparent ownership. For this reason, it has traditionally been accepted as sufficient not just to constitute a security right, but also to make the security right effective against third parties (see A/CN.9/WG.VI/ WP.11/Add.2, para. 57).

### **(b) Possession of the encumbered assets by a third party**

7. Dispossession of the grantor need not involve direct possession by the secured creditor. Possession by a third party, such as an agent or representative, of the secured creditor is sufficient provided an objective bystander would reasonably conclude that the encumbered assets are not in the possession or control of the grantor.

8. Dispossession through a third party does not always require physical removal of the encumbered assets from the grantor's premises. In field warehousing arrangements, the third party assumes control of the grantor's inventory and other encumbered assets through a representative located on the grantor's premises. Third parties are protected by virtue of the fact that the grantor's ability to deal with the encumbered assets requires the consent and cooperation of the secured creditor acting through a third party (see A/CN.9/WG.VI/ WP.9/Add.1, para.7).

9. If the encumbered assets are covered by a negotiable document of title, for example, a bill of lading or a warehouse receipt, the carrier or warehouse keeper is obligated to deliver the underlying assets to the person currently in possession of the document. Delivery of a properly endorsed negotiable document of title therefore offers an alternative means of removing possession of the underlying assets from the grantor.

## **3. Transfer of control over intangible obligations to the secured creditor**

### **(a) Trade receivables and other monetary claims**

10. In legal systems that accept the negotiability of security certificates (for stocks or bonds), delivery of the certificate with any necessary endorsement transfers the benefit of the obligations owed by the issuer to the secured creditor. Delivery of the certificate is therefore the functional equivalent of dispossession through an agent of the secured creditor. The same result can be achieved for certificated securities held with a clearing agency by entering the name of the secured creditor in the books of the clearing agency, and for uncertificated securities, by registering the name of the secured creditor in the books of the issuer. In the case of indirectly held investment property, control over the obligations owed by the broker or other intermediary can be transferred either by putting the investment account in the name of the secured creditor, or obtaining the agreement of the intermediary to respond to the directions of the secured creditor.

11. This Guide does not address issues relating to security rights in investment property. Nonetheless, the idea of control as a method for achieving third party effectiveness of a

security right can be applied to other types of intangible obligations owed by a third person to the grantor. For example, the grant of security in an ordinary trade receivable or other monetary claim generally entitles a secured creditor, in the case of default by the grantor, to demand payment from the person owing the obligation. A demand for payment thus transfers practical control over the monetary claim to the secured creditor.

12. On the other hand, a secured creditor generally will not demand direct payment of monetary obligations owed to the grantor until there is a default on the part of the grantor. Even when the monetary claims are sold outright, the assignee will frequently wish to leave collection in the hands of the assignor. In light of these practicalities, it may be preferable to treat a demand for payment simply as a collection or enforcement technique and not a method for achieving the third party effectiveness of a security right. This is particularly appropriate where the option of filing a notice in a security rights registry is available to both secured creditors and assignees. Registration offers a more efficient means of evaluating priority risk at the outset of the transaction particularly where the security right covers all of the grantor's present and after-acquired monetary intangibles.

**(b) Deposit accounts**

13. Where the encumbered assets take the form of a deposit account held by the grantor with a financial institution or other deposit-taking institution, transfer of control to the secured party can be achieved by putting the name of the secured creditor on the account. Alternatively, the parties could enter into a control agreement under which the institution undertakes to respond exclusively to the directions of the secured creditor in dealing with the account. To protect the information needs of the grantor's creditors and other interested third parties, it may be necessary to require the deposit-taking institution to respond to a demand for confirmation as to whether such a control agreement has been entered into.

14. The deposit-taking institution may itself be owed money by the grantor. Rather than going through the exercise of entering into a control agreement, it may be simpler to treat a deposit-taking institution that takes security in a customer's deposit accounts as having automatic control by operation of applicable law. Once again, however, to satisfy the information needs of third parties, it may be necessary to require the institution to verify to legitimately interested third persons whether it has entered into a control agreement covering the deposit account.

**4. Title-based modes of publicity**

**(a) Title registry systems**

15. Dispossession and equivalent control techniques are available only if the grantor is prepared to give up ongoing use and enjoyment of the encumbered assets. They are not feasible if the grantor needs to retain control of the encumbered assets in order to produce its services or products or otherwise generate profit.

16. For limited categories of high value assets, a State may have adopted a specialized title registry similar to a land title registry. Where a title registry exists, it offers a convenient venue for registering non-possessory security rights in such high-value assets so as to make them effective against third parties. Ships, aircraft, motor homes, and intellectual property rights (notably patents and trade marks) are the most commonly encountered examples of assets for which title registries exist.

**(b) Title certificate systems**

17. Some jurisdictions have established title certificate systems to evidence the acquisition and transfer of title in specific items of movable property (for example, motor vehicles). Entry of a notation of a security right granted by the owner named on the certificate is usually sufficient to make it effective against third parties.

**5. Registration of a notice of security in a general security rights registry****(a) General considerations**

18. A fifth mode of publicity involves filing a notice of the security right in a public registry established for this purpose. Unlike the modes already considered, notice filing offers a universal means of achieving effectiveness against third parties, regardless of the nature of the encumbered assets. As such, it contributes to efficient priority ordering, enabling a priority competition among secured creditors and between a secured creditor and other third parties to be settled by reference to the timing of registration.

19. A notice-based security rights registry is very different from a title registry and from a secured transactions registry based on document filing. A title registry functions as a source of positive information about the current state of title to specific assets. To protect the integrity of the title record, the registrant is generally required to file the actual title transfer documents or tender them for scrutiny by the registrar. Similarly in a document filing secured transactions registry, the actual security documentation is submitted to and checked by a registrar who then issues a registration certificate that constitutes at least presumptive evidence of the existence of the security right.

20. A notice-filing registry on the other hand, operates on a theory of negative publicity. Registration of a notice does not provide positive proof of the existence of the security right but rather provides a warning to third parties about the possible existence of a security right that allows third parties to take further steps to protect their own interests (see para. 39). Since filing constitutes a precondition to the effectiveness of a security right against third parties, it is the absence of registrations on which third parties rely in concluding that they will take the encumbered assets free of any prior security rights. There is therefore no need to require secured creditors to register the security agreement or otherwise prove its existence. From the grantor's perspective, protection from unauthorized registrations can be achieved by requiring the named grantor to be informed of any registration and by establishing a summary administrative procedure to facilitate the removal of unauthorized registrations.

21. Notice filing greatly simplifies the registration process and minimizes the administrative and archival burden on a registry system. It also enhances flexibility during the duration of the financing. So long as the description of the encumbered assets set out in the registered notice does not change, a single notice is sufficient to give third party effect to all security agreements entered into between the same parties (see A/CN.9/WG.VI/WP.14/Add.1, para.19-22).

22. The concept of a notice-based registry has attracted considerable international support. Model systems have been developed by the European Bank for Reconstruction and Development (General Principles of A Modern Secured Transactions Law, 1997; Model Law on Secured Transactions, 1994), the Organization of American States (Model Inter-American Law on Secured Transactions, 2002), and the Asian Development Bank (Law and Policy Reform at the Asian Development Bank: A Guide to Movables Registries, December 2002). The Convention on International Interests in Mobile Equipment, 2001 and the related Aircraft Protocol provide for an international priority

regime based on a filing system for interests in aircraft arising under security agreements, leases and title retention sales agreements. The United Nations Assignment Convention also offers notice filing as the basis for one of the optional priority systems set forth in its annex.

**(b) Asset v. grantor indexing**

23. A notice of security must be indexed according to established criteria to permit its efficient retrieval. Notices in a security rights registry are generally indexed by reference to the identity of the grantor. Asset-based indexing is feasible only for assets that have a serial number or other unique identifier. Even then, the value of individual items within a generic category (e.g. all tangible movables) may be too modest to justify the cost involved in tracking registrations on an item-by-item basis. In addition, asset-based indexing does not accommodate the registration of a notice covering security in after-acquired assets, or circulating assets, for example inventory and receivables.

24. Grantor-based indexing greatly simplifies the registration process. Secured creditors can give third party effect to a security right in all of a grantor's present and after-acquired movable property, or in generic categories, through a single one-time registration. They need not worry about updating the record every time the grantor acquires a new item within the generic category set out in the registered notice.

25. Grantor-based indexing has one drawback. If the encumbered assets become the object of unauthorized successive transfers, prospective secured creditors and buyers cannot protect themselves by conducting a search according to the name of the immediate apparent owner. Because the system is grantor-indexed, the search will not disclose a security right granted by a predecessor in title.

26. A partial solution to this problem would be to require asset-based indexing for particularly high-value assets for which reliable numerical identifiers exist, for example, motor vehicles, boats, mobile homes, trailers, aircraft, and so forth. Although specific asset identification limits the ability to use a single notice to give third party effect to security in after-acquired assets, it is usually necessary only for capital assets used in the grantor's business (and consumer assets used for personal purposes to the extent these are covered by the secured transactions law of the enacting State). In cases where the assets are held by the grantor as inventory, this problem is addressed since a buyer in the ordinary course of business will, in any event, acquire the assets free of the security right. (see A/CN.9/WG.VI/WP.14/Add.1).

27. An alternative or complementary approach would be to require secured creditors who find out about a transfer or sale by the grantor to add the transferee or buyer as an additional grantor on the registered notice in order to preserve priority over subsequent competing claimants. Alternatively, protection might be extended to all subsequent buyers, or even all subsequent third parties, even where the secured creditor has no knowledge of the debtor's unauthorized disposition (see also A/CN.9/WG.VI/WP.14/Add.1, para. 64-72).

**(c) Content of registered notice**

**i. Identification of grantor**

28. Since grantor identity is the usual means by which notices of security are retrieved, registrants and searchers require guidance on the correct mode of setting out the identity of the grantor on the registered notice. The grantor's name and address is the most common criterion.

29. For corporate grantors and other legal persons, the correct name can usually be verified by consulting the public record of corporate and commercial entities maintained by most States. If the information in this record and in the security rights registry is stored in electronic form, it may be possible to provide a common gateway to both databases to simplify the verification process.

30. For individual grantors, verification of the correct name is a little more challenging. There may be inconsistencies between the grantor's popular and formal birth names, or between the names that appear on different identity documents. Name changes may have occurred since birth as a consequence of deliberate choice or a change in marital status. The provision of explicit legislative guidance to deal with these various contingencies ensures that registrants and searchers are operating according to the same criteria. For example, the regulations or administrative rules governing the operation of the registry might specify a hierarchy of official sources, beginning with the name that appears on the grantor's birth certificate, and then referencing other sources (for example, a passport or driver's licence) in situations where there is unavailable or is inaccessible.

31. If more than one grantor shares the same name, the provision of the grantor's address will often resolve the identity issue for searchers. In States where many individuals share the same name, it may be useful to require supplementary information, such as the grantor's birth date. If a State has adopted a numerical identifier for its citizens, this can also be used, subject to privacy concerns, and subject to prescribing an alternative identifier for grantors who are non-nationals.

32. The impact of an error in the grantor's name on the legal validity of a notice depends on the organizational logic of the particular registry system. For instance, some electronic records are programmed to disclose only exact matches between the name entered by the searcher and the names in the database. In such a system, any entry error will nullify the registration because it will render the notice irretrievable by searchers using the correct name of the grantor. In other systems, it may be possible to also retrieve close matches in which event the registered name may well turn up on a search using the correct identifier notwithstanding the entry error. Whether the error nonetheless invalidates the registration depends on the particular case. A useful flexible test would be to treat the error as fatal only if the information disclosed on the notice would mislead a reasonable searcher.

## **ii. Identification of secured creditor**

33. Entry of the name and address of the secured creditor or the secured creditor's representative on the registered notice enables third parties to contact the secured creditor, if necessary. It also provides presumptive evidence that the secured creditor who later claims a priority based on the notice is in fact the person entitled to do so. The rules used for determining the correct name of a grantor can also be applied to secured creditors. However, the name of the secured creditor is not an indexing criterion. Consequently, registration errors in relation to a secured creditor do not pose the same risk of misleading third party searchers and would not lead to nullification of the notice.

## **iii. Description of encumbered assets**

34. A description of the encumbered assets must also be included on the notice. The absence of a description would hamper the ability of a grantor to sell or grant security in assets that remain unencumbered since prospective buyers and secured creditors would demand some form of protection (for example, a release from the secured creditor) before entering into transactions involving any of the grantor's assets. The absence of a description would also diminish the value of the notice for insolvency administrators and



judgement creditors.

35. Although a description of the encumbered assets is normally required, there is no need for a specific item-by-item description. The information needs of searchers are sufficiently served by a generic description (e.g. all tangible assets, all receivables) or even a super-generic description (e.g. all present and after-acquired movables). Indeed, generic description is necessary to ensure the efficient registration of a security right granted in after-acquired assets, and in revolving categories of assets, such as inventory or monetary claims.

36. A more difficult question is whether the notice need only indicate the generic nature of the encumbered assets (e.g. tangible movables), even if the security right is in fact limited to a specific item (e.g. a single automobile), or whether the description should have to conform to the actual range of assets covered by the background security documentation.

37. The first approach simplifies the registration process and reduces the risk of descriptive error. It also permits the parties to amend their security agreement to add new assets within the same generic category without the need to make a further registration. On the other hand, this approach may complicate grantor access to financing against the unencumbered portion of the described assets. Since priority dates from the time of registration, subsequent buyers and secured creditors will require an explicit waiver or discharge to protect them against the risk that the grantor may later expand the actual scope of the assets covered by the initial security agreement.

#### **iv. Maximum value of secured obligation**

38. A further question is whether the notice must disclose the monetary value of the secured obligation. It is not desirable to require the actual or intended value to be set out because this would interfere with the flexibility of credit transactions such as revolving credit transactions. However, secured creditors could be required to specify the maximum amount to be secured by the security right. This approach would facilitate the grantor's ability to use the residual value of assets subject to a broad security right to secure further financing from other secured creditors. On the other hand, the first secured creditor to take a general security right over the grantor's assets is typically the cheapest and most available source of credit. In addition, the value of imposing such a requirement would be lost if inflated estimates were routinely filed.

#### **(d) Access to more detailed information**

39. Prospective buyers and secured creditors can generally deal with the priority risk presented by a registered notice without having to investigate further. They can refuse to deal further with the grantor, obtain a release or subordination agreement from the registered secured creditor or require the grantor to bring about a discharge of the registration (in cases where the registration does not represent an extant security right or where a new secured creditor is prepared to advance sufficient funds to pay out the prior registered secured creditor).

40. Third parties in the position of unsecured creditors and insolvency representatives, along with co-owners of the encumbered assets, are in a somewhat different position. They already have an existing or potential claim against the encumbered assets. However, the value of their claim can be determined only if they know the value of the outstanding obligation owing to the secured creditor since that claim has priority of payment. Since the grantor of the security right may not be a reliable or cooperative source of this information,

it may be desirable to impose a legal obligation on secured creditors to directly respond to a demand by interested third parties for further information on the current state of the financing relationship within reasonable time.

**(e) Duration of registration**

41. The duration of secured financing relationships can vary considerably. The necessary flexibility can be accommodated in one of two ways. The first is to allow registrants to select the desired term of the registration with a right to file renewals. The second is to set a universal fixed term (e.g. five years), also accompanied by a right to file renewals.

42. In medium- and long-term financings, the first approach lessens the risk for secured creditors of a loss of priority for failure to renew in time. In short-term arrangements, the second approach reduces the risk for grantors that secured creditors will register for an inflated term out of an excess of caution.

43. Regardless of which approach is adopted, it is necessary from the perspective of the grantor to ensure that notices are expunged from the record within a reasonable period after the secured obligation is satisfied. Possible solutions include the imposition of a financial penalty on secured creditors who fail to register a timely discharge combined with the establishment of a summary administrative procedure for compelling discharge if the secured creditor fails to respond to a justified demand to do so by the grantor. As an added incentive to timely action, it may be desirable to give secured creditors the right to register a discharge free of charge.

**(f) Administrative issues**

**i. Technological considerations**

44. If the registry records are organized on a regional or district basis, complex rules are needed to determine the appropriate registration venue and to deal with the consequences of a relocation of the assets or the grantor. On the other hand, a single national registry can create inequalities of access. Computerization of the registry data base resolves both problems by enabling all registrations to be entered into a single central record while also allowing for remote registration and searching.

45. An electronic database can support a fully electronic registration system, in which users have direct computer access to the electronic database for both registration and searching. This significantly reduces the costs of operation and maintenance of the system. It also enhances the efficiency of the registration process by putting direct control over the timing of entry into the hands of the registering party, thereby eliminating any time lags between submission of a notice and the actual entry of the information contained in the notice into the database. Perhaps most importantly, a fully electronic system places all responsibility for accurate data entry on registrants and searchers, thereby minimizing staffing and operational costs.

46. The optimal extent of computerization depends on the level of start-up costs of the registry, computer literacy among the registry client base, the reliability of existing communications infrastructure, and on an assessment of whether expected revenues will be sufficient to recover the initial capital costs of construction within a reasonable period. The overall objective is to make the registration and searching process as simple, transparent and accessible as possible within the context of the particular State.

**ii. Liability for system error**

47. If the system is exclusively electronic, there is no risk of human error on the part of the registry office at either the registration or searching stages. The responsibility is cast on the registrants and searchers. As for the risk of system breakdown, the consequences can usually be alleviated by prompt notification of clients and by extending any time periods that might have run out during the breakdown period. To the extent input of data and the entry of searches is carried out by registry staff, the risk of human error in transposing and retrieving data is present. However, this can be alleviated by establishing electronic edit checks and ensuring the timely return to the client of a copy of the registration data or search result.

48. Whatever the design of the system, specific rules need to be made regarding the extent of the registry's legal responsibility, if any, for staff or system error. One compromise solution would be to allocate a portion of the registry revenues to a mandatory compensation fund and to impose an upper limit on the amount of compensation for any single incident.

49. Assuming a compensation claim is available, further rules need to be made on who carries the risk of error as between registrants and third party searchers. In resolving this issue, the rules might, for example, provide that an indexing error on the part of registry staff does not prejudice the third party effectiveness of a security right except as against secured creditors or purchasers who can positively establish that they searched and suffered actual damage as a result of acting to their detriment on the misleading information contained in the record.

**iii. Registration fees**

50. High registration and search fees designed to raise revenue rather than support the cost of the system are tantamount to a tax, ultimately borne by grantors, on secured transactions. To encourage access to secured credit at a reasonable cost, it is critical for the success of the system to set fees at a nominal level that encourages use of the system, while still enabling the system to recover its capital and operational costs within a reasonable time.

**iv. Confidentiality considerations**

51. A notice-based registration system enhances the confidentiality of the grantor's and secured creditor's relationship by limiting the level of detail about their affairs that appears on the public record.

52. The topic of confidentiality raises the issue of whether the registry system should be organized to facilitate public searching against the name of the secured creditor as well as the grantor. The quantity and content of notices filed by a particular financial institution or other creditor may have market value as a source of a competitor's customer lists or for companies seeking to market related financial or other products. Although the additional revenues would be attractive, the retrieval and sale of this kind of information is not relevant to the legal mission of the registry and may inhibit use of the system by secured creditors.

**(g) Advance registration**

53. The establishment of a security rights registry enables competing registered security rights in the same encumbered asset to be resolved according to a general first-to-file rule. The exceptions to this general rule are dealt with in detail in the chapter on priority (see

A/CN.9/WG.VI/WP.14/Add.1, paras. 13-17). However, an issue that is relevant at this stage is whether a secured creditor should be permitted to file a notice of security in advance of the actual conclusion of the security agreement (a notion similar to the prenotation of a mortgage in a land registry).

54. Advance filing enables a secured creditor to establish its ranking against other secured creditors without having to check for further filings before advancing funds. Advance registration also avoids the risk of nullification of the registration in cases where the underlying security agreement happens to have been technically deficient at the point of registration but is later rectified, or where there are factual uncertainties as to the precise time when the security agreement was concluded.

55. From the perspective of the grantor, adequate protection from the risk that no security agreement is ever concluded can be assured through the same measures used in the case of unauthorized registrations (i.e. by requiring that the named grantor be informed of any registration and by establishing a summary administrative procedure to enable the grantor to compel a discharge if the identified secured creditor fails to act within a reasonable time).

**(h) Additional rights subject to registration**

56. Third persons dealing with tangible movables in the possession of a buyer under a sale of goods in which the seller has retained title to secure payment of the price face the same risk as those dealing with a grantor in possession of encumbered goods. In the absence of a public notice filing system, third persons, including prospective secured creditors, have no objective means of verifying whether the goods are bound by the seller's retention of title.

57. One means of alleviating this risk is to require the seller to file a notice of the retention of title agreement in the security rights registry as a precondition to the right of the seller to set up its title against third parties who subsequently acquire an interest in the goods in the hands of the buyer.

58. Other categories of non-possessory transactions for which registration of a notice might be imposed as a condition of third party effectiveness are:

- A lease of tangible assets of significant duration (e.g. one year);
- An outright assignment of monetary claims;
- A consignment for sale of tangible assets.

59. Whether the priority rules that apply to registered security rights should also apply to these transactions is a more complex question. The first-to-file rule has obvious utility where an assignment of claims comes into competition with a security right granted in the same claims. However, in the case of a lease, a consignment, or a retention of title sale, temporal priority ordering has to be qualified in order to preserve the lessor's, the seller's or the consignor's title as against prior registered security rights, perhaps subject to the requirement that registration be effected within a set time period after the transaction. These details are taken up in the chapter on priority (see A/CN.9/WG.VI/WP.14/Add.1, paras. 47-55 and 77-79).

60. The extension of the registration requirements for security rights to commercial transactions that are not denominated as security transactions but perform security functions is reflected at the international level in two conventions. The first is the Convention on International Interests in Mobile Equipment, which extends the

international registry contemplated by the Convention beyond charges to also include retention of title agreements in favour of sellers and aircraft leasing arrangements. The second is the United Nations Assignment Convention under which the choice of law rules governing issues of third party effectiveness and priority apply to both the outright assignment and the grant of security in receivables.

61. Some legal systems have expanded the scope of the security rights registry to permit registration of a notice of a monetary judgment indexed according to the identity of the judgment debtor, with registration creating the equivalent of a security right in the movable assets of the judgement debtor in favour of the judgment creditor. This approach can indirectly promote the prompt voluntary and prompt satisfaction of judgement debts since third parties will be reluctant to buy or take security in the encumbered assets until the judgment debtor has paid the judgement and brought about a termination of the registration.

62. If this approach is adopted, it is necessary to ensure that the registered judgement creditor's right does not conflict with insolvency policies requiring equality of treatment among the debtor's unsecured creditors. This can be resolved by a rule entitling the insolvency administrator to claim the monetary benefit of the registered judgment creditor's priority for the benefit of all unsecured creditors (perhaps subject to a special privilege in favour of the registered judgement creditor to compensate for registration expenses and efforts; see also A/CN.9/WG.VI/WP.14/Add.1, paras. 56-61).

**(i) Alternative notice venues**

63. In lieu of a public registry, some legal systems have endorsed more limited notice venues for a public registry (for instance, entry of a notice in the grantor's own books, or in the books of a notary or court official, or in newspapers in the grantor's locale, or in a government journal). Although some of these notice venues sufficiently address concerns with fraudulent antedating, in comparison to a comprehensive public security rights registry, they lack the permanence and ease of public accessibility needed to adequately protect third parties. Moreover, they do not offer the priority ordering benefits of a first to file rule.

64. Some legal systems allow affixation of a plaque or other form of physical notice to the encumbered asset as a substitute for registration. The reliability of such a mechanism is limited in view of the potential for abuse by the grantor. However, in some markets, the specialized nature of the asset and industry practice may make this form of symbolic possession acceptable (e.g. branding of cattle).

**6. Alternatives to a general security rights registry for non-possessory security rights**

**(a) General considerations**

65. In jurisdictions that choose not to establish a general security rights registry, there are three possible responses to determining the legal efficacy of a non-possessory security right against third parties. The first is to treat all non-possessory security rights as ineffective save those for which the State already has established a title registry or title certificate system through which public notice of the security right can be given. In view of the modern demand for financing against the inventory, receivables and other commercial assets of a business, this is not a feasible alternative. The second is to treat non-possessory security rights as effective both between the parties and against competing claimants as soon as they are created. The third is really a variant of the second and involves giving

special protection to specified classes of third parties, for example those who rely to their detriment on the grantor's apparent ownership.

66. In order to adequately compare these latter two alternatives with a security rights registry system, it necessary to look at the issue in relation to each of the principal categories of competing claimants.

**(b) Competing secured creditors**

67. In a system in which non-possessory security rights take effect against each other according to the order of their creation rather than the order of registration, the cost and risk of registration is eliminated and there is no need to invest in the establishment of a general security rights registry. On the other hand, a public registry system enables prospective secured creditors to more accurately assess their priority risk against each other. In its absence, they must rely on the assurances of the grantor that the assets are not already encumbered, and their own inquiries and perceptions. This additional investigatory burden for secured creditors may impede access to credit by prospective borrowers without an established credit record, and restrict credit market competition by shutting out smaller credit-providers who do not have access to a credit information network.

**(c) Buyers of encumbered assets**

68. By virtue of the proprietary character of security rights, a secured creditor is presumptively entitled to follow the assets into the hands of a third-party buyer who acquires title under an unauthorized sale by the grantor (*droit de suite*). In the absence of a registry system, preservation of the secured creditor's *droit de suite* must be balanced against the need to protect the certainty of sales of movables. This may require a rule protecting the title acquired by buyers who take without actual or presumptive knowledge of an unpublicized non-possessory security right. A registry system dispenses with the need to choose between these two values, namely, respect for the (*droit de suite*) on the one hand and certainty of sale of movables on the other hand. The security right can fairly take effect against third parties on registration since buyers can protect themselves in advance of the purchase by conducting a search of the registry (subject to the caveat that buyers in the ordinary course of business and possibly buyers in good faith or unsophisticated buyers take the assets free of even a registered security right in the interests of commercial convenience; see A/CN.9/WG.VI/WP.14/Add.1, paras. 64-72).

**(d) The grantor's insolvency representative and judgment creditors**

69. In legal systems that have not established a general registry system, a non-possessory security right is normally treated as effective against the grantor's insolvency representative and judgement creditors, provided it is granted before insolvency or enforcement proceedings are initiated (or before any pre-insolvency suspect period begins to run). This is sometimes justified on the basis that unsecured creditors do not rely on the grantor's unencumbered ownership since the very act of extending credit without taking security implies an acceptance of the risk of subordination to the proprietary rights of subsequent secured creditors.

70. However, making registration a pre-condition to the effectiveness of a non-possessory security right against the insolvency representative and unsecured creditors offers a number of advantages. First, it offers a certain date for priority ordering thereby reducing the risk of fraudulent antedating of security instruments. Second, it reduces the cost of insolvency proceedings by giving the insolvency representative an efficient means of ascertaining which security rights are presumptively effective (see

A/CN.9/WG.VI/WP.9/Add.6, para. 2). Outside of formal insolvency, registration likewise enables judgement creditors to determine in advance of initiating costly execution action whether the debtor's assets are already encumbered by security.

## **7. Third party effectiveness of security rights in proceeds**

71. Where a secured transactions law gives secured parties an automatic statutory security right in the identifiable proceeds of the originally encumbered assets, some regimes provide that the security right is automatically effective against third parties as soon as the proceeds arise. Other regimes require the secured creditor to take independent action to make the security right in the proceeds effective against third parties. To require independent action may undermine the rationale behind giving the secured creditor an automatic proceeds security right since the proceeds will often arise as a result of an unauthorized disposition of the original encumbered assets by the grantor (which the secured creditor typically will not become aware of until some time after the fact). On the other hand, to give automatic effect to the security right in proceeds contradicts the purposes of requiring a secured creditor in relation to the original encumbered assets to take possession or register as the case may be in order for its security right to be effective against third parties (see also A/CN.9/WG.VI/WP.14/Add.1, para. 26-35).

72. In resolving these competing policies, it is useful to draw a distinction among different categories of proceeds. First, suppose that a notice of the security right in the original encumbered assets was registered in a general security rights registry and the proceeds are of a kind that fall within the description set out in the registered notice. For example, the registered notice covers all present and after-acquired tangibles of the grantor and the original encumbered asset, a piece of equipment, is exchanged for another piece of equipment of the same kind. In this example, the security right should take automatic effect since third parties are already adequately protected by the existing registered notice which, in effect, covers the proceeds as originally encumbered assets in the form of after-acquired equipment.

73. If on the other hand, the proceeds take the form of money, negotiable instruments or negotiable documents of title, it would be relatively safe to allow for the security right in the proceeds to take automatic effect against third parties since transferees will normally take the assets free of any security right in any event owing to the negotiable character of the proceeds.

74. A more difficult case is one where the proceeds take the form of receivables arising from the disposition of the original encumbered assets, for example, inventory. In order to facilitate inventory financing, it may be desirable to give automatic third party effect to the proceeds security right, either on the theory that receivables are impliedly part of the originally encumbered assets, or on a theory of real subrogation, namely, that the receivables have simply replaced the originally encumbered assets so there is no unfairness to creditors in allowing the secured creditor to shift its claim to the receivables.

75. Apart from these three exceptions, the policies underlying the third party effectiveness rules apply in principle to a security right in proceeds (i.e. a secured creditor has to separately register its right in proceeds). However, it may be fair to give the secured creditor a limited time period after the proceeds arise to take the necessary steps. For example, the law might provide that a proceeds security right takes effect against third parties as soon as the proceeds arise provided the secured creditor, within, e.g., fifteen days, takes possession of the proceeds, or registers a notice, or does some other act that would be sufficient to give third party effect to a security right in encumbered assets of the same type as the proceeds.

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**B. Recommendations**

*[Note to the Working Group: As documents A/CN.9/WG.VI/WP.13 and Add.1 include a consolidated set of the recommendations of the draft legislative guide on secured transactions, the recommendations on Effectiveness against third parties are not reproduced here. Once the recommendations are finalized, the Working Group may wish to consider whether they should be reproduced at the end of each chapter or in an appendix at the end of the guide or in both places.]*



## A/CN.9/WG.VI/WP.14/Add.1

**Report of the Secretary General on the draft legislative  
guide on secured transactions, submitted to  
the Working Group on Security Interests  
at its sixth session**

## ADDENDUM

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## VI. Priority

### A. General remarks

#### 1. The concept of priority and its importance

1. The term “security right”, as used in this Guide, refers to a right in property granted to a creditor to secure the payment or other performance of an obligation (i.e. an *in rem* right). The term “priority”, on the other hand, refers to the extent to which the creditor may derive the economic benefit of that right in preference to other parties claiming an interest in the same property (see A/CN.9/WG.VI/WP.11/Add.1, para. 17 (q), definition of “priority”). As discussed below, these competing claimants may include, among others, unsecured creditors of the grantor, other secured creditors, buyers, sellers or lessees of the property, holders of non-consensual security rights in the property (such as security rights arising from judgements or created by statute) and the insolvency representative in the grantor’s insolvency proceeding. Priority rules determine the ranking of security rights and other rights in encumbered assets and the economic result of such ranking. In some cases, the application of priority rules will lead to a person taking the asset free of competing claims. Both types of cases are covered by this chapter.

2. The concept of priority is at the core of every successful legal regime governing security rights and it is therefore widely recognized that effective priority rules are necessary to promote the availability of low-cost secured credit. There are two primary reasons for this. First, to the extent that priority rules are clear and lead to predictable outcomes, prospective secured creditors are able to determine, in an efficient manner and with a high degree of certainty prior to extending credit, the priority that their security rights will have relative to the rights of competing claimants. This in turn reduces the risks to such prospective creditors and thereby has a positive impact on the availability and cost of secured credit. Second, by providing a mechanism for the ranking of claims, priority rules make it possible for grantors to create more than one security right in their assets, thus utilizing the full value of their assets to obtain more credit (which is one of the key objectives of any effective and efficient secured transactions regime; see A/CN.9/WG.VI/WP.11/Add.1, para. 31).

3. With respect to the first reason noted in paragraph 2 above, a creditor will normally extend credit on the basis of the value of specific property only if the creditor is able to determine, with a high degree of certainty prior to the time it extends credit, the extent to which other claims will rank ahead of its security right in the property. The most critical issue for the creditor in this analysis is what its priority will be in the event of the enforcement of the security right or the grantor's insolvency, especially where the encumbered asset is expected to be the creditor's primary or only source of repayment. To the extent that the creditor has uncertainty with respect to its priority at the time it is evaluating whether to extend credit, the creditor will place less reliance on the encumbered asset. This uncertainty may cause the creditor to increase the cost of the credit to reflect the diminished value of the encumbered asset to the creditor, and may even cause the creditor to refuse to extend credit altogether.

4. To minimize this uncertainty, it is important that secured transactions laws include clear priority rules that lead to predictable outcomes. The existence of such priority rules, together with efficient mechanisms for ascertaining and establishing priority at the time credit is advanced, may be as important to creditors as the particulars of the rules themselves. It often will be acceptable to a creditor that certain competing claimants have a higher priority, as long as the creditor can determine that it will ultimately be able to realize a sufficient value from the encumbered assets to repay its claim in the event of non-payment by the grantor. For example, a lender considering a loan to a grantor secured by an all-asset security may be willing to make the loan even if the inventory is subject to various security rights (such as a security right in favour of a warehouseman who stores inventory for the grantor), as long as the lender can ascertain with reasonable certainty, the nature and amount of such claims.

5. With respect to the second reason noted in paragraph 2 above, many banks and other financial institutions are willing to extend credit based upon security rights that do not have a first-priority ranking but are subordinate to one or more prior security rights, so long as they perceive there to be sufficient value in the grantor's assets to support their security rights and can clearly establish the second-priority position of their security rights. For example, in jurisdictions that recognize an all-asset security (see A/CN.9/WG.VI/WP.11/Add.1, para. 25), Lender B may be willing to extend credit to a grantor whose assets are already subject to an all-asset security in favour of Lender A, so long as Lender B believes that the value of the grantor's assets sufficiently exceeds the amount of the loan secured by the existing all-asset security to support the additional extension of credit by Lender B. This result is much more likely to occur in a jurisdiction that has clear priority rules that enable creditors to assess their priority with a high degree of certainty. By facilitating the granting of multiple security rights in the same assets, priority rules enable a grantor to maximize the extent to which it can use its assets to obtain credit.

6. It is important to note that no matter what priority rule is in effect in any jurisdiction, it will only have relevance to the extent that the applicable conflict-of-laws rules provide that such priority rule governs. This issue is discussed in chapter X (see A/CN.9/WG.VI/WP.14/Add.4, paras. 10-18).

## **2. Approaches to determining priority**

7. There are various possible approaches to determining priority. It is important to note that more than one of these approaches may effectively coexist in the same legal system insofar as they may apply to different types of priority conflicts.

**(a) First-to-file priority rule**

8. As discussed above (see paras. 2-5), in order to effectively promote the availability of low-cost credit, it is important to have priority rules that permit creditors to determine their priority with the highest degree of certainty at the time they extend credit, and that enable grantors to use the full value of their assets to obtain credit. As discussed in chapter V (see A/CN.9/WG.VI/WP. 14, paras. 19-23), one of the most effective ways to provide for such certainty, at least in the case of non-possessory security rights, is to base priority on the use of a public registration system.

9. In many jurisdictions in which there is a reliable registration system, priority is determined by the order of registration, with priority being accorded to the earliest registration (often referred to as the “first-to-file priority rule”). In some jurisdictions, this rule applies even if one or more of the requirements for the creation of a security right have not been satisfied at the time of the registration, which avoids the need for a creditor to search the registration system again after all remaining requirements for the creation of its security rights have been satisfied. This rule provides the creditor with certainty that, once it files a notice of its security right, no other registration will have priority over its security right. Other existing or potential creditors are also protected because the registration will put them on notice of pre-existing security rights, or potential security rights, and they can then take steps to protect themselves (such as by requiring personal guarantees or junior security rights in the same property or senior security rights in other property). Notwithstanding the foregoing, limited exceptions to the first-to-file priority rule may be appropriate, such as in the case of purchase-money security rights (discussed in section 5 (c) below) or statutory (e.g. preferential) creditors (discussed in section 5 (j) below).

10. Some jurisdictions provide that, as long as registration occurs within a certain “grace period” after the date on which the security right is created, priority will be based on the date of creation rather than on the date of registration. Thus, a security right that is created first, but registered second, may still have priority over a security right that is created second but registered first, as long as the first security right is registered within the applicable grace period. As a result, until the grace period expires, the registration date is not a reliable measure of a creditor’s priority ranking, and there is significant uncertainty that does not exist in legal systems in which no such grace periods exist. In order to avoid undermining the certainty achieved by the first-to-file rule, some jurisdictions restrict the use of grace periods to rare circumstances, such as (i) purchase-money security rights in equipment (see para. 53 below), (ii) circumstances in which registration before, or concurrently with creation is not logistically possible, or (iii) where the time difference between creation and registration cannot be minimized through the use of electronic registration or other registration techniques.

11. In many legal systems, the ordering of priority according to the timing of registration applies even if the creditor acquired its security right with actual knowledge of an existing unregistered security right. This rule is generally predicated on the theory that qualifications based on actual knowledge require a fact-specific investigation of a subjective state of mind, which is particularly difficult in the context of corporations and other artificial persons. As a result, priority rules that are dependent on actual knowledge provide opportunities to subject registrations to challenge and complicate dispute resolution, thereby diminishing certainty as to the priority status of secured creditors and hence reducing the efficiency and effectiveness of the system. As in the case of grace periods, there is no unfairness to secured creditors in this approach because they can always protect themselves by making a timely registration.

12. Many jurisdictions have adopted an exception to the first-to-file priority rule where the registration system consists of a title registry system or a title certificate system. A security right registered in one of these systems is often given priority over a notice previously registered in a general security rights registry in order to ensure that purchasers of assets that are registered in these systems can have full confidence in the records of the system in assessing the quality of the title they are acquiring.

**(b) Priority based on possession or control**

13. As discussed in chapters III and V (see A/CN.9/WG.VI/WP.9/Add.1, paras. 5-14, and A/CN.9/WG.VI/WP.14, paras. 7-9), possessory security rights traditionally have been an important component of the secured transactions laws of most jurisdictions. In recognition of this, even in certain jurisdictions that have a first-to-file priority rule, priority may also be established based on the date that the creditor obtained possession or control of the encumbered asset, without any requirement of a registration (see A/CN.9/WG.VI/WP.11/Add.1, para.17 (bb), definition of “control”). In these systems, priority is often afforded to the creditor that first either registered a notice of its security right in the registration system or obtained a security right by possession or control. However, because possession or control often is not a public act, the holder of security rights made effective against third parties by possession or control will, under many legal regimes, have the burden of establishing precisely when it obtained possession or control.

14. In the case of certain types of encumbered assets, (i.e. negotiable instruments such as certificated investment securities, or negotiable documents of title such as bills of lading and warehouse receipts), creditors often require possession or control to prevent prohibited dispositions by the grantor. For these types of assets, the laws of many jurisdictions provide that priority of a security right therein may be established either by possession, control or registration. However, a security right that becomes effective against third parties by possession or control is generally accorded priority over a security right made effective against third parties only by registration, even if the registration occurs first. This result is consistent with the expectations of the parties in the case of negotiable instruments and negotiable documents, because rights in such assets are traditionally transferred by possession.

15. In legal systems where priority of a security right may be established by more than one method (e.g. by registration, possession or control), a question arises as to whether a secured creditor who initially established priority by one method should be permitted to change to another method without losing its original priority ranking with respect to the encumbered asset. In principle, there is nothing objectionable about permitting a creditor to retain its priority in this circumstance, provided there is no gap in the continuity of registration, possession or control, so that the security right is subject to one method or another at all times. Thus, if the law provides that a security right may become effective against third parties by registration or possession, and a security right in an asset first becomes effective by registration and the secured creditor subsequently obtains possession of the asset while the registration is still effective, the security right remains effective as against third parties and priority relates back to the date of registration. If, on the other hand, the secured creditor obtains possession of the asset after the registration has lapsed through the passage of time or otherwise, the priority of the security right should be determined as of the date on which the secured creditor obtained possession.

**(c) Alternative priority rules**

16. In legal systems that do not have a reliable registration system or any registration system at all, both effectiveness of a security right against third parties and priority are often based on the date that the security right is created. In those jurisdictions, although non-possessory security rights may be permitted (often in the form of retention of title or transfers of title for security), creditors typically confirm the existence or non-existence of competing claims through representations by the grantor or information available in the market. In such jurisdictions, because there is no system to determine the ranking of creditors with security rights in the same asset, it is difficult or impossible for a grantor to grant more than one security right in the same asset and thus to fully utilize the value of its assets to obtain secured credit (see paras. 2 and 5 above).

17. Some legal systems have adopted a special priority rule with respect to certain types of encumbered assets. For example, in some jurisdictions, effectiveness of a security right in receivables against third parties and competing claims in receivables are based on the time that the debtors on the receivables (“the account debtors”) are notified of the existence of the security right. However, this system is not conducive to the promotion of low-cost secured credit for a number of reasons. First, it does not permit the creditor to determine, with a sufficient degree of certainty at the time it extends credit, whether there are any competing security rights in the receivables. Second, the system does not provide an efficient way of obtaining security rights in future receivables because notification of the account debtors on future receivables is not possible at the time of the initial extension of credit and therefore account debtors on the future receivables must be notified as the receivables arise. Third, in the case of a multiplicity of account debtors, notification may be costly. Fourth, many grantors may not wish to have their customers directly notified of the existence of a security right in their receivables.

**3. Scope of priority rules**

18. Because of the importance of priority rules, a secured transactions regime should incorporate a set of priority rules that are comprehensive in scope, covering a broad range of existing and future secured obligations and encumbered assets, and provide ways for resolving priority conflicts among a wide variety of competing claimants (both consensual and non-consensual). As noted in paragraph 1 above, a comprehensive set of priority rules not only serves to rank competing claims in the same asset, but also determines when one person may take an asset free from the claims of all other competing claimants.

**(a) Secured obligations affected**

19. In order to determine the amount of credit to be extended and the relevant terms, a creditor must be able to establish, at the time of the conclusion of the secured transaction, how much of its claim will be accorded priority.

20. Some legal systems limit this priority to the amount of debt existing at the time of the creation of the security right. The advantage of this approach is that it may (though not necessarily) match priority with the contemplation of the parties at the time of creation. The disadvantage of this approach is that it requires creditors to conduct additional due diligence (e.g. searches for new registrations) and to execute additional agreements and make additional registrations for amounts subsequently advanced. This is particularly problematic because one of the most effective means of providing secured credit is on a revolving basis, since this type of credit facility most efficiently matches the grantor’s unique borrowing needs (see Example 2 in A/CN.9/WG.VI/WP.11/Add.1, paras. 23-25, and Add.2, para. 7). This problem may be solved by giving future advances the same

priority that is afforded to advances made at the time that the security right is first created. In the case of credit extended for the delivery of goods or services in instalments, the solution lies in treating the entire claim as coming into existence when the contract is signed and not upon each delivery of goods or services.

21. Other legal systems limit priority to the maximum amount specified in the notice registered in a public registry with respect to a security right in order to avoid tying up all the grantor's assets with one creditor and thus reducing the willingness with which subsequent creditors may extend credit to the grantor (see A/CN.9/WG.VI/WP.14, para. 38).

22. Yet other legal systems accord priority to all extensions of credit, even advances made after the creation of the security right, and for all contingent obligations that may arise after the creation of the security right, without the need to specify a maximum amount. In such systems, a security right may extend to all secured monetary and non-monetary obligations owed to the secured creditor and secured by the security right, including principal, costs, interest and fees, and including performance obligations and other contingent obligations. Priority is unaffected by the date on which an advance or other obligation secured by the security right is made or incurred (i.e. a security right may secure future advances under a credit facility with the same priority as advances made under the credit facility contemporaneously with the creation of the security right).

**(b) After-acquired property**

23. As discussed in greater detail in chapter IV (see A/CN.9/WG.VI/WP.11/Add.2, paras. 16-18), in some legal systems, a security right may be created in property that the grantor may acquire in the future. Such a security right is obtained automatically at the time the grantor acquires the property without any additional steps being required at that time. As a result, the costs incident to the grant of a security right are minimized and the expectations of the parties are met. This is particularly important with respect to inventory which is continuously acquired for resale and receivables which are collected and regenerated on a continual basis (see Example 2 in A/CN.9/WG.VI/WP.11/Add.1, paras. 23-25) and equipment which is replaced in the normal course of the grantor's business.

24. The allowance of security rights in after-acquired property raises the question of whether the priority dates from the time of the initial grant (e.g. the date on which the security right first becomes effective against third parties) or from the time the grantor acquires the property. Different legal systems address this matter in different ways. The approach of some legal systems depends on the status of the creditor competing for priority (with priority dating from the date of the initial grant vis-à-vis other consensual secured creditors, and from the date of acquisition vis-à-vis all other creditors). It is generally accepted that dating priority from the initial grant, rather than from the date the grantor acquires rights in the after-acquired assets, is the most efficient and effective approach in terms of promoting the availability of low-cost secured credit (see, for example, article 8 (2) of the United Nations Assignment Convention).

25. Effective secured transactions regimes specify that a security right in after-acquired assets of the grantor has the same priority as a security right in assets of the grantor owned or existing at the time the security right is initially made effective against third parties.

**(c) Proceeds**

26. If the creditor has a security right in proceeds and civil fruits of the original encumbered asset, issues will arise as to the priority of that security right as against other

competing claimants. Competing claimants with respect to proceeds may include, among others, another creditor of the grantor who has a security right in the proceeds and a creditor of the grantor who has obtained a right by judgement or execution against the proceeds (as to what constitutes “proceeds”, see A/CN.9/WG.VI/WP.11/Add.2, paras. 30-34).

27. Property that constitutes proceeds to one secured creditor may constitute original encumbered assets to another secured creditor. For example, Creditor A may have a security right in all of the grantor’s receivables by virtue of its security right in all of the grantor’s existing and future inventory and the proceeds arising upon the sale or other disposition thereof, and Creditor B may have a security right in all of the grantor’s existing and future receivables as original collateral. If the grantor later sells on credit inventory that is subject to the security interest of Creditor A, both creditors have a security right in the receivables generated by the sale: Creditor A has a security right in the receivables as proceeds of the encumbered inventory, and Creditor B has a security right in the receivables as original encumbered assets.

28. A comprehensive secured transactions regime must answer several questions with respect to competing claims of the above-mentioned secured creditors. One question is whether the right of Creditor A in the receivables as proceeds of inventory is effective not only against the grantor but also against competing claimants. The answer to this question must be affirmative in most circumstances. Otherwise, the value of the original encumbered assets (i.e. the inventory) would be largely illusory. Security rights provide economic security to a secured creditor only to the extent that the secured creditor has the right to apply the economic value of the encumbered assets to its secured obligation prior to other competing claimants. Once the inventory in our example is sold, the economic value of the inventory is, from the creditor’s standpoint, embodied in the receivables or other proceeds arising from the sale, and should therefore be available in the first instance to Creditor A.

29. A second question is the extent to which the right to proceeds extends to proceeds of proceeds; for example, the question of whether a creditor with a security right in receivables as proceeds of inventory would also have a security right in the money received when the receivables are collected by the grantor. The answer to this question must also be affirmative in most cases, because a contrary rule would enable the grantor to easily defeat a secured creditor’s right to proceeds.

30. A third question is whether the right to proceeds extends only to identifiable proceeds (e.g. whether a security right in proceeds consisting of money is extinguished once the money is commingled with other funds in a bank account). As to this issue, many jurisdictions have adopted various “tracing” rules to determine when funds deposited in a bank account may properly be considered to be identifiable as proceeds of a security right.

31. Considerations that have led some jurisdictions to require registration or another act in order for a security right in particular property to be effective against third parties have also led some of those jurisdictions to require an additional act to make the right in the proceeds of such property effective against third parties.

32. In some cases, the additional act is a registration as to the proceeds, whereas in other cases it is a different act (such as possession in the case of a negotiable instrument). In cases in which an additional act is required, the legal regime should provide a period of time after the transaction generating the proceeds in which the creditor may perform such act without losing its priority in the proceeds.



33. Although determination of whether an additional act is necessary in order for a security right in proceeds to be effective against third parties is quite important, that determination alone is not sufficient to resolve the relative rights of the holder of such security right and other creditors in proceeds. Priority rules are needed to determine the relative priority of the secured creditor's right in proceeds vis-à-vis the rights of competing claimants.

34. The priority rules may differ depending on the nature of the competing claimant. For example, when the competing claimant is another secured creditor, the priority rules for rights in proceeds of original encumbered assets may be derived from the priority rules applicable to the original encumbered asset and the policies that generated those rules. In a legal system in which the first right in particular property that is reflected in a registration has priority over competing rights, that same rule could be used to determine the priority when the original encumbered asset has been transferred and the secured creditor now claims a right in proceeds. If a registration was made with respect to the right in the original encumbered asset before the competing claimant made a registration with respect to the proceeds, the first security right could be given priority.

35. In cases in which the order of priority of competing rights in the original encumbered asset is not determined by the order of registration (as is the case, for example, with purchase-money security rights that enjoy a super priority), a separate determination will be necessary for the priority rule that would apply to the proceeds of the original encumbered asset.

36. Priority may also depend on other factors when the competing claimant is a judgement creditor (see paras. 56-61) or an insolvency representative (see paras. 92-93).

#### **4. Priority of security rights that are not effective against third parties**

37. As discussed above (para. 18), an effective secured transactions regime should have rules for determining the relative priority between a secured creditor and a broad range of competing claimants. The results may differ depending upon whether the security right involved is or is not effective against third parties. Security rights that are effective against third parties are generally entitled to the highest level of protection, but security rights that are not effective against third parties are nevertheless entitled to a degree of protection in some circumstances.

##### **(a) Unsecured creditors**

38. The grantor will often incur debts that are not secured by security rights in any of the debtor's assets. In fact, these general unsecured claims often comprise the bulk of the grantor's outstanding obligations.

39. It is generally accepted that giving secured creditors priority over unsecured creditors is necessary to promote the availability of secured credit, and that a secured creditor should therefore have the right to derive the economic value of its security rights in preference to the claims of other creditors of the grantor who do not have a security right in the grantor's assets. Unsecured creditors can take other steps to protect their interests, such as monitoring the status of the credit, charging interest on past due amounts or obtaining a judgement with respect to their claims (as discussed in section 5 (d) below) in the event of non-payment. In addition, obtaining secured credit can increase the working capital of the grantor, which in many instances benefits the unsecured creditors by increasing the likelihood that the unsecured debt will be repaid. In fact, advances made under a secured revolving working capital loan facility (see A/CN.9/WG.VI/WP.11/Add.1, paras. 23-25)

are often the source from which a company will pay its unsecured creditors in the ordinary course of its business.

40. Thus, an essential element of an effective secured credit regime is that secured claims, properly created, have priority over general unsecured claims. Notwithstanding this fact, some jurisdictions have adopted an exception to this doctrine in the case of an all-asset security (see A/CN.9/WG.VI/WP.11/Add.2, paras. 23-25).

41. Another question that arises is whether a security right should be accorded priority over unsecured credit even if the security right has not become effective against third parties. Under some legal regimes, the answer to this question will depend upon whether the security right is being enforced in the context of an insolvency proceeding filed by or against the grantor of the security right. If it is, the insolvency representative may be empowered to invalidate security rights that have not become effective against third parties, and if such security rights are invalidated, the obligations that they secure will be treated as unsecured claims. On the other hand, a security right that is not effective against third parties may nevertheless be effective against the grantor, and may be enforced by the secured creditor against the grantor outside of the context of the grantor's insolvency proceedings.

**(b) Secured creditors**

42. As discussed above (see paras. 2 and 5), many legal systems allow the grantor to grant more than one security right in the same asset, basing the relative priority of such security rights on the priority rule (first-to-file or other rule) in effect under such system or on the agreement of the creditors (see paras. 94-95). Allowing multiple security rights in the same asset in this manner enables a grantor to use the value inherent in the asset to obtain credit from multiple sources, thereby unlocking the maximum borrowing potential of the asset.

43. Secured transactions regimes that distinguish between a security right that is effective against third parties and one that is not effective also generally provide that, even though both security rights are effective against the grantor, the security right that is effective against third parties has priority over the security right that is not effective against third parties, regardless of the order in which such security rights were created. To hold otherwise would be to render meaningless the concept of effectiveness against third parties.

44. If, on the other hand, both security rights are not effective against third parties but are nonetheless effective against the grantor, priority is determined in the order in which they were created.

**5. Priority of security rights that are effective against third parties**

**(a) Unsecured creditors**

45. As discussed above (see paras. 38-41), it is a fundamental principle of secured transactions law in many jurisdictions that a security right that is effective against third parties is effective against unsecured creditors of the grantor.

**(b) Secured creditors**

46. In many legal systems, as between two security rights in the same encumbered asset that are effective against third parties, subject to limited exceptions discussed in section 5 (c) below, priority is determined by the order in which their respective third party

effectiveness steps occurred, even if one or more of the requirements for the creation of a security right was not satisfied at such time.

**(c) Holders of purchase-money security rights**

47. Typically, the grantor acquires its assets by purchasing them. In some situations, the purchase is made on credit provided by the seller or is financed by a lender, in each case secured by security rights in the purchased assets. This type of financing is referred to as “purchase-money financing” and the security rights securing such financing are referred to as “purchase-money security rights” (see A/CN.9.WG.VI/WP.11/Add.1, para. 17 (b) and 19-22 and A/CN.9.WG.VI/WP.9/Add.1, paras. 35-45). In these situations, consideration must be given to the priority of such purchase money rights vis-à-vis security rights in the same goods held by other parties.

48. Recognizing that purchase-money financing is an effective means of providing businesses with capital necessary to acquire specific goods, many legal systems provide that holders of purchase-money security rights have priority over other creditors (including creditors that have an earlier-in-time registered security right in the goods) with respect to goods acquired with the proceeds of the purchase-money financing, as long as a notice of the purchase-money security right is registered within an appropriate time (which may involve a “grace period” in the case of certain types of assets).

49. In these legal systems, this heightened priority (sometimes referred to as a “super priority”) is a significant exception to the first-to-file priority rule discussed in section 2 (a) above and is important in promoting the availability of purchase-money financing. Businesses often grant security rights in all or some of their existing and after-acquired inventory and equipment to obtain financing. In these situations, if purchase-money security rights were not afforded a heightened priority, purchase-money financiers would not be able to place significant reliance on their security rights in the purchased goods because they would rank behind existing security rights in the same goods. In Example 1 (see A/CN.9/WG.VI/WP.11/Add.1, paras. 19-22), Vendor A, Lender A and Lessor A would each be reluctant to provide purchase-money financing if their security rights in the goods financed ranked behind the existing security rights of Lender B in Example 2 (see A/CN.9.WG.VI/WP.11/Add.1, para. 25).

50. Providing a heightened priority for purchase-money security rights is generally not considered to be detrimental to the grantor’s other creditors, because purchase-money financing does not diminish the estate (i.e. the net assets or net worth) of the grantor, but instead enriches the estate with new assets purchased. For example, the security position of Lenders B in Example 2 would not be diminished by a purchase-money financing of inventory, because Lender B still has all of its encumbered assets plus a security right subordinate to the purchase-money security right in the new goods financed by the purchase-money credit transaction.

51. In order to promote the availability of purchase-money financing without discouraging general secured credit, it is important that the heightened priority afforded to purchase-money security rights only apply to the goods acquired with such purchase-money and not to any other assets of the grantor.

52. In some legal systems, purchase-money security rights are not subject to registration (on the basis, *inter alia*, that vendors of goods may be unsophisticated parties who should not be expected to file or search in the register). However, in other legal systems, purchase-money security rights are subject to registration in order to avoid other creditors mistakenly relying on assets subject to purchase-money security rights (see A/CN.9/WG.VI/WP.14, paras. 56-57).

53. From the perspective of a competing creditor, requiring a notice of such purchase-money security rights to be registered at the time they were obtained would be beneficial. This would mean that any creditor could search the registration system and determine with certainty, whether any of the grantor's existing assets are, at the time of the search subject to purchase-money security rights. However, in order to facilitate on-the-spot financing in the equipment sales and leasing sectors, some systems provide a grace period for purchase-money registrations where the encumbered assets consist of equipment. To most effectively balance competing interests, this grace period must be long enough so that the registration requirement is not an undue burden to purchase-money financiers, but short enough so that other secured creditors are not subject to long periods before they are able to search the registry and determine if any competing security rights exist.

54. Typically, such a grace period does not apply to registrations with respect to purchase-money security interests in inventory. Instead, in order to obtain a super priority in inventory, in some legal systems, the holder of such a security right must, in addition to registration, give notice of its security right to other existing holders of security rights before the goods come into the grantor's possession. This notice generally takes the form of a one-time notice given at the inception of the purchase-money financing arrangement, rather than a notice at the time of each purchase of goods financed by the purchase-money financier. The argument in favour of requiring such notice is that existing inventory financiers should be put on notice of the purchase-money rights so that they will not make additional loans against the debtor's existing inventory in the mistaken belief that they would have a first priority in such inventory. To otherwise eliminate this danger, such financiers would need to check the register daily before each new advance against inventory to ascertain that there were no claimed purchase-money rights in the inventory (a circumstance that could significantly increase the cost of such financing), and even checking daily would not suffice if a grace period were afforded to the purchase-money security rights.

55. An important policy decision that must be made in fashioning a super priority rule for purchase-money financing is whether such a priority should be available only to sellers of goods, or whether it should also extend to banks and other lenders who finance the acquisition of goods. The arguments in favour of limiting the priority to vendors tend to be historical, in that supplier-financing (e.g. in the form of retention of title arrangements) was developed as a low-cost and efficient alternative to bank financing. A principal argument in favour of extending the priority to banks and other lenders is that such equal treatment enhances competition, which in turn should have a positive impact upon both the availability and cost of credit.

**(d) Judgement creditors**

56. Many legal systems provide that a general unsecured creditor who has obtained a judgement with respect to its claim and has taken the actions prescribed by law to enforce the judgement (such as seizing specific property or registering the judgement), has the equivalent of a security right in that property. This right effectively gives the judgement creditor priority over general unsecured creditors of the grantor with respect to such property.

57. Judgement creditors are given this priority over other unsecured creditors in recognition of the legal steps they have taken to enforce their claims. This is not unfair to other general unsecured creditors because they have the same rights to reduce their claims to judgement. However, to avoid giving judgement creditors excessive powers in legal systems where a single creditor may institute insolvency proceedings, insolvency laws

provide that security rights arising from judgements made within a specified period of time prior to the insolvency proceeding may be avoided by the insolvency representative.

58. Where a judgement creditor is given the equivalent of a security right, an existing creditor with an earlier-in-time consensual security right in certain assets would have an interest in making sure that its security right retains its priority over the security right obtained by a judgement, particularly with respect to assets it has already relied upon in extending credit. At the same time, the judgement creditor has an interest in receiving priority with respect to assets that have sufficient value to serve as a source of repayment of its claim.

59. Many legal systems that have a registration system rank priority in this situation by time of registration of the security right, i.e. an earlier in time registered consensual security right in property will have priority over a subsequent security right in the same property obtained by judgement. Conversely, granting a consensual security right in the property after a creditor has obtained some form of a judgement security right will result in a security right that is subordinate to the existing judgement security right. This approach is generally acceptable to creditors as long as the judgement security right is made sufficiently public so that creditors can become aware of it in an efficient manner and factor its existence into their credit decision before extending credit.

60. There is generally an exception to this rule when it is applied to future advances (discussed in greater detail in section 3 (a) above). While a previously registered security right will customarily have priority over a judgement security right with respect to credit advanced prior to the date that the judgement security right becomes effective, it will generally not have priority over the judgement security right with respect to any credit advanced after such effective date (unless such credit had been committed prior to the effective date of the judgement). For example, in Example 2 (see A/CN.9/WG.VI/WP.11/Add.1, para. 25), Lender B makes loans to ABC which are secured by all of ABC's existing and future receivables and inventory. If an unsecured creditor obtains a judgement against ABC thereby obtaining a security right in ABC's inventory, Lender B's security right in the inventory would have priority over the judgement security right with respect to loans that Lender B made prior to the date that the judgement became effective, as well as loans that Lender B made within a specified period following the effective date of the judgement. However, the judgement security right would have priority with respect to any additional loans made by Lender B after the specified period, unless Lender B had committed, prior to the effective date of the judgement, to extend such additional loans).

61. To protect existing secured creditors from making additional advances based on the value of assets subject to judgement security rights, there should be a mechanism to put creditors on notice of such judgement security rights. In many jurisdictions in which there is a registration system, this notice is provided by subjecting judgement security rights to the registration system. If there is no registration system or if judgement security rights are not subject to the registration system, the judgement creditor might be required to notify the existing secured creditors of the judgement. In addition, the law may provide that the existing secured creditor's priority continues for a period of time (perhaps 45-60 days) after the judgement security right is registered (or after the creditor receives notice), so that the creditor can take steps to protect its interest accordingly. The less time an existing secured creditor has to react to the existence of judgement security rights and the less public such judgement security rights are made, the more their potential existence will negatively affect the availability and cost of credit facilities that provide for future advances.

**(e) Buyers of encumbered assets**

62. When a grantor sells assets that are subject to existing security rights, the buyer has an interest in receiving the assets free and clear of any security right, whereas the existing secured creditor has an interest in maintaining its security right in the assets sold (unless the secured creditor has consented to the sale). It is important that priority rules address both of these interests, and that an appropriate balance be struck. If the rights of a secured creditor in particular assets are put at risk every time its grantor sells such assets, their value as security would be severely diminished, and the availability of low-cost credit based on the value of such assets would be jeopardized.

63. It is sometimes argued that the secured creditor is not harmed by a sale of the assets free of its security right so long as it retains a security right in the proceeds of the sale. However, this would not necessarily protect the secured creditor, because proceeds are often not as valuable to the creditor as the original encumbered assets. In many instances, the proceeds may have little or no value to the creditor as security (e.g. a receivable that cannot be collected). In other instances, it might be difficult for the creditor to identify the proceeds, and its claim to the proceeds may, therefore, be illusory. In addition, there is a risk that the proceeds, even if of value to the secured creditor, may be dissipated by the seller who receives them, leaving the creditor with nothing. Jurisdictions have taken a number of different approaches to achieving this balance between the interests of secured creditors and persons buying encumbered assets from grantors in possession.

**i. The ordinary course of business approach**

64. One approach taken in many jurisdictions is to provide that sales of encumbered assets in the form of inventory made by the grantor in the ordinary course of its business will result in the automatic extinction of any security rights that the secured creditor has in the assets without any further action on the part of the buyer, seller or secured creditor. The corollary to this rule is that sales of inventory outside the ordinary course of the grantor's business will not extinguish any security rights, and the secured creditor may, upon a default by the grantor (see A/CN.9/WG.VI/WP.14/Add.2, para. 5, definition of "default"), enforce its security right against the inventory in the hands of the buyer (unless, of course, the secured creditor has consented to the sale). Where the security agreement so provides, the sale itself may constitute a default entitling the secured creditor to enforce its security rights; otherwise, the secured creditor cannot do so until default has occurred.

65. In order to qualify as a "buyer in the ordinary course of business," the seller of the assets must be in the business of selling assets of that kind. In addition, the buyer must not have knowledge that the sale violates the security or other rights of another person in the assets, as would be the case, for example, if the buyer had actual knowledge that the sale was prohibited by the terms of the security agreement between the seller and a lender to the seller who held security rights in the assets (see A/CN.9/WG.VI/WP.11/Add.1, para. 17 (aa), definition of "buyer in the ordinary course of business").

66. This approach arguably provides a simple and transparent basis for determining whether goods are sold free and clear of security rights. For example, the sale of an automobile by an automobile dealer to a consumer is clearly a sale of inventory in the ordinary course of the dealer's business, and the consumer should automatically take the car free and clear of any security rights in favour of the dealer's creditors. On the other hand, a sale by the dealer of many cars in bulk to another dealer would presumably not be in the ordinary course of the dealer's business. This approach is consistent with the commercial expectation that the grantor will sell its inventory of goods (and indeed must sell it to remain viable), and that buyers of the goods will take them free and clear of

existing security rights. Without such an exemption, a grantor's ability to sell goods in the ordinary course of its business would be greatly hampered, because buyers would have to investigate claims to the goods prior to purchasing them. This would result in significant transaction costs and would greatly impede ordinary course transactions.

67. To promote such ordinary course transfers, and to remove the uncertainty caused by making priority dependent upon the knowledge of the prior security right (see para. 11), many legal systems provide that buyers in such transactions obtain the assets free and clear of any security right even if the buyer had actual knowledge of the security right. This consideration is so important that some jurisdictions even permit a buyer of goods with actual knowledge of a security right in the goods to take free of such security right even if the security right is not effective against third parties. However as noted above (see para. 65), in some jurisdictions a buyer is not permitted to take free of a security right if the buyer had knowledge that the sale was made in violation of an agreement between the seller and its creditor that the assets would not be sold without the consent of the creditor.

68. With respect to sales that are outside of the ordinary course of the grantor's business, as long as the creditor's security right is subject to registration in a reliable and easily accessible registration system, the buyer may protect itself by searching the registration system to determine whether the asset it is purchasing is subject to a security right, and if so, seek a release of the security right from the secured creditor. Low-cost items are in some systems exempted from this rule because the search costs imposed on potential buyers may not be justified for such items. On the other hand, it may be argued that, if an item is truly low-cost, a secured creditor is unlikely to enforce its security right against the asset in the hands of the buyer. In addition, determining which items are sufficiently low-cost to be so exempted would result in setting arbitrary limits which would have to be continually revised to respond to cost fluctuations resulting from inflation and other factors.

69. In some countries that have a registration system that is searchable only by the grantor's name, rather than by a description of the encumbered assets, a purchaser who purchases the assets from a seller who previously purchased the assets from the grantor (a "remote purchaser") obtains the assets free of the security rights granted by such grantor. This approach is taken because it would be difficult for a remote purchaser to detect the existence of a security right granted by a previous owner of the encumbered assets. In many instances, remote purchasers are not aware that the previous owner ever owned the asset, and accordingly, have no reason to conduct a search against the previous owner.

70. A possible disadvantage of the ordinary course of business approach is that it might not always be clear to a buyer (particularly in international trade) what activities might be within or not within the ordinary course of the seller's business. Another possible disadvantage might be that, if this rule were applied only to sales of inventory and not of other goods, there could be confusion on the part of the buyer as to whether the goods it is buying constitute inventory from the seller's point of view. On the other hand, it should be noted that, in a normal buyer-seller relationship, it is highly likely that buyers would know the type of business in which the seller is involved, and in these situations the ordinary course of business approach would be consistent with the expectations of the parties. In addition, this approach facilitates commerce and allows secured creditors and buyers to protect their respective interests in an efficient and cost-effective manner without undermining the promotion of secured credit. Moreover, these possible disadvantages would not apply to retail trade (where the sale is presumed to be in the ordinary course of the seller's business, and a buyer is not required to check the registry), while in other situations buyers could protect themselves by negotiating with sellers (and their secured creditors) to obtain the assets free of any security rights.

**ii. Other approaches**

71. Another approach to this problem taken by some jurisdictions is to provide that a buyer of goods will take free of any security rights in the goods if the buyer purchases the goods in good faith (i.e. with no actual or constructive knowledge of the existence of the security rights). One argument in favour of this approach is that good faith is a notion known to all legal systems, and that there exists significant experience with its application both at the national and international level. It has also been argued that a presumption should exist that a buyer is acting in good faith unless it is proven otherwise.

72. A number of other approaches are possible that seek to blend the “good faith” and the “ordinary course of business” approaches. One such approach is to provide that the principal criterion should be the “ordinary course of business” test, but that the “good faith” test should be applied in the situation of the “remote purchaser” described above (see para. 69). In that case, the remote purchaser would take free of security rights created by the party from whom its direct seller purchased the goods, unless the remote purchaser had actual or constructive knowledge of the security rights. Even though this approach might inadvertently open the way to abuse, since a grantor could frustrate the rights of the secured creditor by selling the goods outside the ordinary course of business to a party who would then sell them in the ordinary course of business, there is a strong policy reason to protect remote purchasers. One approach to protect secured creditors in this circumstance is to make the circumventing grantor liable to the secured creditor for damages.

**(f) Holders of reclamation claims**

73. In many legal systems, a supplier who sells goods on unsecured credit may reclaim the goods from the buyer within a specified period of time (known as the “reclamation period”). This reclamation is possible after the supplier discovers that the buyer has become insolvent. Upon the return of the goods to the seller, the sale agreement under which the goods were originally sold to the buyer is generally deemed terminated.

74. Although the supplier will want the reclamation period to be as long as possible to protect its interests, other creditors will be reluctant to provide credit based on assets subject to potential reclamation claims. Moreover, if the supplier is truly concerned about the credit risk, the supplier could insist upon a purchase-money security right in the goods that it supplies on credit. Accordingly, although a reclamation claim is important so that suppliers can have some rights in the goods that they supply on unsecured credit, the reclamation period should be brief (30-45 days at most) so that it does not impede lending generally.

75. An important policy consideration is whether reclamation claims relating to specific goods should have priority over pre-existing security rights in the same goods. In other words the question is whether, if the inventory of the buyer, (including the goods sought to be reclaimed), is subject to effective security rights in favour of a third party financier, the reclaimed goods should be returned to the seller free of such security rights. In some jurisdictions, the reclamation has a retroactive effect, placing the seller in the same position it was prior to the sale (i.e. holding goods that were not subject to any security rights in favour of the buyer’s creditors). However, in other jurisdictions the goods remain subject to the pre-existing security rights, on the basis that any other result would be unfair to a pre-existing creditor of the buyer who had relied on the existence of such goods in extending credit, and would also promote uncertainty and thereby discourage inventory financing.



76. In many jurisdictions, reclamation claims in specific goods are extinguished when the goods are incorporated into other goods in the manufacturing process or otherwise lose their identity, or are sold to a third party.

**(g) Lessees**

77. Priority disputes sometimes arise between the holder of a security right in an asset granted by the owner/lessor of the asset that is effective against third parties and a lessee of such asset. The principal issue in this situation is whether, if the holder of such security right enforced it, the lessee could nevertheless continue using the asset so long as it continued to pay rent and otherwise abide by the terms of the lease.

78. To address this situation, some jurisdictions have adopted the approach that a lessee of goods takes priority over a security right in the goods created by the lessor if the lease is entered into in the ordinary course of the lessor's business, even if the lessee has actual knowledge of the existence of the security right. Thus, even if the secured creditor in this situation enforced its security right and sold the lessor's interest to a third party at a foreclosure sale, the third party would take title to the asset subject to the lease, and the lessee would be entitled to continue to use the asset in accordance with the terms of the lease.

79. An exception is sometimes made if, at the time the lessee entered into the lease, the lessee has actual knowledge that the lease violates the rights of the secured creditor, as would be the case if the lessee knew that the security agreement creating such security right specifically prohibited the grantor from leasing the property. However, the mere knowledge of the existence of the security right, as evidenced by a notice registered in the security registration system, would not be sufficient to defeat the priority of the lessee.

**(h) Holders of negotiable instruments and negotiable documents**

80. Many secured transactions regimes have adopted a special priority rule for negotiable instruments (such as promissory notes) and negotiable documents (such as negotiable warehouse receipts and bills of lading) under which holders of such property may take the property free of the claims of other persons, including the holders of valid security rights. This special status accorded to holders of negotiable instruments and documents is a reflection of the importance of the concept of negotiability in those jurisdictions, and the desire to preserve such concept. Usually the law (either the secured transactions regime or other applicable law) only grants such special status to holders who meet certain specified standards of good faith (e.g. to assure that they are not acting in collusion with the person from whom they received the property).

**(i) Holders of rights in money**

81. Many secured transactions regimes accord a similar status to a person who gives value for money and has possession of the money, permitting such person to take the money free of the claims of other persons, including the holders of valid security rights in the money. This special priority rule is designed to preserve the free flow of money as an unencumbered medium of exchange. Different rules often apply where the money is deposited in a bank account, or where it can be established that the holder of the money colluded with the grantor to defeat the claim of the holder of security rights in, or other claims to, the money.

**(j) Statutory (preferential) creditors**

82. In many jurisdictions, as a means of achieving a general societal goal (e.g. protection of tax revenue or employee wages), certain unsecured claims are given priority, within or even outside insolvency proceedings, over other unsecured claims and, in some cases, over secured claims (including secured claims previously registered). For example, to protect claims of employees and the government, claims for unpaid wages and unpaid taxes are in some jurisdictions given priority over previously existing security rights. Because societal goals differ from jurisdiction to jurisdiction, the precise nature of these claims (e.g. whether they relate to taxes, employee-related claims or other types of claims), and the extent to which they are afforded priority, also differ.

83. The advantage of establishing these preferential claims is that a societal goal may be furthered. The possible disadvantage is that these types of priorities can proliferate in a fashion that reduces certainty among existing and potential creditors, thereby impeding the availability of low-cost secured credit. In addition, even if the preferential claims can be ascertained with certainty by an existing or potential creditor, such claims (whether arising within or outside of insolvency proceedings) will adversely affect the availability and cost of secured credit: because such claims diminish the economic value of an asset to a secured creditor, creditors will often shift the economic burden of such claims to the grantor by increasing the interest rate, or by withholding the estimated amount of such claims from the available credit.

84. To avoid discouraging secured credit, the availability of which is also a societal goal, the various societal goals should be carefully weighed in deciding whether to provide a preferential claim. Preferential claims should be as limited as possible, and permitted only to the extent that there is no other effective means of satisfying the underlying societal objective and when the jurisdiction has determined that the impact of such claims on the availability of low-cost credit is acceptable. For example, in some jurisdictions, tax revenue is protected through incentives on company directors to address financial problems quickly or face personal liability, while wage claims are protected through a public fund.

85. If preferential claims exist, the laws establishing them should be sufficiently clear and transparent so that a creditor is able to calculate the potential amount of the preferential claims and to protect itself. Some jurisdictions have achieved such clarity and transparency by listing all preferential claims in one law or in an annex to the law. Other jurisdictions have achieved it by requiring that preferential claims be registered in a public registry, and according priority to such claims only over security rights registered thereafter. In those jurisdictions, priority is awarded to security rights that were either registered before the preferential claims are registered, or security rights that are created within a specified period (such as 45-60 days after the preferential claims are registered), if the pre-existing security rights secure a commitment to provide future advances. However, a problem with adopting a registration requirement with respect to some preferential claims that arise immediately prior to an insolvency proceeding is that it may be difficult to calculate their amount or to file in time.

**(k) Holders of rights in assets for improving and storing encumbered assets**

86. Some legal systems provide that creditors who have added value to goods in some way, such as by repairing them, have security rights in the goods and that such security rights generally rank ahead of other security rights in those goods. This priority rule has the advantage of inducing those who supply such value to continue in their efforts, and also has the advantage of facilitating the maintenance and preservation of encumbered

assets. As long as the amount that these security rights secure is limited to an amount that reflects the value by which the encumbered asset has been enhanced, such security rights and their elevated priority should not be objectionable to existing secured creditors.

87. Some systems also provide that creditors, such as landlords and warehousemen, who store encumbered assets or who lease to a grantor the premises on which the encumbered assets are stored, have security rights in the encumbered assets to secure rental and storage obligations, and such security rights often rank ahead of other secured claims in the same encumbered assets.

88. In many jurisdictions, the rights described in the preceding two paragraphs are not subject to any registration requirement, and their existence can only be discerned through due diligence on the part of a prospective creditor. As a result, these security rights are often referred to as being “secret”. While secret security rights have the advantage of protecting the rights of the parties to whom they are granted without requiring such parties to incur the costs associated with registration, they pose a significant impediment to secured credit because they limit the ability of creditors to ascertain the existence of competing security rights. As discussed in chapter V (see A/CN.9/WG.VI/WP.14, paras. 56-59), consideration should be given to requiring that notice of such security rights be registered in the security rights registration system.

89. If legislators give priority to the rights of such service providers, a question arises as to whether these rights should be limited in amount and recognized as priority claims only in certain circumstances. One approach may be to limit these rights in favour of service providers in amount (such as one month’s rent in the case of landlords) and to recognize their priority over pre-existing security rights only where the value added directly benefits the holders of the pre-existing security rights. Another approach may be to avoid introducing such limitations, since doing so would unfairly inhibit the availability of credit to such service providers. In addition, introducing such limitations may be unnecessary since secured creditors can protect themselves against such service claims in various ways, such as by contractually limiting the extent to which their grantors may enter into such service contracts, or by reserving a sufficient portion of the available credit to enable the creditor to pay the service providers in the event that the grantor fails to do so.

**(l) Holders of security rights in real property to which fixtures are attached**

90. To the extent that a secured transactions regime permits security rights to be created in fixtures (the approach recommended by this Guide), the regime should also establish rules governing the relative rights of a holder of security rights in fixtures vis-à-vis persons who hold rights with respect to the related immovable property (such as a person, other than the grantor, who has an ownership interest in the immovable property, a purchaser of the immovable property or a creditor who has security rights that extend to the immovable property as a whole). Such priority rules might usefully address situations such as where the security rights in the fixtures were created prior to the creation of the rights in the immovable property, and vice versa, where security rights in goods were created before the goods became fixtures and where the security rights in the goods were created after the goods became fixtures. When developing priority rules with respect to fixtures, care should be taken not to unnecessarily disturb well-established principles of real property law.

**(m) Donees**

91. The position of a recipient of an encumbered asset as a gift (a “donee”) is somewhat different from that of a buyer or other transferee for value. Because the donee has not parted with value, there is no objective evidence of detrimental reliance on the grantor’s apparently unencumbered ownership. As a result, in a priority dispute between the donee

of an asset and the holder of a security right in the asset granted by the donor, a strong argument exists in favour of awarding priority to the secured creditor, even in circumstances where the security right was not otherwise effective against third parties. On the other hand, there may be valid grounds for departing from this principle in specific situations, such as where the donee has changed its position based upon the gift, subject to the right of the secured creditor and the donor's insolvency representative to challenge the gift under applicable fraudulent conveyance laws where it can be demonstrated that the donee was acting in collusion with the donor to defeat the rights of the secured creditor.

**(n) Insolvency representatives**

92. It is particularly important that a secured creditor be able to determine what its priority will be in the event that an insolvency proceeding is commenced by or against its grantor, because there most likely will not be sufficient assets to pay all creditors and the encumbered assets may be the creditor's primary, or only, source of repayment. As a result, in deciding to extend credit and in evaluating priority, secured creditors generally place their greatest focus on what their priority will be in an insolvency proceeding of the grantor. Therefore, it is important that the priority of a properly obtained security right not be diminished or impaired in an insolvency proceeding, subject to applicable provisions of the insolvency laws pertaining to preferential claims and avoidance actions. The importance of this point in crafting an effective secured transactions law cannot be over-emphasized. To the extent that secured credit and insolvency laws are not clear on this point, the willingness of creditors to provide secured credit will be seriously diminished.

93. In order to effectively compensate insolvency representatives for their work in the insolvency proceeding, they often are given a super priority preferential claim in the assets of the insolvent estate. This claim and the extent to which an insolvency representative may be empowered to challenge security rights in various circumstances are discussed in detail in chapter IX.

**6. Subordination agreements**

94. In many legal systems, priority may be, and frequently is, altered by a secured creditor unilaterally or by private contract with other secured creditors. As an example, Lender A, holding a security right in all existing and after-acquired assets of a grantor under an all-asset security, could agree to permit the grantor to give a first priority security right in a particular asset to Lender B so that the grantor could obtain additional financing from Lender B based on the value of that asset. Such agreements are to be distinguished from subordination agreements between unsecured creditors waiving the principle of equal treatment of their unsecured claims. The recognition of the validity of subordination of security rights unilaterally or by private contract reflects a well-established policy (see, for example, article 25 of the United Nations Assignment Convention).

95. Such agreements altering priority are perfectly acceptable as long as they affect only the parties who actually consent to such alterations. Subordination agreements should not affect the rights of creditors who are not parties to the agreement. Additionally, it is essential that the priority afforded by a subordination agreement continue to apply in an insolvency proceeding of the grantor, and the insolvency laws should so provide. In fact, in some jurisdictions, such a provision in the insolvency laws may be necessary to empower the courts to enforce subordination agreements, and to empower insolvency representatives to deal with priority conflicts among parties to subordination agreements without risk of liability (see chapter IX).

## **7. Relevance of priority prior to enforcement**

96. Another important issue pertaining to priority is whether priority only has relevance after the occurrence of a default by the grantor in the underlying obligation or whether priority also has relevance prior to default. Many jurisdictions adopt the former approach, thereby allowing the holder of a subordinate security right (in the absence of a contrary agreement between the first-ranking and subordinate claimants), to receive regularly scheduled payments on its obligation even though the secured obligation having priority has not been paid in full. The argument for this approach is that, in the absence of a contrary agreement and prior to a default, a grantor should be free to dispose of its assets and use the proceeds to pay its obligations as they mature, irrespective of the relative priority of the security rights in such assets. Requiring the subordinate claimant to remit the payment to the first-ranking claimant in the absence of such an express agreement would be a major impediment to the subordinate claimant providing financing.

97. The result may be different if the subordinate claimant received proceeds from the collection, sale or other disposition of the encumbered asset. In that circumstance, some jurisdictions require the subordinate claimant to remit the proceeds to the first-ranking claimant if the subordinate claimant received the proceeds with the knowledge that the grantor was required to remit them to the first-ranking claimant. The rationale behind this rule is similar to the rationale discussed in section 5 (e) above with respect to buyers of encumbered assets.

## **B. Recommendations**

*[Note to the Working Group: As documents A/CN.9/WG.VI/WP.13 and Add.1 include a consolidated set of the recommendations of the draft legislative guide on secured transactions, the recommendations on priority are not reproduced here. Once the recommendations are finalized, the Working Group may wish to consider whether they should be reproduced at the end of each chapter or in an appendix at the end of the guide or in both places.]*

## A/CN.9/WG.VI/WP.14/Add.2

**Report of the Secretary General on the draft legislative  
guide on secured transactions, submitted to  
the Working Group on Security Interests  
at its sixth session**

## ADDENDUM

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## **IX. Default and enforcement**

### **A. General remarks**

#### **1. Introduction**

1. A reasonable secured creditor expects a debtor to perform its obligations without the need for the creditor to have recourse to encumbered assets. A reasonable debtor will also expect to perform. Both will recognize, however, that there will be times when the debtor will not be able to do so. The failure may result from poor management or business misjudgements, but it may also be for reasons beyond the debtor's control, such as an economic downturn in an industry or more general economic conditions.

2. Creditors generally will periodically review their debtors' business activities and the encumbered assets and communicate with those debtors who show signs of having financial difficulties. Debtors generally will cooperate with their creditors to work out ways to overcome these financial difficulties. A debtor and its creditors working together may enter into a "composition" or "work out" agreement that extends the time for payment, reduces the debtor's obligation or modifies the security agreements. Negotiations to reach a composition agreement take place in the shadow of two principal legal factors: the secured creditor's right to enforce its security rights if the debtor defaults on its secured obligation and the possibility that insolvency proceedings will be initiated by or against the debtor.

3. At the heart of a secured transactions regime is the right of the secured creditor to look to the value of the encumbered assets to satisfy the secured obligation if the debtor defaults. The availability of efficient enforcement and economical mechanisms that allow creditors accurately to predict the time and cost involved in the enforcement of the secured obligation, as well as the amount they might recover from the disposition of the encumbered assets will have an impact on the availability and the cost of credit. A secured transactions regime should, therefore, provide efficient predictable and economical procedural and substantive rules for the enforcement of a security right after a debtor has defaulted. These rules should be clear, simple and transparent to ensure certainty about the likely outcome of enforcement proceedings. At the same time, the rules should provide reasonable safeguards for the interests of the debtor, the grantor, and other persons with an interest in the encumbered assets.

4. This chapter examines the secured creditor's enforcement of its security right if the debtor fails to perform ("defaults on"; see para. 5) the secured obligation prior to the institution of insolvency proceedings or with the permission of the appropriate body in insolvency (insolvency is dealt with in chapter IX).

#### **2. Default**

5. If a debtor fails to perform the secured obligation, the debtor is "in default". The debtor's default is a precondition to the secured creditor's right to enforce its security right against the encumbered assets. The parties' agreement and the general law of obligations will determine whether there has been an event of default, whether notice of default should be given and whether the debtor should be entitled to cure the default. Normally, the debtor must take the initiative to seek to challenge before a court the secured creditor's position that there has been an event of default, or the calculation of the amount owing as a result of the default. To avoid unduly delaying rightful enforcement, the review should be

expedited. Safeguards should be built into the process to discourage debtors from making unfounded claims to delay enforcement.

### **3. Enforcement**

#### **(a) General considerations**

6. The key issue for a secured transactions regime is what modifications, if any, should be made to the normal rules for debt collection to facilitate the enforcement of security rights. Some regimes, for example, provide for expedited court proceedings. Other regimes delegate to the secured creditor the right to determine if a breach has occurred, to take possession of the encumbered assets and to dispose of them with no direct government or independent administrative intervention. Expedited procedures and delegation of authority, however, should take into account the right of other persons to be heard in protection of their legitimate claims to the encumbered assets. Moreover, the allocation of resources within the judicial system and any delegation to private persons necessarily raise issues of public interest. When determining the role of the judiciary or other administrative authorities in the enforcement of security rights, it is essential to do so in a clear and straightforward manner.

7. All interested parties (i.e. the secured creditor, the debtor or grantor and other creditors) benefit from maximizing the amount that will be realized by disposing of the encumbered assets after the debtor has defaulted. The secured creditor benefits by the potential reduction of any deficiency the debtor may owe as an unsecured debt after application of the proceeds of the encumbered assets. At the same time, the debtor or grantor and the debtor's other creditors benefit, either by a smaller deficiency or by a larger surplus. A secured transactions regime that decreases the hurdles and transaction costs of the disposition, while assuring that the secured creditor makes commercially reasonable efforts to dispose of the encumbered assets, will increase the amount of the proceeds received on disposition of the encumbered assets.

8. A security right is of particular importance to a secured creditor when the debtor is in financial difficulty. A debtor who is in financial difficulty is more likely to default on its obligations and may end up voluntarily or involuntarily in insolvency proceedings. If insolvency proceedings place undue barriers in the way of the secured creditor seeking to enforce its security right so that the value of that right in insolvency proceedings is less than its value outside such proceedings, the debtor and its other creditors will have an incentive to precipitate the insolvency proceedings. When initially deciding whether to extend credit, a secured creditor subject to such a regime will take into account the diminished value of the security right in insolvency proceedings and will reduce the credit extended or increase the costs of the credit to the debtor to compensate for the increased risk to its security rights. Thus, provision for recognition and enforcement of security rights within the insolvency process will create certainty and facilitate the provision of credit (for a discussion of enforcement of security rights in insolvency proceedings, see chapter IX).

9. It is important that the system take into account the rights of the debtor, the grantor and other persons with an interest in the encumbered assets. Many systems impose, as a general and overriding matter, a requirement that the secured creditor in enforcing its rights must act in good faith, follow commercially reasonable standards and respect public policy.



**(b) Notice of enforcement**

10. Secured transactions law normally addresses whether notice of the intention to enforce should be given and to whom. The principal benefit of a specific notice to the debtor or grantor is that it alerts them to the need to protect their interests in the encumbered assets (the debtor will not be unaware of its default but the third-party grantor may be), such as by curing the debtor's default, if otherwise allowed. Notice to other interested parties allows them to monitor subsequent enforcement by the secured creditor and, if they are secured creditors whose rights have priority (and the debtor is in default towards them as well), to participate in or take control of the enforcement process. The disadvantages of notice include its cost, the opportunity it provides an uncooperative debtor or grantor to remove the encumbered assets from the creditor's reach and the possibility that other creditors will race to assert claims against the debtor's business. Because of the requirement for notice of any disposition of the encumbered assets, many regimes do not also require a notice of default (see para. 5).

11. As with other situations where notice may be required, in those legal systems where a notice of default is required, secured transactions law normally spells out the minimum contents of a notice, the manner in which it is to be given and its timing. When doing so, the law might distinguish between notice to the debtor, notice to the grantor when the grantor is not the debtor, notice to other creditors and notice to public authorities or the public in general. The secured creditor might, for example, be required to give prior written notice to the debtor and grantor followed by filing a notice in a public register (see article 54 of Inter-American Model Law). The creditor might also be required to give written notice to those other secured creditors who have filed notice of their interests or who have otherwise notified the creditor. Alternatively, the registrar might be required to give such notice. As for the information to be included in the notice to the debtor and grantor, the law might require the inclusion of the secured creditor's calculation of the amount owed as a consequence of default and detail the steps the debtor or grantor may take to pay the secured obligation or to cure the default. The secured creditor may also be required to indicate, at least provisionally, the steps it intends to take to enforce its security right. Notice to other interested parties may not need to be so specific.

**(c) The extent of court supervision of enforcement**

12. A key issue for a secured transactions regime is the extent to which the secured creditor must resort to the courts or other authorities (e.g. bailiffs, notaries or the police) to enforce its security right rather than to make use of out-of-court procedures. In order to protect the debtor and other parties with rights in the encumbered assets, some legal systems require the secured creditor to resort exclusively to the courts or other governmental authorities to enforce its security right. However, because court proceedings often cannot produce a result in a timely and cost-efficient manner or the maximum possible value of the encumbered assets, the requirement of court proceedings will negatively impact on the availability and the cost of credit. The time and cost involved reduce the realization value of the encumbered assets and will be factored into the cost of the financing transaction.

13. In order to avoid these problems, some legal systems do not require the secured creditor to use the courts or other governmental authorities in the enforcement process. In these legal systems the secured creditor is often authorized to enforce its security right without any prior intervention of official State institutions, such as courts, bailiffs or the police. In other legal systems, there is only limited prior intervention of official State institutions in the enforcement process. For example, the secured creditor may apply to a court for an order of repossession, which the court issues without a hearing (although the

debtor may initiate an independent proceeding to challenge this order; see article 57 of the Inter-American Model Law). In such a case, once the secured creditor is in possession of the asset, it may sell it directly without court intervention following certain prescribed procedures (see article 59 of the Inter-American Model Law). The justification for such an approach lies in the fact that having the secured creditor or a trusted third party take control and dispose of the assets will often be more flexible, quicker and less costly than a State-controlled process. It may also maximize the realization value of the encumbered assets.

14. However, even in these legal systems the courts are available to ensure recognition of legitimate claims and defences of the debtor and other parties with rights in the encumbered assets. In order to inform these parties and give them an opportunity to react, the secured creditor may be required to give them a notice of default and enforcement (see paras. 5 and 10). In addition, the secured creditor may not enforce its rights to take possession of the encumbered assets if such enforcement would result in a disturbance of the public order. Moreover, in disposing of the encumbered assets, the secured creditor has to act in a “commercially reasonable” manner (see para. 9).

15. Even if permitted to act without official intervention, a secured creditor is normally also entitled to seek to enforce its security right by judicial action. The secured creditor may choose to bring a judicial action, rather than rely on its own actions, for a number of reasons. For example, the secured creditor may wish to avoid the risk of having its private actions challenged after the fact, or may conclude that it will have to bring a judicial action anyway to recover an anticipated deficiency.

16. Whether or not they require a secured creditor to resort to the courts, many legal systems modify the normal rules of civil procedure when a secured creditor seeks to enforce security rights. These modifications may limit the time within which the court must act or limit the claims or defences that the parties may raise. If the court concludes that there has been default, the objective of any decision is to satisfy the creditor’s secured claim. The court is typically authorized to order the debtor to pay the obligation, to dispose of the encumbered assets itself, or to turn over the assets to the secured creditor or to the court for disposition.

**(d) Freedom of parties to agree to the enforcement procedure**

17. Another key issue is the extent to which the secured creditor and the debtor or other grantor may agree to modify the statutory framework for the enforcement of the security right. In some legal systems, the enforcement procedure is part of mandatory law that the parties cannot modify by agreement. In other legal systems, the parties are allowed to modify the statutory framework for enforcement as long as public policy, priority, and third-party rights (in particular in the case of insolvency) are not affected. In yet other legal systems, emphasis is placed on efficient enforcement mechanisms in which judicial enforcement is not the exclusive or the primary procedure. Even if a system has limits on the extent to which the secured creditor and the debtor or other grantor may agree to modify the statutory framework, permitting the parties to agree freely on the consequences of their exchange after a default encourages an efficient allocation of resources. However, such freedom may be the subject of abuse at the time of conclusion of the security agreement. Thus, the law may only recognize agreements modifying the statutory framework reached after the debtor has defaulted.

**(e) Acceptance of the encumbered assets in satisfaction of the secured obligation**

18. Following default, the secured creditor may propose to the grantor that the secured creditor accept the encumbered assets in full or partial satisfaction of the secured obligation. Most jurisdictions make unenforceable an agreement entered into prior to default that automatically vests ownership of the encumbered assets in the secured creditor upon default, although some laws make an agreement entered into after default enforceable. The advantage of permitting agreements entered into after default is that, as a result of such an agreement, enforcement costs are minimized and the security right is enforced more quickly. The disadvantage is that the secured creditor may put undue pressure on the debtor or grantor in cases where the encumbered assets are more valuable than the secured obligation.

19. The law may guard against abusive behaviour in connection with such agreements by requiring the consent of the debtor or other grantor, third parties or the court under certain circumstances, such as where the debtor has made substantial payments on the secured obligation. Notice to other interested persons may be required and a fixed delay before final settlement may be prescribed to allow an appeal to a court (by an interested person who has not consented). The law might also require an official appraisal of the value of the encumbered assets.

**(f) Redemption of the encumbered assets**

20. Most laws permit a defaulting debtor or grantor to redeem the encumbered assets before their disposition by the secured creditor by paying the outstanding amount of the secured obligation, including interest and the costs of enforcement up to the time of redemption. Redemption brings the transaction to an end. The hope of redemption may encourage the debtor or other grantor to search for potential buyers to purchase the encumbered assets and to monitor the secured creditor's acts closely. Redemption of the encumbered assets should be distinguished from reinstatement of the secured obligation. Reinstating the secured obligation (e.g. by paying a missed instalment before disposition), if permitted under the general law of obligations, cures a default and the restored obligation continues to be secured by the encumbered assets. Redeeming the encumbered assets discharges the secured obligation.

**(g) Authorized disposition by the grantor**

21. Following default, the secured creditor will be concerned about realizing the maximum value of the encumbered assets. Frequently, the grantor will be more knowledgeable about the market for the assets than the secured creditor. For this reason, the grantor is sometimes given a limited period of time following default during which it is entitled to dispose of the encumbered assets.

**(h) Removing the encumbered assets from the grantor's control**

22. Upon the debtor's default, the secured creditor who is not already in possession of the encumbered assets will be concerned about potential dissipation or misuse of the assets. This may be alleviated by placing the assets in the hands of a court, a State official, a trusted third party or the secured creditor itself. Permitting the secured creditor to take possession without any or only limited recourse to a court or other authority reduces the costs of enforcement (see paras. 13-14). However, even those laws that permit such repossession by the secured creditor recognize the potential for abuse, especially the possibility of public disorder or intimidation. Most of these laws, therefore, condition

repossession on avoiding a disturbance of the public order (“breach of the peace”). Some laws require prior notice of default as a precondition to taking possession.

23. In the special case where the encumbered assets threaten to decline rapidly in value, most laws provide for preliminary relief ordered by a court or other relevant authority to preserve the value of the assets.

**(i) Sale or other disposition of the encumbered assets**

24. A security right entitles the secured creditor to have the encumbered assets sold or otherwise disposed of. Law should provide additional general procedures for the disposition of the encumbered assets. These should include the method of advertising a proposed disposition, whether to have a public auction and permission to sell, lease, license or collect upon the encumbered assets. The objective of the disposition should be to maximize the value of the encumbered assets, while not jeopardizing the legitimate claims and defences of the debtor or grantor and other persons.

25. Requirements in existing legal systems range from the less to the more formal. Some legal systems require disposition subject to the same public procedures used to enforce court judgements. Other legal systems permit the secured creditor to control the disposition but prescribe uniform procedures for the disposition by public auction of encumbered assets, with rules on such matters as timing, publicity and minimum price. Yet other legal systems permit the secured creditor to control the disposition subject to flexible rules on how to proceed (always subject to an independent standard, such as commercial reasonableness). These systems may condition the right of the creditor on the consent of the debtor or other grantor, whether in the security agreement or after default. A general standard is usually prescribed which the secured creditor must observe (e.g. “commercially reasonable” or “with the care of a prudent business person”). There may also be special rules dealing with the manner by which the proceeds of a disposition are to be collected and kept pending distribution.

26. Most secured transactions laws share the requirements that notice must be given to certain parties with respect to a proposed disposition and the sale must be advertised or offers sought from appropriate parties. Due to the finality of any disposition, detailed rules are necessary to alert interested parties to protect their interest. Special procedures may be prescribed for the sale of a business as a going concern.

27. The collection of intangibles and negotiable instruments may not fit easily into the procedures for disposition of the encumbered assets. Thus many systems have special rules for this type of encumbered asset, including the right to require the person obligated to make any payments owed directly to the secured creditor.

**(j) Allocation of proceeds of disposition**

28. To minimize disputes, secured transactions laws set out rules on the distribution of the proceeds of the disposition. The most common allocation is to pay reasonable enforcement costs first and then the secured obligation. Laws typically include rules prescribing if and when a secured creditor is responsible for distributing proceeds to some or all other secured creditors (such as secured creditors with junior security rights in the encumbered assets) with security rights in the same encumbered assets. These rules often require that notice of these other interests be given to the secured creditor and that any surplus proceeds are to be returned to the debtor or other grantor.

29. The proceeds distributed to the secured creditor are applied towards the costs of the distribution and the satisfaction of the secured obligation. If there is a deficiency after the

distribution, the obligation is discharged only to the extent of the proceeds received. The secured creditor is normally entitled to recover the amount of the deficiency from the debtor. Unless the debtor has created a security right in other assets for the benefit of the creditor, the creditor's claim for the deficiency is unsecured vis-à-vis the debtor (although the secured creditor may have received security rights from a third party).

**(k) Finality**

30. Secured transactions laws normally provide finality following disposition of the encumbered assets. The secured creditor's security right in the encumbered assets terminates, as does the debtor's or other grantor's rights, and the rights of any junior secured creditor or other person with a lower ranking right in the encumbered assets. The law normally provides that the rights of other persons in the encumbered assets (including other secured creditors) continue notwithstanding disposition of the assets in the enforcement procedure.

**(l) Variations on general framework**

31. Secured transactions law that includes within its scope many different types of encumbered assets provides, where necessary, special rules for the disposition of some types of asset. This is especially true of receivables and negotiable instruments. For example, a secured creditor with a security right in a receivable should be entitled to inform the account debtor to make payments directly to the secured creditor following the debtor's default.

32. Secured transactions laws also address the issue of how a secured creditor is to proceed when a single transaction includes security rights in both movable and immovable assets. Enforcement of a security right in fixtures also requires special rules to deal with the problem of severing a fixture from immovable property owned by someone other than the debtor or other grantor.

**(m) Judicial proceedings brought by other creditors**

33. Other creditors of the debtor or grantor may resort to the courts to enforce their claims against the debtor and procedural law may give these creditors the right to force the disposition of encumbered assets, subject to the interests of the secured creditor. The secured creditor will look to procedural law for rules on intervening in these judicial actions in order to protect its priority. In rare cases, procedural law may provide exceptions to general rules of priority. In some legal systems, for example, a court may order a person who owes money to a judgement debtor to pay the judgement creditor. If the court order may effectively give priority to the judgement creditor and if a secured creditor has a security right in this receivable, the result is bound to affect the availability and cost of credit extended on the basis of receivables.

**B. Recommendations**

*[Note to the Working Group: As documents A/CN.9/WG.VI/WP.13 and Add.1 include a consolidated set of the recommendations of the draft legislative guide on secured transactions, the recommendations on default and enforcement are not reproduced here. Once the recommendations are finalized, the Working Group may wish to consider whether they should be reproduced at the end of each chapter or in an appendix at the end of the guide or in both places.]*

## A/CN.9/WG.VI/WP.14/Add.4

**Report of the Secretary General on the draft legislative  
guide on secured transactions, submitted to  
the Working Group on Security Interests  
at its sixth session**

## ADDENDUM

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**X. Conflict of laws****A. General remarks****1. Introduction****a. Purpose of conflict-of-laws rules**

1. This Chapter discusses the rules for determining the law applicable to the creation of a security right as between the grantor and the secured creditor, effectiveness against third parties (“third party effectiveness”), priority and enforcement. These rules are generally referred to as conflict-of-laws rules and also determine the territorial scope of the substantive rules envisaged in the Guide (i.e. if and when the substantive rules of the State enacting the regime envisaged in the Guide apply). For example, if a State has enacted the substantive law rules envisaged in the Guide relating to the priority of a security right, these rules will apply to a priority contest arising in the enacting State only to the extent that the conflict-of-laws rule on priority issues points to the laws of that State. Should the conflict rule provide that the law governing priority is that of another State, then the

relative priority of competing claimants will be determined in accordance with the law of that other State, and not pursuant to the substantive priority rules of the enacting State.

2. After a security right has become effective, a change might occur in the connecting factor for the choice of the applicable law. For instance, if security over tangible goods located in State A is governed by the law of the location of the goods, the question arises as to what happens if those goods are subsequently moved to State B (whose conflict rules also provide that the location of the goods governs security rights over tangible property). One alternative would be for the security to continue to be effective in State B without the need to take any further step in State B. Another alternative would be for new security to be obtained under the laws of State B. Yet another alternative would be for the secured creditor's pre-existing right to be preserved subject to the fulfilment in State B of certain formalities within a certain period of time (e.g. 30 days after the goods have been brought into State B). These issues are addressed by the conflict-of-law rules of some legal systems. This Chapter proposes a general rule in this regard.

3. Conflict-of-laws rules should reflect the objectives of an efficient secured transactions regime. Applied to the present Chapter, this means that the law applicable to the property aspects of a security right should be capable of easy determination: certainty is a key objective in the elaboration of rules affecting secured transactions both at the substantive and conflict-of-laws levels. Another objective is predictability. As illustrated by the questions in the preceding paragraph, the conflict-of-laws rules should permit the preservation of a security right acquired under the laws of State A if a subsequent change in the connecting factor for the selection of the applicable law results in the security right becoming subject to the laws of State B. A third key objective of a good conflict-of-laws system is that the relevant rules must reflect the reasonable expectations of interested parties (creditor, grantor, debtor and third parties). According to many, in order to achieve this result, the law applicable to a security right should have some connection to the factual situation that will be governed by such law.

4. Use of the Guide (including this Chapter) in developing secured transactions laws will help reduce the risks and costs resulting from differences between current conflict-of-laws rules. In a secured transaction, the secured creditor normally wants to ensure that its rights will be recognized in all States where enforcement might take place (including in a jurisdiction administering the insolvency of the grantor). If those States have different conflict-of-laws rules in relation to the same type of encumbered assets, the creditor will need to comply with more than one regime in order to be fully protected. A benefit of different States having harmonized conflict-of-laws rules is that a creditor can rely on one single law to determine the priority status of its security in all such States. This is one of the goals achieved in respect of receivables by the United Nations Assignment Convention and in respect of indirectly-held securities by the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary.

5. It is worth noting that conflict-of-laws rules would be necessary even if all States had harmonized their secured transactions laws. There would remain instances where the parties would have to identify the State whose requirements will apply. For example, if the laws of all States provided that a non-possessory right is made effective against third parties by filing in a public registry, one would still need to know in which State's registry the filing must be made.

**b. Scope of the conflict-of-laws rules**

6. This Chapter does not define the security rights to which the conflict-of-laws rules will apply. Normally, the characterization of a right as a security right for conflict-of-laws purposes will reflect the substantive security rights law in a jurisdiction. In principle, a court will use its own law whenever it is required to characterize an issue for the purpose of selecting the appropriate conflict-of-laws rule. The question arises, however, as to whether the conflict-of-laws rules for security rights should also apply to other transactions that are functionally similar to security, even if they are not covered by a secured transactions regime. To the extent that title reservation agreements, financial leases, consignments and other similar transactions would not be governed by the substantive law provisions governing secured transactions, a State might nonetheless subject these devices to the conflict-of-laws rules applicable to secured transactions.

7. A similar issue arises in respect of certain transfers not made for security purposes, where it is desirable that the applicable law for creation, third party effectiveness and priority be the same as for a security right over the same category of property. An example is found in the United Nations Assignment Convention, which (including its conflict-of-laws rules) applies to outright transfers of receivables as well as to security rights over receivables (see art. 2 (a)). This policy choice is motivated, *inter alia*, by the necessity of referring to one single law to determine priority between competing claimants with a right in the same receivable. In the event of a priority dispute between a purchaser of a receivable and a creditor holding security over the same receivable, it would be more difficult (and sometimes impossible) to determine who is entitled to priority if the priority of the purchaser were governed by the laws of State A but the priority of the secured creditor were governed by the laws of State B.

8. Whatever decision a jurisdiction makes on the range of transactions covered by the conflict-of-laws rules, the scope of the rules will be confined to the property aspects of these transactions. Thus, a rule on the law applicable to the creation of a security right only determines what law governs the requirements to be met for a property right to be created in the encumbered assets. The rule would not apply to the personal obligations of the parties under their contract. Personal obligations, in most legal systems, subject to certain limitations, are governed by the law chosen by the parties.

9. A corollary to recognizing party autonomy with respect to the personal obligations of the parties is that the conflict-of-laws rules applicable to the property aspects of secured transactions are matters that are outside the domain of freedom of contract. For instance, the grantor and the secured creditor are normally not permitted to select the law applicable to priority, since this could not only affect the rights of third parties, but also result in a priority contest between two competing secured creditors being subject to two different laws leading to opposite results.

**2. Conflict-of-laws rules for creation, third party effectiveness and priority**

10. The determination of the extent of the rights conferred by a security right generally requires a three-step analysis:

(a) The first issue is whether the security has been validly created (see Chapter IV);

(b) The second issue is whether the security is effective against third parties (see Chapter V); and



(c) The third issue is what is the priority ranking of the secured creditor (see Chapter VI).

11. Not all legal systems make specific conceptual distinctions among these issues. In some legal systems, the fact that a property right has been validly created necessarily implies that the right is effective against third parties. Moreover, legal systems that clearly distinguish among the three issues do not always establish separate substantive rules on each issue. For example, in the case of a possessory pledge complying with the requirements for the *in rem* validity of a security right of this type generally results in the security being effective against third parties without any need for further action.

12. The key question is whether one single conflict-of-laws rule should apply to all three issues. The alternative is to allow for more flexibility, where it may be more appropriate that the law applicable to third party effectiveness or priority be different from that governing the creation of the right. Policy considerations, such as simplicity and certainty, favour adopting one rule for creation, third party effectiveness and priority. As noted above, the distinction among these issues is not always made or understood in the same manner in all legal systems, with the result that providing different conflict-of-laws rules on these issues may complicate the analysis or give rise to uncertainty. There are, however, instances where selecting a different law for priority issues would better take into account the interests of third parties such as persons holding non-consensual security.

13. Another important question is, whether on any given issue (i.e. creation, third party effectiveness or priority) the relevant conflict-of-laws rule should be the same for tangible and intangible property. A positive answer to that question would favour a rule based on the law of the location of the grantor. The alternative would be the place where the encumbered asset is held (*lex situs*), which would, however, be inconsistent in respect of receivables with the United Nations Assignment Convention (article 22 of which refers to the law of the State in which the assignor, i.e. the grantor, is located).

14. Simplicity and certainty considerations support the adoption of the same conflict-of-laws rule (e.g. the law of the grantor's location) for both tangible and intangible property, especially if the same law applies to creation, third party effectiveness and priority. Following this approach, one single enquiry would suffice to ascertain the extent of the security rights encumbering all assets of a grantor. There would also be no need for guidance in the event of a change in the location of encumbered assets or to distinguish between the law applicable to possessory and non-possessory rights (and to determine which prevails in a case where a possessory security right governed by the law of State A competes with a non-possessory security right over the same property governed by the law of State B).

15. Not all jurisdictions, however, regard the law of the location of the grantor as sufficiently connected to security rights over tangible property (for "non-mobile" goods at least). Moreover, the law governing a secured transaction would need to be same as the law governing a sale of the same assets. This means that acceptance of the grantor's law for every type of security right would be workable only if jurisdictions, generally, were prepared to accept that rule for all transfers.

16. In addition, it is almost universally accepted that a possessory right should be governed by the law of the place where the property is held, so that adopting the law of the grantor for possessory rights would run against the reasonable expectations of non-sophisticated creditors. Accordingly, even if the law of the grantor's location were to be the general rule, an exception would need to be made for possessory security rights.

17. As the applicable conflict rules might be different depending on the tangible or intangible character of the assets or the possessory or non-possessory nature of the security, the question arises as to which conflict rule is appropriate if intangible property is capable of being the subject of a possessory security right. In this regard, most legal systems assimilate certain categories of intangibles incorporated in a document (such as negotiable instruments and certificated securities) to tangible property, thereby recognizing that such assets may be pledged by delivering the document to the creditor. The pledge would then be governed by the law of the State where the document is held.

18. A related issue arises where goods are represented by a negotiable document of title (such as a bill of lading). It is generally accepted that a negotiable document of title is also assimilated to tangible property and may be the subject of a possessory pledge. The law of the location of the document (and not of the goods covered thereby) would then govern the pledge. The question arises, however, what law would apply to resolve a priority contest between a pledgee of a document of title and another creditor to whom the debtor might have granted a non-possessory security right in the goods themselves, if the document and the goods are not held in the same State. In such a case, the conflict-of-laws rules should accord precedence to the law governing the pledge, on the basis that this solution would better reflect the legitimate expectations of interested parties.

*[Note to the Working Group: The scope of the law envisaged by this Guide is focused on commercial goods, equipment and trade receivables. If the Working Group decides to cover other categories of intangible property, such as non-trade receivables, bank deposits, letters of credit and intellectual property, it may wish to consider whether there should be any special conflict rules for these types of asset.]*

### **3. Conflict-of-laws rules for security rights in proceeds**

19. Simplicity and certainty considerations would dictate applying to proceeds the same conflict rules as those governing the creation, third party effectiveness and priority of a security right directly obtained over assets that are of the same type of property as the proceeds. For instance, if a creditor claims rights over receivables as proceeds from the sale of inventory previously subject to a security right in its favour, the creditor's entitlement to the receivables should be determined using the same law as would have been applicable to a security right directly obtained over the receivables as original encumbered assets. In this example, if the law of State B were to govern a security right originally granted over receivables, that law would also determine whether the creditor is entitled to the receivables as proceeds from inventory, even if the creditor's security right over the inventory was governed by the law of State A. The third party effectiveness and the priority of the creditor's entitlement to the receivables (as proceeds from inventory) would also be governed by the law of State B.

20. It is arguable, however, that the above solution should be subject to an exception, namely, that the creation of a security right over proceeds should be governed by the law that was applicable to the creation of the security right over the original encumbered assets from which the proceeds arose. This would meet the expectations of a creditor obtaining a security right over inventory under a domestic law providing that such security right automatically extends to proceeds. Under this approach, the question of whether a security right extends to proceeds would be governed by the law applicable to the creation of a right in the original encumbered assets from which the proceeds arose, while the third party effectiveness and priority of an entitlement to proceeds would be subject to the law

that would have been applicable to such issues if the proceeds had been original encumbered assets.

#### **4. Effect of a subsequent change in the connecting factor**

21. Whatever connecting factor is retained for determining the most appropriate conflict-of-laws rule for any given issue, there might occur a change in the relevant factor after a security right has been created. For example, where the applicable law is that of the jurisdiction where the grantor has its head office, the grantor might later relocate its head office to another jurisdiction. Similarly, where the applicable law would be the law of the jurisdiction where the encumbered assets were located, the assets might be moved to another jurisdiction.

22. If these issues are not dealt with specifically, an implicit rule might be drawn. The general conflict-of-laws rules on creation, third party effectiveness and priority might be construed to mean that, in the event of a change in the relevant connecting factor, the original governing law continues to apply to issues that arose before the change (e.g. creation), while the subsequent governing law would apply to events occurring thereafter (e.g. a priority issue between two competing claimants).

23. The silence of the law on these matters might, however, give rise to other interpretations. For example, one interpretation might be that the subsequent governing law also governs creation in the event of a priority dispute occurring after the change (on the basis that third parties dealing with the grantor are entitled to determine the applicable law for all issues relying on the actual connecting factor, being the connecting factor in effect at the time of their dealings).

24. Providing a rule on these issues would appear to be necessary to avoid uncertainty, in particular where the connecting factor changes from a State that has not enacted a law based on the recommendations of this Guide to a State that has enacted such a law.

25. A similar issue arises with respect to goods in transit. Some legal systems provide that a security right over such goods may be validly created and made effective against third parties under the law of the place of destination if they are moved to that place within a specified time limit.

#### **5. Conflict-of-laws rules for enforcement issues**

26. Where a security right is created and made effective against third parties under the law of one State, but is sought to be enforced in another State, an issue arises regarding what remedies are available to the secured creditor. This is of great practical importance where the substantive enforcement rules of the two States are significantly different. For example, the law governing the security right could allow enforcement by the secured creditor without prior recourse to the judicial system unless there is a breach of peace, while the law of the place of enforcement might require judicial intervention. Each of the possible solutions to this issue entails advantages and disadvantages.

27. One option is to subject enforcement remedies to the law of the place of enforcement, i.e. the law of the forum (*lex fori*). The policy reasons in favour of this rule include that:

(a) The law of remedies would coincide with the law generally applicable to procedural issues;

(b) The law of remedies would, in many instances, coincide with the location of the property being the object of the enforcement (and could also coincide with the law governing priority if the conflict-of-laws rules of the relevant State point to such location for priority issues);

(c) The requirements would be the same for all creditors intending to exercise rights against the assets of a grantor, irrespective of whether such rights are domestic or foreign in origin.

28. On the other hand, the *lex fori* might not give effect to the intention of the parties. The parties' expectations may be that their respective rights and obligations in an enforcement situation will be those provided by the law under which the security was created. For example, if extra-judicial enforcement is permitted under the law governing the creation of the security, it may also be available to the secured creditor in the State where the latter has to enforce its security, even if it is not generally allowed under the domestic law of that State.

29. An approach based on the reasonable expectations of the parties would support a rule referring enforcement issues to the law governing the creation or, to the extent creation and priority are governed by the same law (see Recommendations 101 to 103 in A/CN.9/WG.VI/WP.13/Add.1), to the priority of a security right. Another benefit of such an approach would be that creation, priority and enforcement issues would be subject to the same law.

30. A third option is to adopt a rule whereby the law governing the contractual relationship of the parties would also govern enforcement matters. This would often correspond to their expectations and, in many instances, would also coincide with the law applicable to the creation of the security right since that law is often selected as also being the law of the contract. However, under this approach, parties would then be free to select, for enforcement issues, a law other than the law of the forum or the law governing creation, third-party effectiveness and (or) priority. This solution would be disadvantageous to third parties that might have no means to ascertain the nature of the remedies that could be exercised by a secured creditor against the property of their common debtor.

31. Therefore, referring enforcement issues to the law governing the contractual relationship of the parties would necessitate exceptions designed to take into account the interests of third parties, as well as the mandatory rules of the forum, or of the law governing creation and third party effectiveness. Procedural matters would, in any case, need to be governed by the law of the forum. As a result, the various enforcement issues would be treated differently.

## **6. The impact of insolvency on conflict-of-laws rules**

32. As pointed out in the Insolvency Chapter (A/CN.9/WG.VI/WP.14/Add.3, para. ...), subject to avoidance actions, a security right effective against the grantor and third parties outside of insolvency should continue to be effective in insolvency proceedings. Similarly, the occurrence of insolvency should not displace the conflict-of-laws rules applicable to the creation, third party effectiveness and, subject to some exceptions, the priority of a security right.

## **B. Recommendations**

*[Note to the Working Group: As documents A/CN.9/WG.VI/WP.13 and Add.1 include a consolidated set of the recommendations of the draft legislative guide on secured transactions, the recommendations on conflict of laws are not reproduced here. Once the recommendations are finalized, the Working Group may wish to consider whether they should be reproduced at the end of each chapter or in an appendix at the end of the guide or in both places.]*

## D. Report of the Working Group on Security Interests on the work of its seventh session (New York, 24-28 January 2005)

(A/CN.9/574) [Original: English]

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## I. Introduction

1. At its present session, Working Group VI continued its work on the preparation of a legislative guide on secured transactions pursuant to a decision taken by the Commission at its thirty-fourth session, in 2001.<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

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<sup>1</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 358. For a history of the project, see A/CN.9/WG.VI/WP.15, paras. 6-17. The reports of the first to the sixth sessions of the Working Group are contained in documents A/CN.9/512, A/CN.9/531, A/CN.9/532, A/CN.9/543, A/CN.9/549 and A/CN.9/570. The reports of the first and the second joint sessions of Working Group V (Insolvency Law) and VI (Security Interests) are contained in documents A/CN.9/535 and A/CN.9/550. The consideration of those reports by the Commission is reflected in documents A/57/17 (paras. 202-204), A/58/17 (paras. 217-222) and A/59/17 (paras. 75-78).

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>

## II. Organization of the session

2. The Working Group, which was composed of all States members of the Commission, held its seventh session in New York from 24 to 28 January 2005. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Belarus, Canada, China, Colombia, Czech Republic, France, Germany, Guatemala, India, Italy, Japan, Madagascar, Mexico, Nigeria, Poland, Republic of Korea, Russian Federation, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uganda, United States of America and Zimbabwe.

3. The session was attended by observers from the following States: Afghanistan, Cuba, Dominican Republic, Ethiopia, Holy See, Hungary, Ireland, Malaysia, Peru, Philippines and Senegal.

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

(a) United Nations system: International Monetary Fund, World Bank and World Intellectual Property Organization (WIPO);

(b) Intergovernmental organizations: Council of the Inter-Parliamentary Assembly of Member Nations of the Commonwealth of Independent States (CIS IPA), Hague Conference on Private International Law; and

(b) International non-governmental organizations invited by the Commission: American Bar Association (ABA), Center for International Legal Studies (CILS), Commercial Finance Association (CFA), International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL), International Chamber of Commerce (ICC), International Credit Insurance & Surety Association (ICISA), International Insolvency Institute (III), International Working Group on European Security Rights, Max-Planck-Institute for Foreign and Private International Law (MPI), the European Law Student's Association (ELSA), the Association of the Bar of the City of New York (ABCNY) and Union of Industrial and Employers' Confederations of Europe (UNICE).

5. The Working Group elected the following officers:

*Chairman:* Ms. Kathryn SABO (Canada)

*Rapporteur:* Mr. Sung-Keun YOON (Republic of Korea)

6. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.14/Add.1 (Priority), A/CN.9/WG.VI/WP.16 and Add.1 (Recommendations), A/CN.9/WG.VI/WP.17 and Add.1 (Acquisition financing devices), A/CN.9/WG.VI/WP.18 and Add.1 (Security rights in bank accounts) and A/CN.9/WG.VI/WP.19 (Conflict of laws).

7. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.

<sup>2</sup> Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 455, and *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 347.

3. Adoption of the agenda.
4. Preparation of legislative guide on secured transactions.
5. Other business.
6. Adoption of the report.

### III. Deliberations and decisions

8. The Working Group considered chapters X (Conflict of Laws), XII (Acquisition financing devices) and XVI (Security rights in bank accounts). The deliberations and decisions of the Working Group are set forth below in chapters IV and V. The Secretariat was requested to revise those chapters to reflect the deliberations and decisions of the Working Group.

### IV. Preparation of a legislative guide on secured transactions

#### **Chapter X. Conflict of laws (A/CN.9/WG.VI/WP.16/Add.1, Recs. 100-116 and A/CN.9/WG.VI/WP.19)**

##### **A. Recommendations**

###### **Purpose section**

9. There was general agreement in the Working Group with the purpose section and the premise that the conflict-of-laws rules needed to be clear, easy to apply, pragmatic and meeting the needs of modern secured finance.

###### **Recommendations 100 (possessory security rights in tangible property) and 101 (non-possessory security rights in tangible property)**

10. While there was general agreement in the Working Group with the substance of recommendations 100 and 101, differing views were expressed as to whether they should be merged. One view was that, although they both provided for the application of the law of the location of the assets (*lex rei sitae*), recommendations 100 and 101 should not be merged. It was stated that the distinction should be preserved for reasons of consistency in the guide. In addition, it was observed that the distinction was justified since, assuming that possession meant actual possession (see A/CN.9/WG.VI/WP.16, recommendation 31), a possessory security right in mobile goods, goods in transit and export goods was not possible.

11. However, the prevailing view was that recommendations 100 and 101 should be merged. It was stated that no distinction should be made where a single rule could apply to both possessory and non-possessory security rights. It was also said that while a possessory security right in mobile goods, goods in transit and export goods was rare, it was possible and thus the special rules in the second sentence of recommendation 101, and in recommendations 104 and 105 should apply to both possessory and non-possessory security rights. After discussion, it was agreed that recommendations 100 and 101 should be merged and include a cross-reference to the special rules on mobile goods, goods in



transit and export goods (while the meaning of those terms should be clarified in the commentary).

12. In that connection, the Working Group considered the character of recommendations 104 and 105 and agreed that they appropriately provided the secured creditor with the alternative of taking the steps to create a security right as between the parties and to make it effective as against third parties under the law of the State of the ultimate destination (see paras. 17 and 18 below).

13. With respect to the note after recommendation 102, it was agreed that the discussion be deferred until the Working Group had the opportunity to consider the subject of security rights in negotiable instruments and negotiable documents on the basis of a report by the Secretariat.

#### **Recommendation 103 (proceeds)**

14. The Working Group noted that if a security right in the original encumbered assets (e.g. inventory) was created in State A and a security right in the proceeds (receivables) was created in State B where the receivables arose, under alternative A, the law governing the creation, third-party effectiveness and priority of the security right in the receivables would be the law of State B, while, under alternative B, the law governing the creation of the security right in the receivables would be the law of State A and the law of governing third-party effectiveness and priority of that right would be the law of State B.

15. In support of alternative A, it was stated that it subjected issues of creation, third-party effectiveness and priority of security rights in proceeds to a single law. Thus, it was observed, alternative A avoided creating problems in the application of the rule in States that did not distinguish between creation of the security right as between the parties and its effectiveness against third parties and discriminating against creditors in countries that did not recognize an automatic security right in proceeds. On the other hand, it was stated that alternative A would create uncertainty as to the law applicable to proceeds, since: the creation of a security right in proceeds would be different from the law governing the creation of the security right in the original encumbered assets; that law would be very difficult to determine at the time of the creation of the security right in the original encumbered assets; and more than one applicable law would be involved in cases where proceeds arose in several countries.

16. The prevailing view was that alternative B was preferable. It was observed that alternative B enhanced certainty as to the law applicable to proceeds, since it provided for the application of a single law to issues relating to the creation of a security right in both the original encumbered assets and their proceeds and of a law that could be easily determined at the time of the creation of the security right in the original encumbered assets. It was also said that alternative B was consistent with the substantive law recommendation 13 (A/CN.9/WG.VI/WP.16) that provided that the security right in proceeds arose from the security right in the original encumbered assets and respected the normal expectations of the parties. After discussion, the Working Group decided to delete alternative A and to retain alternative B.

#### **Recommendations 104 (goods in transit) and 105 (export goods)**

17. The Working Group noted that, under recommendations 104 and 105, a security right in goods in transit and export goods could be created as between the parties and made effective against third parties not only according to the law of the initial location of the goods (under recommendations 100 and 101) but also under the law of the State of their

ultimate destination. It was also noted that priority remained, under recommendations 100 and 101, subject to the law of the location of the goods at the time the priority conflict arose (see recommendation 107).

18. There was general agreement in the Working Group with the substance of recommendations 104 and 105. As to the formulation of recommendation 105, it was agreed that reference should be made consistently to the law of the State of the ultimate destination of the goods and to the creation of a security right “as between the parties” (and not to creation in general). A suggestion to limit the scope of recommendation 105 to goods exported to the grantor only did not attract sufficient support as it would unnecessarily exclude, for example, situations where goods were shipped by the grantor to another party.

**Recommendations 106 (location), 107 (relevant time when determining location) and 108 (continued third-party effectiveness upon change of location)**

19. There was general support in the Working Group for the substance of recommendations 106, 107 and 108. It was also agreed that, because of its importance for the conflict-of-laws recommendations of the guide, recommendation 106 should be retained in that chapter.

20. A suggestion to delete recommendation 107 did not attract sufficient support. It was stated that recommendation 107 was important since it provided a basic rule as to the time when location of the assets or the grantor should be determined. It was explained that the relevant time was not the same for creation and third-party effectiveness, since creation involved a single point of time while third-party effectiveness could be achieved at one time and lost thereafter. It was also said that the concern as to the exact meaning of the expression “time of creation”, which was a matter of the applicable substantive law and was discussed in the chapter of the guide dealing with the creation of the security right as between the parties, could be addressed in the commentary. It was also observed that the exact meaning of the expression “the issue arises” could also be explained in the commentary by reference to specific examples (e.g. the relevant time for determining the law applicable to third-party effectiveness of a security right in the case of the insolvency of the grantor should be the time of commencement of the insolvency proceeding).

**Recommendation 109 (*renvoi*)**

21. There was general agreement in the Working Group with the substance of recommendation 109. As to its formulation, the suggestion to replace the words “conflict of laws” with the words “choice of law” in order to avoid inadvertently covering issues such as the issue of characterization, did not attract sufficient support. It was stated that the expression “conflict of laws” was widely used and easily understood, while the expression “choice of law” could be misunderstood as meaning choice of law by the parties. Because of its importance for the conflict-of-laws recommendations of the guide, it was agreed that recommendation 109 could be retained in that chapter.

**Recommendation 110 (competing claimant)**

22. There was general support in the Working Group for the substance of recommendation 110. As to its formulation, it was agreed that: discussion of paragraph (a bis) should be postponed until the Working Group considered the chapter on acquisition financing; in paragraph (c), reference should be made to the “insolvency representative”; and in paragraph (d), which should be retained without the square brackets, reference should be made to “a buyer or any other transferee” of the encumbered assets. As

recommendation 110 included the definition of a term used in other chapters of the guide, it was agreed that it should be placed in chapter I with the other definitions of the guide.

**Recommendation 111 (extent of party autonomy with respect to governing law)**

23. It was noted that recommendation 111 was intended to recognize the freedom of the parties to choose the law applicable to their rights and obligations as between them arising from the security agreement before default. As the expression “mutual rights and obligations of the parties” had been taken from article 28 of the United Nations Assignment Convention which in turn originated from article 12 (1) of the Rome Convention on the Law Applicable to Contractual Obligations, it was noted that recommendation 111 covered in principle contractual issues. There was general support in the Working Group for that understanding of the substance of recommendation 111.

**Recommendation 112 (law governing the mutual rights and obligations of the parties in the absence of agreement of the parties)**

24. It was agreed that, in the absence of a choice of law by the parties, their mutual rights and obligations arising from the security agreement should be governed by the law governing the security agreement. It was stated that such an approach was appropriate, since the mutual rights and obligations of the parties arose from the security agreement and was clearer than the similar expression “the law of the State with which the security agreement is most closely connected”.

**Recommendation 113 (substantive enforcement matters)**

25. Support was expressed for alternatives A (law of the forum), C (law governing the contractual relationship of the parties) and D (law governing the mutual rights and obligations of the parties).

26. In favour of alternative A, it was stated that application of the law of the forum to enforcement matters was appropriate since it would result in the application of the law governing remedies (and thus render unnecessary the distinction between procedural and substantive enforcement matters), the law of the likely location of the assets and the law which parties would expect to be applicable. It was also observed that alternatives C and D created uncertainty, as third parties could not easily ascertain what law governed the contractual relationship or the mutual rights and obligations of the parties to a specific security agreement, and could result in the application of more than one law in situations where enforcement was sought by more than one creditor.

27. The suggestion was also made that alternative A could be revised to provide that, while enforcement should be subject to the law of the forum, the effectiveness and priority of a security right under other law should be respected in the same way they would be respected under recommendations 115 and 116 in the case of enforcement in the insolvency of the grantor.

28. In favour of alternatives C and D, it was observed that they treated enforcement issues as part of the bargain between the secured creditor and the grantor, and referred them to the law of a single and easily determinable jurisdiction. That was said to enhance certainty for the secured creditor with respect to the law applicable to the most important matter for which the security right was created, i.e. the protection of the secured creditor in the case of default. It was also said that alternative A would create uncertainty, as parties could not easily determine at the time of the conclusion of the security agreement where

enforcement might take place and as enforcement involved various steps that could be subject to more than one law if the encumbered assets were in different countries.

29. As between alternatives C and D, one view was that alternative D was preferable since it avoided the distinction between substantive and procedural enforcement issues and referred more directly to specific enforcement steps. Another view was that alternative C was preferable since it appropriately referred to the mandatory rules of the forum in general, without highlighting specifically the need for the consent of the grantor (or other person in possession of the assets) to be obtained in the case of extrajudicial enforcement.

30. After discussion, it was agreed that alternative A should be retained along with a variation consistent with the approach taken in the case of enforcement in the insolvency of the grantor. It was also agreed that alternatives C and D or a combination thereof should also be retained.

#### **Recommendation 114 (procedural enforcement matters)**

31. The Working Group noted that recommendation 114 would not be necessary if alternative A or alternative D of recommendation 113 were adopted.

#### **Recommendations 115 (impact of insolvency on conflict-of-laws rules) and 116 (enforcement in insolvency proceedings)**

32. Due to the lack of sufficient time, the Working Group decided to postpone discussion of recommendations 115 and 116.

### **B. General remarks**

33. Having completed its discussion of the recommendations, the Working Group requested the Secretariat to adjust the general remarks of the chapter on conflict of laws to the recommendations.

## **Chapter XII. Acquisition financing devices (A/CN.9/WG.VI/WP.17 and Add.1)**

### **A. General remarks**

34. The Working Group confirmed its decision in favour of a functional approach (see A/CN.9/WG.VI/WP.16, rec. 6), according to which all devices performing security functions would be covered in the guide. In addition, the Working Group agreed that the functional approach could be implemented either by integrating under a single notion of security right all devices performing security functions and subjecting them to the rules of the secured transactions law (“integrated approach”) or by preserving the various forms of devices performing security rights without subsuming them into a unitary notion of security right but subjecting them to certain rules of secured transactions law (“non-integrated approach”). It was stated that States with a developed legal system and a mature credit economy might prefer the non-integrated approach (which would require some coordination between secured transactions and other law), while other States that were not concerned about revising other law and needed to develop a credit economy might prefer the integrated approach (which might be easier to implement).

35. Moreover, it was widely felt that the guide needed to treat all the possible providers

of acquisition financing equally so as to enhance competition that should decrease the cost and increase the availability of credit. At the same time, it was agreed that the importance of retention of title and financial leases should be emphasized, in particular for small- and medium-size businesses, for which suppliers and lessors might be, in some economies, the main or even the only affordable source of credit. It was also generally understood that the guide should focus on the rights and obligations of the parties and on ensuring certainty and transparency in that regard rather than on determining which creditor was the owner of an asset.

36. After a discussion of the key points that should be emphasized in the general remarks, the Working Group proceeded to discuss the recommendations.

## **B. Recommendations**

### **Recommendation 1 (equivalence of acquisition financing devices to security rights)**

37. While some preference was expressed for one or the other approach, it was generally agreed that both the integrated and the non-integrated approach should be recommended to States. At the same time, it was widely felt that recommendation 1 should be revised to better reflect the two approaches. As to the terminology, preference was expressed for the general term “acquisition financing” to cover retention of title, purchase-money lending arrangements and financial leases. The Working Group deferred consideration of the question of the placement of the recommendations relating to acquisition financing in the guide until it had completed its consideration of those recommendations.

### **Recommendation 2 (creation of acquisition security rights as between the parties)**

38. While recommendation 2 received sufficient support, a number of concerns were also expressed. One concern was that, by failing to require a signed writing, recommendation 2 could create uncertainty and litigation. In response, it was stated that recommendation 2 accomplished its policy objectives to provide certainty with respect to the creation of an acquisition security right, while at the same time accommodating the needs of retention-of-title and similar practices. It was observed, however, that if signature was not required, that could increase the due diligence costs which the secured creditor would pass on to the borrower, a matter that needed to be clarified in the commentary on recommendation 2. For that reason, it was widely felt that recommendation 2 should not apply to non-acquisition security rights.

39. Another concern was that, by requiring some form of writing, recommendation 2 was inconsistent with the United Nations Convention on Contracts for the International Sale of Goods (CISG), which required no writing. In response, it was observed that recommendation 2 dealt with the retention-of-title agreement, the security agreement and the financial lease agreement, and not with the sales contract.

40. Yet another concern was that, while recommendation 2 might be appropriate if a State adopted an integrated approach, it might not be sufficient if a State adopted a non-integrated approach. It was mentioned, for example, that the term “grantor” might be confusing in the context of sales or other law, under which both the seller and the buyer had ownership rights and no one granted to the other a security right. It was also pointed out that the impact of recommendation 2 on sales or other law was not clear, as recommendation 2 did not specify the consequences of the failure of the seller to meet the form requirements of recommendation 2. In response, it was said that, as recommendation

2 introduced a very low threshold, it would be met in most commercial sales transactions with retention-of-title clauses.

41. However, it was agreed that, in order to address that concern, the recommendation or the commentary should clarify the consequences of the failure of the seller to meet the form requirements of recommendation 2. With respect to the exact nature of these consequences, differing views were expressed. One view was that title should pass to the buyer who should then be able to grant a security right in the goods to a third party. Another view was that, as the sales contract might be null and void as a result of the invalidity of the retention-of-title agreement which would be of the essence for the sales contract, title would remain with the seller. As a result, if the buyer had given any security rights in the goods to third parties, these security rights would be non-existing, as the buyer would have no right in the encumbered assets.

42. Yet another view was that, if the form requirements of recommendation 2 were not met and the buyer granted a security right to a third party that took all the necessary steps to obtain an effective and enforceable security right, the secured creditor's claim would have priority over the claim of the seller. It was stated that the guide did not need to interfere with sales and property law and go as far as to suggest that title passed to the buyer (which was not necessary as the buyer could grant a security right even without being an owner; see recommendation 12 in A/CN.9/WG.VI/WP.16).

43. In addition, it was said that considering that title remained with the seller would undermine the whole regime envisaged in the guide, as a secured creditor that would have followed all the rules recommended in the guide would be deprived of its priority. There was sufficient support in the Working Group for the discussion of these matters in the commentary on recommendation 2. There was also sufficient support for the suggestion that the commentary should alert States that there might be an impact on their sales or property law even if they adopted a non-integrated approach.

44. In that connection, it was stated that the discussion of the consequences of the failure of the parties to meet the form requirements set out in recommendation 2 (see paras. 40-43 above) had shown the difficulty of following a non-integrated approach and should lead the Working Group to reconsider its position to recommend two alternative approaches. In response, it was observed that the problem of the consequences of non-compliance with form requirements would be resolved if no form requirements were imposed for the creation of an acquisition security right.

45. After discussion, the Working Group generally agreed with the substance of recommendation 2. It was also agreed that the commentary should discuss the impact of recommendation 2 in the context of an integrated and a non-integrated approach to secured transactions law. In addition, while it was widely felt that the threshold of the form requirements under recommendation 2 was so low that most commercial sales transactions with retention-of-title clauses, purchase-money lending arrangements and financial leases would meet it, it was agreed that it would be useful for the commentary to discuss the consequences of the failure of the acquisition financier (i.e. the seller, the purchase-money lender or the financial lessor) to meet those form requirements.

### **Recommendation 3 (effectiveness of acquisition security rights against third parties)**

46. While the substance of recommendation 3 was found to be generally acceptable, a number of suggestions were made. One suggestion was that the grace period should be longer than 20 or 30 days. It was stated that, in situations where a paper-based registry or a registry in another country was involved, a grace period of 50 or 60 days would be more

appropriate. It was observed that, in all those situations, the acquisition financier would need time to familiarize itself with the registration requirements, obtain legal advice as to the foreign law and work its way through an unknown foreign bureaucracy. That suggestion was objected to. It was stated that the grace period constituted a compromise in the sense that additional credit to a buyer, grantor or financial lessee would be delayed to protect the interests of the acquisition financier. It was also stated that, in a paper-based system, a grace period of 20 or 30 days would be sufficient, while, in an electronic system in which users could register directly from their computers without any intervention from the registry, the grace period should be much shorter (2-3 days). It was pointed out, however, that each State would have to determine the exact length of the grace period, taking into account local circumstances, needs and capabilities. After discussion, it was agreed that the commentary should elaborate on the considerations for determining the length of the grace period and the recommendation should refer to a grace period that would be as short as possible under the circumstances prevailing in the enacting State.

47. Another suggestion was that the starting point of the grace period (i.e. the time of delivery of possession of the goods) should be further clarified. There was sufficient support for that suggestion. It was stated that, in line with the recommendations of the guide on creation as between the parties and effectiveness as against third parties of a security right, reference should be made to delivery of actual possession of the goods. However, it was widely felt that the recommendation should not go any further as the exact meaning of delivery was a matter of sales law. A related suggestion was that, in situations in which a person was in possession of the goods in another capacity, the grace period should start when that person became a buyer, a grantor or a financial lessee. There was sufficient support for that suggestion.

48. Yet another suggestion was that the registration should be effective at the time the notice was submitted to the registry and not at the time the notice was made available by the registry to searchers. While support was expressed for that suggestion, it was noted that the time of effectiveness of the registration was a general matter that should be dealt with in the chapter on effectiveness of a security right against third parties.

49. Yet another suggestion was that the consequence of the failure of the acquisition financier to register a notice about the acquisition security right in the secured transactions registry should be discussed in the commentary both in the context of an integrated and a non-integrated approach. That suggestion attracted sufficient support.

#### **Recommendation 4 (exceptions)**

50. There was support in the Working Group for an exception from the principle of registration for acquisition finance transactions relating to consumer goods, i.e. goods bought by individuals for personal, family or household purposes (recommendation 4 (a)). The concern was expressed, however, that in its current formulation the exception for transactions relating to consumer goods made it necessary for the legislator to monitor and amend the value of consumer goods transactions that should not be exempted. In order to address that concern, it was suggested that reference should be made to consumer goods with a resale value, coupled by an indicative list of such items as vehicles, aircraft, boats, trailers and the like. It was stated that, under such an approach, transactions in small-value consumer goods would be exempted from registration since there was no market for the financing of the resale of such consumer goods. It was also observed that high-value consumer goods subject to a title registry, such as motor vehicles, would also be exempted from registration in the secured transactions registry.

51. With respect to the exceptions from the principle of registration for small-value and short-term transactions (recommendation 4 (b) and (c)), differing views were expressed as to whether they should be retained. One view was that these exceptions should be retained since they helped avoid burdening parties with unnecessary formalities and registries with excessive information. As to the small-value exception, it was suggested that the value should be fixed at a realistic level to protect transactions in which registration was unnecessary. With regard to the short-term exception, it was suggested that the term should be fixed at 180 days.

52. The prevailing view, however, was that these exceptions should be deleted. It was stated that an exception relating to the amount of the secured obligation or the time of payment would make it necessary for the legislator to monitor and revise the amount and would introduce complexity and litigation as the amount and the time payment would change from time to time. In addition, it was observed that the exception for transactions relating to consumer goods was sufficient to exclude small-value transactions and the grace period was sufficient to exclude short-term transactions. Moreover, it was said that an exception for short-term transactions would be very difficult to implement, in particular in inventory-related transactions in which the turnover involved a few days but could not be determined with certainty as the financier financed on the basis of invoices and could not monitor the actual movement of inventory on a daily or short-time basis. It was also mentioned that the exception for short-term or small-value transactions would be prone to manipulation, since parties to long-term or high-value financing arrangements could structure their relationship in short terms or small amounts to avoid registration. After discussion, the Working Group agreed that the exceptions for small-value and short-term transactions should be deleted.

**Recommendation 5 (priority of acquisition security rights over pre-existing non-acquisition security rights in future goods other than inventory)**

53. The Working Group agreed with the substance of the recommendation that the acquisition security right should have priority over a pre-registered non-acquisition security right in future goods other than inventory if the acquisition financier retained actual possession of the goods or registered a notice within the specified grace period after delivering the goods to the buyer, grantor or financial lessee, or if the acquisition transaction was not subject to registration according to recommendation 4. It was agreed that reference should be made to a pre-registered (rather than to a pre-existing) non-acquisition security right, since, as advance registration was possible, such a right could be created even after registration took place. It was also agreed that reference should be made to delivery of actual possession to the buyer, grantor or financial lessee acting in that capacity (see para. 47 above).

**Recommendation 6 (priority of acquisition security rights over pre-existing acquisition security rights in future inventory)**

54. There was general support in the Working Group for the substance of the recommendation that the acquisition security right should have priority over a pre-registered (rather than pre-existing) non-acquisition security right in future inventory if the acquisition financier retained actual possession of the inventory or, before delivery of the actual possession of the inventory to the buyer, grantor or financial lessee acting in that capacity, registered a notice and notified pre-registered inventory financiers. In response to a number of questions, it was stated that the notification did not need to describe the assets in specific terms or mention that it related to an acquisition security right; the notification was a condition to the right of the acquisition financier being given super-priority; and



failure to notify a pre-registered inventory financier would result in that financier's right having priority over the acquisition financier's right.

55. The view was expressed that the acquisition financier should be allowed to register within a grace period after delivery of the inventory to the buyer, grantor or financial lessee. It was stated that, without such a grace period, the acquisition financier would not finance the acquisition of inventory by the buyer, grantor or financial lessee. It was also observed that, in the absence of a grace period, the acquisition financier would have to delay the delivery of the inventory until it had the opportunity to register and notify pre-registered inventory financiers, which could take several days. The prevailing view, however, was that a grace period would inadvertently result in inventory financiers withholding credit until the expiry of the grace period, since inventory was fungible and turned over so quickly that inventory financiers would be unable to monitor its movement. It was observed that the acquisition financier would not be prevented from extending credit because of the lack of a grace period since it could obtain super-priority by first registering and notifying pre-registered inventory financiers, and then delivering the goods to the buyer, grantor or financial lessee. It was also stated that, unlike equipment, it was not easy to distinguish old from new inventory and to determine the time of delivery since the inventory financier could not monitor constantly moving assets, such as inventory. In response to a question, it was noted that recommendation 3, which allowed a grace period for the registration of acquisition security rights in both inventory and equipment, provided a super-priority to the acquisition financier only over creditors that obtained a security right within the grace period. It was also noted that, while the question whether notification was effective at the time it was sent or received was a matter of other law, it should be addressed by the legislator.

56. After discussion, the Working Group decided that no grace period should be allowed for the registration of acquisition security rights in inventory.

#### **Recommendation 7 (cross-collateralization)**

57. There was general support in the Working Group for the recommendation that the acquisition financier should not lose its super-priority just because it had a non-acquisition security right in other assets of the buyer, grantor or financial lessee securing the same obligation as that secured by the acquisition security right or had a non-acquisition security right in the same assets securing, however, other (non-acquisition) obligations of the buyer, grantor or financial lessee.

#### **Recommendation 8 (priority of acquisition security rights in proceeds of inventory)**

58. With respect to recommendation 8, differing views were expressed. One view was that recommendation 8 should be retained in its current formulation, providing that the super-priority right of an acquisition financier should not extend to proceeds of inventory (e.g. receivables). It was stated that such an approach would allow the buyer, grantor or financial lessee to obtain other kinds of financing, such as receivables financing, with which it could pay off the inventory debt or other working expenses. Another view was that the super-priority of acquisition security rights in inventory should be extended to proceeds of inventory (in all cases or only if agreed between the acquisition financier and the buyer, grantor or financial lessee). However, the prevailing view was that the super-priority of an acquisition security right should extend to proceeds of the acquired inventory, provided that the acquisition financier notified financiers that had previously registered a security right in assets of the same kind as the proceeds. It was stated that such an approach was consistent with the approach taken with respect to super-priority in inventory, would avoid double financing and would protect pre-registered financiers to the

extent that the super-priority would relate to identifiable proceeds. While some doubt was expressed with regard to those advantages of that approach, after discussion, the Working Group decided that recommendation 8 should be recast to provide super-priority to acquisition security rights in proceeds of inventory, provided that the acquisition financier would notify pre-registered financiers with a security right in assets of the same kind as the proceeds.

### **Recommendations 9 and 10 (enforcement)**

59. The Working Group agreed with the substance of recommendation 9 that, upon default by the grantor, the acquisition financier would be entitled to repossess and dispose of the goods subject to the rules applicable to the enforcement of non-acquisition security rights generally. It was stated that such a rule would be appropriate for a State that adopted an integrated approach. However, it was also observed that the remedies available to an acquisition financier should be discussed in the commentary with appropriate cross-references to the chapter on default and enforcement, since even in the context of an integrated approach, non-acquisition financiers could be given special rights as long they were all treated equally.

60. As to recommendation 10, differing views were expressed. One view was that it appropriately reflected an approach taken in States that treated acquisition financing devices as title devices. It was stated, however, that not all such systems took the approach recommended in recommendation 10. Another view was that, in order to better reflect the non-integrated approach, recommendation 10 or the commentary needed to discuss in more detail how acquisition financing devices would be enforced compared to non-acquisition financing devices. Such an approach would require, for example, that the recommendation or the commentary specify the remedies available to acquisition financiers (e.g. how would an acquisition financier repossess the goods and what rights would accrue to that financier after repossession), providing guidance as to the impact of secured transactions law on sales and property law. It was stated that equivalence of rights of acquisition financiers with the rights of non-acquisition financiers was a key policy objective that could not be achieved if, for example, a deficiency claim was not recognized for the acquisition financier or if the financier was given the right to retain any surplus. It was also observed that, in the absence of a deficiency claim, a financier would have an incentive to request more encumbered assets, limiting the grantor's possibility to use its assets so as to obtain credit from other creditors, which would be inconsistent with the overall objective of the guide to increase the availability of secured credit. In addition, it was said that there was no economic or other justification in providing the acquisition financier with a right to retain a surplus, a result that would amount to unjust enrichment. Moreover, it was pointed out that another way to achieve equivalence between acquisition financiers and non-acquisition financiers was to refer to the principles reflected in the chapter on default and enforcement, such as the principle that the acquisition financier should enforce its rights in good faith and in a commercially reasonable manner.

61. After discussion, it was agreed that recommendation 10 should be recast to address the substance of a non-integrated approach, treating all acquisition financiers equally and in a manner that would be equivalent with the manner non-acquisition financiers would be treated.

### **Recommendations 11 and 12 (insolvency)**

62. There was sufficient support in the Working Group for recommendation 11. It was stated that, by suggesting that acquisition security rights should be treated in the same way as non-acquisition security rights, recommendation 11 reflected what was called in earlier

discussions the integrated approach (i.e. the same set of rules would apply to both acquisition and non-acquisition security rights and any special rules would apply to all acquisition security rights equally).

63. Some support was expressed for recommendation 12. It was stated that it appropriately reflected the approach taken in many legal systems that treated acquisition financing devices as title devices. However, it was suggested that recommendation 12 should be recast to address the rights of the acquisition financier in the case of insolvency rather than the duties of the insolvency representative.

64. At the same time, a number of concerns were expressed with respect to recommendation 12. One concern was that recommendation 12 did not sufficiently reflect the only other alternative approach approved by the Working Group (the non-integrated approach), which involved the application to acquisition security rights of a set of rules that was different from, but equivalent to, the set of rules applicable to non-acquisition security rights. Another concern was that, by suggesting what an insolvency representative could or could not do, recommendation 12 inappropriately interfered with insolvency law.

65. Yet another concern was that, to the extent that recommendation 12 might be read as suggesting that the insolvency representative was obliged to decide quickly to perform or reject the contract, it might be inconsistent with the UNCITRAL Legislative Guide on Insolvency Law ("the UNCITRAL Insolvency Guide"), which allowed the insolvency representative sufficient time to determine, *inter alia*, whether the business should be liquidated or reorganized, and whether one or the other contract should be performed or rejected. In addition, it was stated that recommendation 12 might not be fully in line, for example, with recommendation 54 of the UNCITRAL Insolvency Guide, which provided that the insolvency representative might use assets owned by a third party and in the possession of the grantor, provided that certain conditions were satisfied (e.g. the interests of the third party would be protected against diminution in the value of the asset and the costs under the contract of continued performance of the contract and use of the asset would be paid as an administrative expense).

66. In that connection, it was stated that a treatment of acquisition security rights that would be consistent with the treatment of third-party owned assets in the UNCITRAL Insolvency Guide could form part of the non-integrated approach. It was observed that, in the context of such an approach, it was crucial that nominal differences would not be allowed to lead to different outcomes and that, in order to increase the availability of credit, all acquisition security rights would be treated equally, even if somehow differently from non-acquisition security rights. It was also said that the recommendations as to the treatment of acquisition security rights in insolvency should balance the overall objective of the guide to increase the availability of secured credit with the objectives of the UNCITRAL Insolvency Guide to maximize the value of the estate for the benefit of all creditors and to facilitate reorganization.

67. After discussion, it was agreed that all acquisition financing devices should be treated equally, whether a State integrated them in its secured transactions law or to a different but equivalent set of rules. In addition, it was agreed that on the treatment of acquisition devices to the guide should be consistent with the UNCITRAL Insolvency Guide. Moreover, it was agreed that the question that the guide should address was which recommendations of the UNCITRAL Insolvency Guide should apply to acquisition financing devices, those dealing with security rights or those dealing with third-party owned assets. The Secretariat was requested to prepare a revised version of recommendations 11 and 12 that would reflect the understanding of the Working Group.

**Recommendations 13 and 14 (conflict of laws)**

68. In response to a question, it was noted that if a State took an integrated approach, recommendations 13 and 14 would not be required as they repeated the recommendations applicable to non-acquisition security rights. While it was noted that these recommendations would be necessary if a State took a non-integrated approach, it was agreed that that result could be achieved by a reference to the rules applicable to non-acquisition security rights (with the exception of recommendation 102, which dealt with the law applicable to security rights in intangible property).

**Recommendation 15 (transition)**

69. It was stated that acquisition financiers should be given a short period of time after the effective date of the new law, within which they could register their rights in the secured transactions registry and preserve their priority. However, it was observed that there should not be a longer transition period for acquisition security rights, as such an approach would inadvertently result in delaying possibly for years the application of the new law. The Working Group agreed that transition issues should be discussed in the chapter on transition.

**Chapter XVI. Security rights in bank accounts  
(A/CN.9/WG.VI/WP.18 and Add.1)****A. General remarks**

70. Broad support was expressed for including bank accounts within the scope of the guide. It was stated that a modern regime on secured transactions could simply not ignore bank accounts. It was also observed that lack of an appropriate legal regime on security rights in bank accounts was an obstacle to business parties using one of their most important assets to obtain credit. There was also support for the suggestions that: the discussion on bank accounts should be integrated in the relevant chapters of the guide (on scope, creation, third-party effectiveness, priority and so on); and the general recommendations should apply, unless special rules were necessary, the reasons for which needed to be carefully considered.

**B. Recommendations**

71. The Working Group proceeded to discuss the recommendations with respect to security rights in bank accounts.

**Paragraph 81 (scope of bank account)**

72. It was suggested that the recommendation and the commentary should clarify that internal bank accounts were not covered.

**Paragraph 82 (coordination with securities law)**

73. There was broad support for the idea that bank accounts should be clearly distinguished from securities accounts. While there was support that the legal regime on bank accounts should be identical or at least coordinated with the legal regime on securities, it was agreed that the relevant wording in paragraph 82 should be retained in

square brackets until the Working Group had the opportunity to consider the substance of the rules recommended. It was also agreed that the reference to specific legal texts in paragraph 82 should be deleted.

#### **Paragraph 83 (creation)**

74. There was broad support for the proposition that the general recommendations dealing with the creation of security rights should apply to the creation of a security right in a bank account. It was noted that regulatory and consumer-protection law would, in any case, not be affected.

75. The Working Group agreed with the substance of paragraph 83 and requested the Secretariat to revise the commentary to take into account the comments expressed and the suggestions made, in particular the need to explain: (i) the application of the general rules to bank accounts; (ii) any special rules with respect to anti-assignment agreements; and (iii) any exceptions introduced by consumer-protection laws.

#### **Paragraph 84 (third-party effectiveness)**

76. There was support in the Working Group for paragraph 84. The Working Group requested the Secretariat to further explain in the commentary the method of control as an alternative to registration, in particular when obtained by a transfer of the bank account to the secured creditor. It was also agreed that the depositary bank should be under no obligation to respond to queries by third parties as to the existence of a control agreement.

#### **Paragraphs 85 and 86 (priority)**

77. The Working Group agreed with the substance of paragraphs 85 and 86.

#### **Paragraph 87 (enforcement)**

78. The Working Group agreed with the substance of paragraph 87, providing for extra-judicial enforcement by the secured creditor in control of the bank account with limited and clearly prescribed exceptions (including insolvency). While it was agreed that the commentary explained the special character of a bank account and should be retained, it was also agreed that, to the extent a recommendation repeated the general rule, it might not be necessary.

#### **Paragraph 88 (rights and duties of the depositary bank)**

79. There was support in the Working Group for paragraph 88 that the depositary bank could not be bound to enter into a control agreement or assume any other duties against its consent. It was suggested that the recommendation should be incorporated in paragraph 83 dealing with the creation of a security right in a bank account.

#### **Paragraph 89 (applicable law)**

80. It was agreed that the recommendation should contain two alternatives, the law governing the account agreement and the law of the location of the depositary bank which had the closest connection to the bank account. It was also agreed that reference should be retained within square brackets to the grantor's location for third-party effectiveness obtained by notice filing, if notice filing was not recognized by the otherwise applicable law.

## **V. Future work**

81. The Working Group noted that its eighth session was scheduled to take place in Vienna from 5 to 9 September 2005 and that its ninth session was scheduled to take place in New York from 30 January to 3 February 2006, those dates being subject to approval by the Commission at its thirty-eighth session scheduled to take place in Vienna from 4 to 15 July 2005.

## A/CN.9/WG.VI/WP.16

**E. Report of the Secretary General on recommendations  
of the draft legislative guide on secured transactions,  
submitted to the Working Group on  
Security Interests at its seventh session**

**(A/CN.9/WG.VI/WP.16 and Add.1) [Original: English]**

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**Recommendations of the draft Legislative Guide on Secured  
Transactions**

**I. Key objectives**

**Purpose**

The purpose of the recommendations on key objectives is to provide a broad policy framework for the establishment and development of an effective and efficient secured transactions law. These recommendations could be included in a preamble of the secured transactions law (hereinafter referred to as “the law”).

**Key objectives**

1. The following key objectives should be considered:
  - (a) Promote secured credit;
  - (b) 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;
  - (c) Obtain security rights in a simple and efficient manner;
  - (d) Recognize party autonomy;
  - (e) Provide for equal treatment of creditors;
  - (f) Validate non-possessory security rights;

- (g) Encourage responsible behaviour by enhancing predictability and transparency;
- (h) Establish clear and predictable priority rules;
- (i) Facilitate enforcement of creditor's rights in a predictable and efficient manner;
- (j) Balance the interests of the affected persons; and
- (k) Harmonize secured transactions laws, including conflict of laws rules.

## II. Scope of application

### Purpose

The purpose of the scope provisions of the law should be to specify the parties, the security rights, the secured obligations and the assets to which the law applies.

### Parties, security rights, secured obligations and assets covered

2. The scope of the law should be as broad as possible with respect to the parties, and the types of security rights, secured obligations and encumbered assets covered. Any exceptions should be limited and clearly stated in the law.

3. In particular, the law should apply to:

(a) Legal and natural persons, including consumers, without, however, affecting their rights under consumer-protection legislation;

(b) Property rights created contractually to secure all types of obligations, including future obligations, fluctuating amounts of obligations and obligations described in a generic way;

(c) Possessory and non-possessory security rights in movable property and fixtures securing payment or other performance of one or more obligations, present or future, determined or determinable;

(d) All types of movable assets and fixtures, tangible or intangible, not specifically excluded in the law, including inventory, equipment and other goods, receivables, [negotiable instruments, such as cheques, bills of exchange and promissory notes, negotiable documents, such as bills of lading, bank accounts, letters of credit and intellectual property rights; *[Note to the Working Group: If the Working Group decides that such types of asset should be covered in the draft Guide, it may wish to review the recommendations to ensure that they are appropriate for those assets as well and to add special recommendations where necessary.]*

(e) Security rights acquired by way of transfer of title and all other types of rights securing the payment or other performance of one or more obligations, irrespective of the form of the relevant transaction and whether ownership of the encumbered assets is held by the secured creditor or the grantor, including retention of title, financial leases and hire-purchase agreements; and

(f) To some extent, sales of receivables.

4. The law should not apply to security rights in:

(a) Securities;



- (b) Real property, with the exception of fixtures;
- (c) Wages;
- (d) [...].

*[Note to the Working Group: The Working Group may wish to consider whether a recommendation should be included here at all providing that the law does not override international obligations of the enacting State arising out of treaties or international agreements and if so, whether such recommendation should refer to all or just to specific treaties or international agreements.]*

### **III. Basic approaches to security**

#### **Purpose**

The purpose of the recommendations on basic approaches to security is to specify that the law follows a unitary and functional approach.

#### **Unitary approach**

5. The law should include a comprehensive and consistent set of provisions on non-possessory security rights in tangibles and intangibles. The law should also provide for possessory security rights in tangibles.

#### **Functional approach**

6. The law should address all devices that perform security functions, including the transfer of title for security purposes, retention of title, financial leases and hire-purchase agreements, in the same way as secured transactions, except to the extent otherwise provided in the law.

### **IV. Creation of the security right as between the parties**

#### **Purpose**

The purpose of the provisions of the law dealing with creation is to specify the way in which a security right in movable property is created as between the grantor and the secured creditor.

#### **Security agreement**

7. The law should specify that a security right, including a purchase-money security right, is created by agreement between the grantor and the secured creditor.

#### **Delivery of possession**

8. The creation of a possessory security right requires, in addition to an agreement, the delivery of possession of the assets to be encumbered to the secured creditor or a third person (other than the grantor or an agent or employee of the grantor) that holds the assets on behalf of the secured creditor.

**Minimum contents of the security agreement**

9. The law should provide that the security agreement must, at a minimum, identify the secured creditor and the grantor, and reasonably describe the secured obligation and the assets to be encumbered. A generic description of the secured obligation and the encumbered assets should be sufficient.

**Form**

10. The law should provide that the security agreement by which a non-possessory security right is created must be in writing and signed by the grantor. The law should specify that that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference (see article 6 of the UNCITRAL Model Law on Electronic Commerce and article 9, para. 2, of the draft Convention on Electronic Contracting).

11. The law should also specify that, unless the law provides otherwise, where the law requires a signature of a person, that requirement is satisfied in relation to an electronic communication if:

(a) A method is used to identify that person and to indicate that person's approval of the information contained in the electronic communication message; and

(b) That method is as reliable as was appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement.

*[Note to the Working Group: The Working Group may wish to consider whether recommendation 2 contained in A/CN.9/WG.VI/WP.17/Add.1 should apply to agreements for the creation of both purchase-money and non-purchase money security rights.]*

**Assets and obligations subject to a security agreement**

12. The law should make it possible to secure all types of obligations, including future obligations and fluctuating amounts of obligations. It should also make it possible to provide security in all types of asset, including assets which the grantor may not own or have the power to dispose of, or which may not exist at the time of the security agreement, and in proceeds. Any exceptions to these rules should be limited and described clearly in the law.

**Proceeds**

13. The law should provide that, unless otherwise agreed by the parties to the security agreement, the security right in the encumbered assets extends to the proceeds to the extent that the proceeds are identifiable in accordance with rules dealing with tracing that are also included in the law. [The security right extends to fruits of encumbered assets, such as [...], only if the parties so provide in the security agreement.]

**Fixtures, accessions and commingled goods**

14. The law should provide that a security right may be created in fixtures [under this law or real property law] or accessions, or continue in encumbered assets that become fixtures or accessions.

15. The law should also provide that a security right may not be created in goods that are physically united with other goods in such a way that their identity is lost in a product or mass (“commingled goods”). However, if encumbered assets become commingled goods, the security right becomes a security right in the mass or product (see also rec. 37 on third-party effectiveness and rec. 42 on priority).

#### **Time of creation**

16. The law should provide that a possessory security right is created at the time the grantor delivers possession of the assets to be encumbered to the secured creditor or a third person (other than the grantor or an agent or employee of the grantor) that holds the assets on behalf of the secured creditor, unless the parties otherwise agree.

17. The law should also provide that a non-possessory security right is created at the time the security agreement is made, unless the parties otherwise agree, and a security right in future property is created at the time grantor acquires rights in such property.

*[Note to the Working Group: Reference is made to possession only as tangibles are subject to possession only. However, if the Working Group decides to apply “control” rules to certain types of tangibles, such as letters of credit and certificates of deposit, a reference to “control” may need to be added to the first sentence after “possession”, in the technical meaning of “control”, i.e. the legal authority to direct the disposition of encumbered assets without the need of any further consent or action by the grantor].*

### **V. Effectiveness of the security right against third parties**

#### **Purpose**

The purpose of the provisions of the law on the effectiveness of a security right against third parties is to require an additional step before a security right may become effective against third parties so as to:

- (a) Alert third parties dealing with the movable assets of the grantor of the risk that those assets may be encumbered by a security right; and
- (b) Provide a temporal event for ordering priority among secured creditors and between a secured creditor and other classes of competing claimants.

#### **Methods for achieving third-party effectiveness**

18. The law should provide that a security right is effective against third parties only when one of the following events occurs:

- (a) Registration of a notice of the security right in a general security rights registry;
- (b) Dispossession of the grantor if the encumbered assets are specific items of tangible movable property;
- [(c) Transfer of control to the secured creditor if the encumbered assets are [certain intangible obligations, other than receivables, owing to the grantor by a third person] [a bank account];]
- (d) Registration of a notice of the security right in a specialized title registry if the encumbered assets are specific items of movable property for which title is established,

under other law of the enacting State, by registration in such a registry;

(e) Entry of a notation of the security right on the title certificate if the encumbered assets are specific items of tangible movable property for which, under other law of the enacting State, title is evidenced by a title certificate; [or

(f) ...].

*[Note to the Working Group: The Working Group may wish to consider additional methods for achieving third-party effectiveness (e.g. automatic third-party effectiveness upon creation of a security right in consumer goods. The Working Group may also wish to consider whether, in the case of assets subject to registration in a specialized registry or to a title certificate registration system, in addition to registration in a specialized title registry or a title certificate, registration of a notice in the general secured transactions registry should also be required. The advantage of such an additional registration requirement would be that a search in the secured transactions registry would reveal all security rights in a wide range of assets, including those that are subject to a specialized registration system.]*

19. The law should confirm that different methods for achieving third-party effectiveness may be used for different items or kinds of encumbered assets, whether or not they are encumbered by the same security agreement or by separate security agreements.

#### **Establishment and characteristics of a general security rights registry**

20. The law should provide for the establishment of a general security rights registry having the following characteristics:

(a) Registration is effected by filing a notice of the security right as opposed to a copy of the security documentation;

(b) The record of the registry is centralized; that is, it contains all notices of security rights registered under the secured transactions law of the enacting State;

(c) The registration system is set up to permit the indexing and retrieval of notices according to the name of the grantor or according to some other reliable identifier of the grantor;

(d) The registry is open to the public;

(e) Reasonable public access to the registry is assured through such measures as:

(i) Setting fees for registration and searching at a cost-recovery level; and

(ii) Making available remote modes or points of access;

(f) The registration system is administered and organized to facilitate efficient registration and searching. In particular:

(i) A notice may be registered without verification or scrutiny of the sufficiency of its content;

(ii) If the financial and infrastructural capacity of the enacting State permits, notices are stored in electronic form in a computer database;

(iii) If the financial and infrastructural capacity of the enacting State permits, registrants and searchers have access to the registry record by electronic or similar means, including electronic data interchange, electronic mail, telex, telephone or telecopy; and

(g) The law provides rules on the allocation of liability for loss or damage caused by an error in the administration or operation of the registration and searching system.

#### **Required content of registered notice**

21. To constitute a legally effective registration, the law should require the registered notice to contain only:

(a) The names (or other reliable identifiers) of the grantor and the secured creditor, and their addresses;

(b) A description of the movable property covered by the notice;

(c) The term of the registration; and

[(d) A statement of the maximum monetary amount for which the security right may be enforced [if a State elects that such information is necessary to facilitate subordinate lending.]

#### **Legal sufficiency of grantor name in a registered notice**

22. The law should provide that the name or other identifier of the grantor entered on a registered notice is legally sufficient if the notice can be retrieved by searching the registry record according to the correct legal name or other identifier of the grantor. For this purpose, the law should specify rules for determining the correct legal name or other identifier of individuals and entities.

#### **Legal sufficiency of description of assets covered by a registered notice**

23. The law should provide that a description of the assets covered by a registered notice is legally sufficient if it enables a third person to identify the assets covered by the notice separate from other assets of the grantor.

24. If the assets covered by the notice consist of a generic category or categories of movable property, the law should confirm that a generic description is legally sufficient.

25. If the assets covered by the notice are all the present and after-acquired movable property of the grantor, the law should confirm that it is legally sufficient to describe the charged assets as “all movable property” or by using equivalent language.

#### **Advance registration**

26. The law should confirm that a registration may be made before or after the creation of the security right to which it relates.

#### **One registration for multiple security agreements between the same parties**

27. The law should confirm that a single registration is sufficient for security rights created by all security agreements entered into between the same parties to the extent they cover items or kinds of movable property that fall within the description contained in the registered notice.

**Duration and renewal of registration**

28. The law should specify the duration of registration or permit the duration to be selected by the registrant at the time of registration. The law should provide for the right to successively renew the term of a registration.

**Discharge of registration**

29. The law should adopt a summary procedure to enable the grantor to compel discharge of a registration if no security agreement has been completed between the parties or if the security right has been terminated by full payment or performance of all of the secured obligations. The law should also permit discharge of a registration by agreement of the secured creditor and the grantor.

**Additional rights subject to registration**

30. The law should provide that the following rights are effective against third parties only if notice of the right is registered in the general security rights registry:

[(a) The title of a creditor who retains title to goods to secure payment of the purchase price of the goods or its economic equivalent under a financial lease or hire-purchase agreement;] and

(b) The right of an assignee under an outright assignment of receivables;

[(c) The law may also permit registration of a notice in respect of the following rights for purposes of achieving third-party effectiveness:

(i) A lessor under a lease that is not a financing lease but which extends for a term of more than one year;

(ii) A consignor under a commercial consignment in which the goods are consigned to a consignee as agent for sale other than an auctioneer or that a consignee who does not act as a consignee in the ordinary course of business; and

(iii) A buyer under a sale of goods outside the ordinary course of the seller's business where the seller remains in possession of the goods for more than [thirty] [sixty] [ninety] days;]

**Dispossession of the grantor**

31. The law should provide that, for a possessory security right to be effective against third parties, dispossession of the grantor should be actual and not constructive, fictive or symbolic. Dispossession of the grantor is sufficient only if an objective third person can conclude that the encumbered assets are not in the actual possession of the grantor. Possession by a third person constitutes sufficient dispossession only if the third person is not an agent or employee of the grantor and holds possession for or on behalf of the secured creditor.

**Dispossession of the grantor in the case of tangibles represented by a negotiable document of title**

32. The law should provide that, for a possessory security right in tangibles represented by a negotiable document of title to be effective against third parties, delivery of the document

to the secured creditor constitutes effective dispossession of the grantor during the time that the tangibles are covered by the document.

**[Transfer of control in [intangible obligations] [bank accounts]**

33. The law should provide that a security right in [certain intangible obligations] [bank accounts] may be made effective against third parties through the transfer of control of the [intangible obligation] [bank account] to the secured creditor.

34. [A person who owes a certain intangible obligation to the grantor] [a depository institution with whom the grantor has a bank account] is required to respond, within a [prescribed] [reasonable] time, to a written demand from a creditor of the grantor for confirmation of whether control over [the performance of the intangible obligation] [the bank account] has been transferred to a secured creditor.]

35. If the secured creditor and the [person owing the intangible obligation] [the depository institution] are the same person, the law should confirm that the secured creditor acquires control as soon as the security right is created.]

**Security rights in proceeds**

36. Where the law recognizes a statutory security right in the identifiable proceeds of the originally encumbered assets, the law should provide that the security right in the proceeds becomes effective against third parties as soon as the right in the proceeds is created as between the parties to the security agreement provided that:

- (a) The proceeds take the form of money, negotiable instruments, negotiable documents of title, or receivables [including] [and] bank accounts;
- (b) The proceeds are covered by the description contained in a notice registered in the general security rights registry; or
- (c) The security right in the proceeds is independently made effective against third parties by one of the methods referred to in recommendation 18 within [...] days after the proceeds arise.

**Security rights in fixtures, accessions and commingled goods**

37. The law should provide that a security right in fixtures, accessions and commingled goods becomes effective against third parties by one of the methods referred to in recommendation 18. [*Note to the Working Group: With respect to security rights in fixtures, the Working Group may wish to consider whether a notation in the real property registry should also be required.*] If a security right is effective against third parties at the time when the encumbered assets become accessions or commingled goods, the security right in the encumbered assets or, in the case of commingled goods, in the product or mass remains effective against third parties.

## **VI. Priority of the security right over the rights of competing claimants**

**Purpose**

The purpose of the provisions of the law on priority is to:

- (a) Enable a potential secured creditor to determine, in an efficient manner and

with a high degree of certainty prior to extending credit, the priority that the security rights would have over competing claimants; and

(b) Enable grantors to create more than one security right in the same asset and to thereby use the full value of their assets to facilitate obtaining credit.

### **Scope of priority rules**

38. The law should have a complete set of priority rules covering all possible priority conflicts.

### **Secured obligations affected**

39. The law should provide that the priority accorded to a security right:

(a) Extends to all monetary and non-monetary obligations owed to the secured creditor [up to a maximum monetary amount set forth in the registered notice], including principal, costs, interest and fees, to the extent secured by the security right; and

(b) Is unaffected by the date on which an advance or other obligation secured by the security right is made or incurred (i.e. a security right may secure future advances under a credit facility with the same priority as advances made under the credit facility at the time the security right is made effective against third parties).

### **Priority in after-acquired property**

40. The law should specify that a security right in after-acquired or after-created assets of the grantor has the same priority as a security right in assets of the grantor owned or existing at the time the security right is made effective against third parties.

### **Priority in proceeds**

41. The law should provide that a secured creditor's priority with respect to an encumbered asset extends to the proceeds of the asset subject to the requirements of recommendation 36.

### **Priority in fixtures, accessions and commingled goods**

42. The law should set forth rules governing the relative priority of:

(a) A security right in fixtures over rights with respect to the related immovable property, such as an ownership interest, held by a person other than the grantor, in the immovable property, the right of a purchaser of such immovable property or a security right that extends to the immovable property as a whole;

(b) A security right in accessions over security rights and other rights in the asset to which the accession is affixed; and

(c) A security right in commingled goods over security rights and other rights in the product or mass that results from the commingling.

### **Continuity in priority in the case achieving third-party effectiveness by various methods**

43. The law should provide that, if a security right is made effective against third parties by one method, it is also made effective against third parties by another method, priority



dates as of the time the first method is completed [provided that there was no time gap between completion of the first and the second method].

### **Priority of security rights that are not effective against third parties**

#### **Unsecured creditors**

44. The law should provide that a secured creditor with a security right that is not effective against third parties has [towards third parties no right other than as an unsecured creditor] [priority over unsecured creditors unless the unsecured creditor has taken steps to reduce its claim to a judgement or the grantor has become insolvent].

#### **Secured creditors**

45. The law should provide that:

(a) A security right in an asset that is not effective against third parties is subordinate to a security right in the same asset that is effective against third parties, without regard to the order in which the security rights were created; and

(b) Priority among security rights that are not effective against third parties is determined by the order in which they were created.

### **Priority of security rights that are effective against third parties**

#### **Unsecured creditors**

46. The law should provide that a security right that is effective against third parties has priority over the rights of unsecured creditors.

#### **Secured creditors**

47. The law should provide that:

(a) As between two security rights in the same encumbered asset that are effective against third parties, except as provided in recommendation [on priority of purchase-money security rights], priority is determined by the order in which their respective third-party effectiveness steps occurred, even if one or more of the requirements for the creation of a security right was not satisfied at such time. If one of the security rights is made effective against third parties by possession or control of the encumbered asset, the holder of that security right will have the burden of establishing when it obtained possession or control;

(b) Where a security right may be made effective against third parties by control, that security right has priority over a security right made effective against third parties by any other method;

(c) With respect to negotiable instruments, negotiable documents and money, a security right made effective against third parties by possession or control has priority over a security right made effective against third parties by registration.

#### **Judgement creditors**

48. The law should provide that, if, under applicable law, a judgement creditor, who has taken steps to enforce the judgement, acquires rights in assets of the judgement debtor, a security right that is effective against third parties has priority over the right of the

judgement creditor that is registered after the security right has become effective against third parties, except with respect to amounts advanced by the secured creditor subsequent to a specified number of days after the date on which the judgement creditor registers a notice of its rights.

#### **Buyers of encumbered assets**

49. The law should provide that the right of a buyer of goods is subject to a security right that has become effective against third parties before the sale, unless the secured creditor authorized the sale. However, a buyer of inventory, who buys encumbered inventory in the ordinary course of business of the seller (and anyone whose rights to the encumbered inventory derive from that buyer), takes free of a security right that is effective against third parties in that inventory, even if such buyer has knowledge of the existence of the security right.

#### **Reclamation claims**

50. If the law provides that suppliers of goods have the right to reclaim the goods within a specified time after the buyer becomes insolvent, the law should also provide that such specified time is short, and that the right to reclaim the goods is subordinate to security rights in such goods granted by the buyer that are effective against third parties.

#### **Lessees**

51. The law should address the priority of a security right in a leased asset that is effective against third parties as against the rights of a lessee of such asset.

#### **Holders of promissory notes and negotiable documents**

52. The law should provide that the rights of a [person who by other law takes rights in a promissory note or negotiable document free of claims to it] [holder in due course of a promissory note or negotiable document] takes such asset free of a security right that is effective against third parties.

#### **Holders of rights in money**

53. The law should provide that the rights of a person, who gives value for, and has possession of, money, holds the money free of a security right in the money that is made effective against third parties only by registration.

#### **Statutory (preferential) creditors**

54. The law should limit, both in number and amount, preferential claims that have priority over security rights that are effective against third parties, and to the extent preferential claims exist, they should be described in the law in a clear and specific way.

#### **Holders of rights in assets for improving and storing the assets**

55. If applicable law gives rights equivalent to security rights to a creditor who has added value to goods (e.g. by repairing them) or preserved the value of goods (e.g. by storing them), such rights should be limited to the goods whose value has been improved or preserved that are in the possession of such creditor, and should have priority over pre-existing security rights in the goods that are effective against third parties only to the extent

that the value added by the improvement or preservation directly benefits the holders of the pre-existing security rights.

**Creditors in insolvency proceedings**

56. The law should provide that a secured creditor's priority should continue unimpaired in an insolvency proceeding of the grantor, subject to applicable provisions of the insolvency laws pertaining to preferential claims and avoidance actions.

**Subordination agreements**

57. The law should recognize agreements that alter the priority of security rights, provided that they affect only the persons who actually consent to such alterations. Such agreements should be binding on such persons even in the case of the insolvency of the grantor of the security rights.

## A/CN.9/WG.VI/WP.17

**F. Report of the Secretary General on the draft legislative guide on secured transactions, submitted to the Working Group on Security Interests at its seventh session**

(A/CN.9/WG.VI/WP.17 and Add.1) [Original: English]

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## XII. Acquisition financing devices

### A. General remarks

#### 1. Introduction

1. A retention-of-title seller, by extending credit terms to its buyer, is financing the buyer's acquisition of the goods (equipment or inventory) sold by the seller to the buyer. However, the retention-of-title seller is just one of several financiers that can finance a person's acquisition of goods. Specifically, a lender may provide credit to the buyer for the purpose of enabling the buyer to acquire the goods from the seller. In addition, a lessor who leases goods to its lessee on terms economically equivalent to those of a sale is likewise providing credit to enable the person to acquire the goods.

2. One of the key questions that a State considering law reform in the field of secured transactions must face is how to treat transactions that fulfil the economic function of secured transactions but which are effectuated through devices in which a seller or lessor

retains title to goods until full payment, after which time title to goods is transferred to the buyer or lessee. The answer to this question depends on whether a State wishes to follow: (i) a unitary and functional approach under which transactions performing security functions are treated in essentially the same way (either under separate but substantively identical rules or integrated in the same set of rules as part of the secured transactions law); or (ii) an approach treating transactions on the basis of their form (the label applied by the parties) and not of their real function. This policy decision is bound to affect the rights of third parties (in and outside insolvency proceedings) and, as result, the availability and the cost of credit.

3. The Guide recommends a unitary and functional approach (see Chapter III. Basic approaches to security, Recommendations 6 and 7 in A/CN.9/WG.VI/WP.16). Such an approach promotes competition among credit providers and thus is more likely to increase the availability of credit at lower cost than an approach in which transactions performing security functions are treated substantially differently. An additional advantage to this approach is that it better enables policy decisions to be made transparently and on efficiency grounds. In line with this unitary and functional approach, this chapter suggests that acquisition financing transactions should be addressed, whether in the secured transactions law or in separate but substantively identical rules, regardless of the form of the transaction as a retention-of-title arrangement, secured transaction or financial lease arrangement.

4. This is not to say that a separate retention-of-title regime, with its own different rules, does not work well in a particular State when looked at in isolation. Rather, the question is whether, given the other recommendations in this Guide for an efficient, modern system providing for non-possessory security rights, purchase-money security rights and notice filing in a secured transactions registry, it makes sense for this Guide also to recommend a separate retention-of-title regime, with its own rules distinct from those in the secured transactions regime. This chapter takes the position that it does not.

5. This chapter discusses in part A.2 the commercial background, in part A.3 the various approaches taken in legal systems with respect to acquisition finance, in part A.4 the creation of such devices as between the parties, in part A.5 the effectiveness of such devices as against third parties, in part A.6 priority as against competing claimants, in part A.7 enforcement, in part A.8 insolvency, in part A.9 conflict of laws and in part A.10 transition issues. Part B includes recommendations to the legislature considering law reform in the field of secured transactions.<sup>1</sup>

## 2. Commercial background

6. There are a number of different ways for a buyer to finance the acquisition of goods. First, a buyer might simply borrow the purchase price from a third party on an unsecured basis. This method is simple, but the buyer's credit rating or reputation might limit availability of such credit or make the cost of such credit prohibitively high. Second, the seller could agree to sell the goods to the buyer on terms (without security) that allow the buyer to make payment (perhaps in instalments) after the completion of the sale. This

<sup>1</sup> In Chapter I. Introduction, "purchase-money security right" is defined as including retention-of-title devices (see A/CN.9/WG.VI/WP.11/Add.1, para. 17 (b)). However, in this chapter reference is made to the terms "retention of title" (seller and buyer) and its equivalents, such as a "purchase-money security right" (secured creditor and grantor) and a "financial lease" (financial lessor and lessee), to make the point that they should be treated in the same way. [Note to the Working Group: The Working Group may wish to consider whether the term "acquisition security right" might be preferable.]

method, of course, is not really different than third-party finance except that the risk of non-payment is now on the seller rather than on a third-party financier. Many sellers are unwilling to bear such an unsecured risk. As a result, for many buyers, as a practical matter it is necessary for them to give some form of security in order to acquire goods on credit. While the property subject to a security right could be other property of the buyer, typically the most obvious source of security, and frequently the only source of security, is the acquired goods themselves. Utilizing such goods as security can be effectuated by formally granting a security right in the goods to a third-party financier or to the seller, or by use of a mechanism, which, although not in the form of a security right, is its economic equivalent. Two such mechanisms are the financial lease and retention of title (or, as it is sometimes known, “conditional sale”, although it is not the sale that is conditional but rather the passing of ownership).

### **Retention of title and “conditional sales”**

7. A supplier of inventory or equipment may wish to meet its customer’s need for credit by supplying the goods to the customer directly or to a finance house or other lender who may then sell the goods on a “conditional sale” to the buyer. Under the “conditional sale”, title to the goods sold is reserved by the seller until the purchase price has been paid in full or the buyer has complied with any other conditions prescribed in the sale agreement. In other words, the agreement by the seller to postpone full payment is protected by delaying the passing of title to the goods to the buyer. Such simple retention-of-title arrangements may, in some jurisdictions, be varied through certain clauses, including: “all monies” or “current account” clauses, in which the seller retains title until all debts owing from the buyer to the seller have been discharged (and not just those arising from the particular contract of sale); and proceeds and products clauses, in which the seller’s title is extended to, or the seller is deemed to have a security right in, the proceeds and the products of the assets in which the seller retained title (see A/CN.9/WG.VI/WP.9/Add.1, paras.35-45). Often, however, the applicable law limits the retained ownership only to the goods sold, and only so long as they remain in their original condition (i.e. unaltered by the manufacturing process), or only to secure the sale price of those goods, or both.

### **Finance leases and hire-purchase transactions**

8. A supplier may also use the concept of a lease to sell goods to a buyer. For example, a supplier of equipment may lease a piece of equipment to a buyer who takes possession of the equipment and pays for it in instalments. The supplier reserves title to the equipment as security for the payment of instalments as they fall due. Hire-purchase transactions are based on a similar principle. A typical leasing transaction would commence with the lessee (buyer) selecting the equipment from the supplier (seller) of the equipment. The lessee would then apply to a leasing company (usually a financial institution or an affiliate of one) to purchase the equipment from the supplier and to lease it to the lessee. Generally, the lease comprises the useful life of the equipment and the lessee has the option to purchase the equipment at the end of the lease period for a nominal sum. Alternatively, the lease period is for less than the useful life of the equipment, but the lessee at the end of the lease period has the option to purchase the equipment at a bargain price. Although the transaction is referred to as a finance lease, the reality is that the lessee is paying the purchase price for the equipment in instalments, while the lessor remains the owner until full payment is made. Lease periods may range from a few months to a several years and items leased may range from high-value equipment, such as aircraft, to lower-value equipment, such as computers. Often, leasing arrangements are tailored to the lessees’ unique cash-flow requirements and other needs.

### 3. Approaches to the financing of the acquisition of goods

9. As an element of property (or sales) law, the technique of title retention is known in most legal systems, both civil law and common law. Its conditions and effects, however, vary widely. Many of these differences are products of history (often originating from a need to fill gaps or avoid inflexible rules), rather than the results of contemporary economic analysis. Indeed, in many countries, existing business practices do not support continuation of the legal status quo, as those practices reflect neither legislative policy nor the free choice of the parties but rather are simply the product of the inflexibility of existing legal rules and the absence of legislative intervention, leaving the law to be developed by courts lacking the institutional capability to modernize the legal structure.

10. In legal systems that do not follow a unitary and functional approach in their secured transactions legislation, different statutes or judge-made rules deal with different types of secured transactions or transactions that perform security functions while they bear different names. In some of those systems, retention of title and economically equivalent devices, often developed by practice and courts in the absence of legislation, are the main or the only devices that provide security while the debtor remains in possession of the assets offered as security ("non-possessory security rights" from the point of view of the creditor). This approach is sometimes based on a policy decision to protect small- and medium-size suppliers of goods on credit over large financing institutions in view of the importance of small- and medium-size businesses (manufacturers and distributors) for the economy and the dominant position of financing institutions in credit markets. In those countries, a number of assumptions are made to justify the use of retention-of-title and economically equivalent devices, including that: suppliers have an interest in providing credit at low rates to increase the volume of their sales; the cost of such credit is affordable to the extent that suppliers do not charge interest and, as a result of competition among suppliers, competitive sales prices are offered to buyers; and that buyers may benefit from the competition between supplier credit and bank credit as retention of title is available only to suppliers while banks can obtain it only through an assignment of the claim for the purchase price.

11. A State considering law reform in the field of secured transactions, however, needs to evaluate these assumptions carefully. The fact that a supplier of goods sells goods to a buyer under a retention-of-title arrangement, does not necessarily mean that the seller's credit terms come at no cost to the buyer. The supplier itself has a cost of obtaining funds in order to extend credit terms to the buyer. The supplier's cost of obtaining the funds is embedded in the price of the goods to the buyer. In addition, a State interested in promoting the manufacture and supply of goods does not necessarily have to favour suppliers of goods over parties financing the acquisition of goods. In the same way that competition among suppliers of goods drives down the prices of goods, competition among suppliers of credit drives down the cost of credit. Fostering competition among all suppliers of credit will not only result in credit being available to the buyer at the cheapest rates for the acquisition of goods but also will open up other sources of credit which enable buyers to make payments to sellers for goods supplied. This is especially important for States seeking to expand sources of credit. Additional sources of payment available to buyers will in themselves encourage the manufacture and supply of goods by reason of the flexibility afforded to sellers to sell and receive payment for the goods without the necessity of themselves providing financing to the buyers.

12. Moreover, financiers for the acquisition of goods do not consist only of sellers of goods and of lenders providing working capital financing to the grantor and holding a security right in existing and future assets of the grantor. Although this may be the case currently in some States, that situation may be the product of old legal structures and is not

economically inevitable. The legal rules for the State's secured transactions regime should not create legal barriers for other financiers to emerge to extend credit for the buyer to acquire the goods. The legal rules should allow for the possibility not only for retention-of-title sellers and pre-existing secured creditors to compete for the right to provide financing to buyers (grantors and lessees) but also for other banks, finance companies and financial lessors to do so.

13. In some of the legal systems that do not follow a unitary and functional approach, some of the expanded types of retention-of-title clauses are recognized, such as proceeds clauses (often referred to as "extended retention of title"). However, in the absence of specific tracing rules, in these legal systems title actually extends to proceeds only if they are readily identifiable. In these legal systems, retention of title is available only to lenders that finance the seller taking as security the seller's purchase-money claim with the retentions of title. In some of those systems that recognise a buyer's right expectancy in the goods, the buyer may create a lower-ranking security right in the goods in favour of another creditor. In other legal systems that do not follow a unitary and functional approach, only the simple retention of title is treated as a title device, while more complex retention-of-title clauses, such as all-sums clauses, or proceeds or products clauses, are either not recognized or are treated as security rights.

14. In yet other legal systems with functional secured transactions legislation, acquisition financing transactions are either treated under separate but substantively identical rules or are integrated into the same set of rules comprising the secured transactions laws. If acquisition financing transactions are addressed in separate statutes or in a body of judicially developed law, the various rules and their consequences need to be coordinated with the secured transactions rules in those States. To avoid the risk of imperfect coordination, some of those legal systems integrate acquisition financing transactions into the same rules that govern security rights and treat them all as secured transactions. Both approaches are based on a policy decision to treat all transactions performing security functions equally and to create equal opportunities for all credit providers, on the assumption that this will enhance competition among credit providers and competition will increase the amount of credit available and will drive down its cost.

15. In those jurisdictions, retention of title is available as a so called "purchase-money security right" (see definition in Chapter I. Introduction, in A/CN.9/WG.VI/WP.11/Add.1, para. 17 (b)). The purchase-money security right: (i) is available not only to suppliers but also to other providers of credit, including lenders and lessors; (ii) the purchase-money creditor is given a security right, regardless, for secured transactions purposes, of whether that creditor retains title to the goods; (iii) the buyer may offer a lower-ranking security right in the same goods to other creditors and is thus able to utilize the full value of its assets to obtain credit, thereby enhancing mobilization of capital within the economy; (iv) the purchase-money creditor has to register a notice of its security right in a secured transactions registry to establish priority over competing claimants and to provide third parties with a way of being informed that a security right is claimed by another creditor in the same goods; (v) once a notice of the security right is filed in the secured transactions registry the security right is effective against third parties; (vi) if the notice is filed within a short period of time after delivery of the goods to the buyer, the purchase-money security right has priority over a holder of a judgement right or an insolvency administrator of the buyer between the time of the delivery of the goods to the buyer and the filing of the notice; (vii) if the goods are equipment, and notice is filed within a short period of time after delivery of the equipment to the buyer, the purchase-money security right has priority over the security right of a pre-existing secured creditor with a security right in future equipment of the buyer; (viii) if the goods are inventory, and, before the inventory is



delivered to the buyer, the purchase-money creditor files the notice in the secured transactions registry and also notifies a pre-existing secured creditor with a security right in future inventory of the buyer, for which a notice has been filed in the secured transactions registry, that the purchase-money creditor is claiming a higher-ranking purchase-money security right in the inventory, the purchase-money security right has priority over the security right of the pre-existing secured creditor; and (ix) the purchase-money creditor seller may enforce its rights, within or outside insolvency proceedings, in the same way as any other secured creditor.

16. The modern trend in law reform in the area of secured transactions, particularly in States that need to introduce or enhance a credit economy, is to follow a unitary and functional approach and thus to deal in a comprehensive and consistent way with all transactions that perform security functions, irrespective of their name or form. The same trend prevails at the international level as well. For example: the Convention on International Interests in Mobile Equipment subjects retention of title and financial leases to separate but substantively identical rules and, most importantly, extends the international registry contemplated by the Convention beyond security rights to retention of title in favour of sellers and to leasing arrangements; the United Nations Assignment Convention applies the same rules to: (i) security assignments; (ii) outright assignments for security purposes; and (iii) even pure outright assignments (article 2), avoiding drawing a distinction between security and title devices that would inadvertently lead to uncertainty and litigation (and, most importantly, article 22 of the Convention covers various priority conflicts, including a conflict between an assignee of receivables and a creditor of the assignor with a retention of title in goods extending to the receivables from the sale of the goods). The same approach is followed in the EBRD Model Law on Secured Transactions, the Inter-American Law on Secured Transactions and the Asian Development Bank Guide to Movables Registries.

17. The specific terminology used, and whether acquisition finance devices are recharacterized as security rights or are treated like secured transactions in separate but identical rules, is not so important (although the former approach may be preferable to avoid the problem of coordination among the various statutes). What is important is that essentially the same rules apply to all transactions that perform security functions. It makes no sense for a secured transactions regime to adopt substantially different rules for providers of purchase-money financing depending upon the form of the transaction. If retention-of-title sellers, purchase-money lenders and financial lessors are subject to substantially different rules, then competition among them will not be based on price alone. Rather, the differing rules will create advantages for some credit providers over others, impairing pure price competition.

#### **4. Creation as between the parties**

18. Legal systems that treat retention of title as a non-security device differ widely with respect to the requirements for its creation. In many of those systems, the subject of creation is usually governed by the general contract law. As a result, retention of title, which normally arises from a clause in a sales contract, may be concluded even orally or by reference to correspondence, a purchase order or an invoice with printed general terms and conditions. These documents may not bear the signature of the buyer but may be implicitly accepted by the buyer through the acceptance of delivery of the goods and payment of part of their purchase price as indicated, for example, in the purchase order or invoice.

19. In some of those legal systems, only the seller may retain title, while other lenders may obtain the retention of title only if they receive an assignment of the outstanding

balance of the purchase price from the lender. Lenders in the context of financial leases, hire-purchase and related transactions may, however, retain title in the context of those transactions.

20. In other legal systems, a writing (even minimal), a date certain, notarization or even registration may be required for a retention-of-title clause to be effective. In some of those systems, if goods subject to retention of title are then commingled with other goods, the retention of title is extinguished, while in a few other systems the retention of title is preserved as long as similar goods are found in the hands of the buyer, with the seller being deemed to hold title to such similar goods. In some legal systems, retention of title is preserved even if the goods are processed into a new product, while in other systems retention of title cannot be extended to new products.

21. In legal systems with a unitary and functional secured transactions law, the financing of the acquisition of goods is treated as a special category of secured financing, either in parallel but substantially identical rules to secured transactions rules or integrated in the secured transactions legislation. Such financing may be provided by the seller or by any other person and the form requirements are the same as those that relate to other secured transactions (e.g. a written and signed agreement identifying the parties and reasonably describing the assets sold and their price).

22. The difference among the legal systems described above rarely lies in a significant way in the requirement of a writing, since most of them would accept correspondence, an invoice, a purchase order or the like with general terms and conditions, whether they are in paper or electronic form. The difference seems to lie more in the requirement of a signature which may not be necessary as long as the retention-of-title seller, purchase-money lender or financial lessor is able to demonstrate by other evidence that the terms of the writing have been accepted by the buyer or financial lessee. Such evidence could consist merely of the buyer's or financial lessee's acquisition and use of the goods without protest after having received the writing. Thus, these minimal formal requirements are not burdensome. Also, because so many transactions for the purchase of goods are in fact well documented for other reasons, this issue rarely arises.

## **5. Effectiveness against third parties**

23. In most jurisdictions that treat retention-of-title devices as a non-security device, with very few exceptions, retention-of-title devices are not subject to registration. In addition, even where registration is required, no distinction is drawn between creation of a property right as between the parties and its effectiveness as against third parties. To the contrary, upon their creation, property rights are effective as against all parties. The creditor retaining title has full ownership rights and any other creditor has nothing even if it provided credit to the buyer and the value of the buyer's assets subject to retention of title is higher than the amount of its obligations owing to the seller (with the exception of those legal systems in which the buyer may encumber its expectancy right). These legal systems either prevent or make it difficult for borrowers to use the full value of their movable assets subject to retention-of-title rights by providing a non-possessory security right in the same assets to several creditors or a system to rank those creditors in terms of priority for payment (although such a system exists with respect to immovable property where there can be multiple mortgagees with priority based on time of registration).

24. In jurisdictions that follow a unitary and functional approach, retention of title and its economic equivalents are subject to registration of a notice in the secured transactions registry in the same way as any other secured transaction. The registration of the notice does not create the security right but rather serves as a basis for establishing priority and

provides a notice to third parties that such a right might exist. Registration efficiently promotes credit market competition by, *inter alia*, providing information in the registry that is available to all creditors. In the context of a function-based system, registration enhances the quality of opportunity among suppliers. The system enables financiers to better assess their risks and promotes certainty in the financing of the acquisition of goods. If creditors were not able to rely upon the security rights registry to indicate the possible existence of pre-existing retention-of-title arrangements, the integrity and the usefulness of the registry itself would be undermined. The creditor's uncertainty as to the priority of its security right, given its inability to rely on the registry, would reduce the availability of credit or result in an increase in the cost of credit, even in situations where no retention-of-title arrangement exists with respect to the relevant goods.

#### **Effectiveness of purchase-money transactions relating to equipment or inventory as against third parties**

25. In some jurisdictions, the general rules of third-party effectiveness applicable to non-purchase-money secured transactions apply to purchase-money secured transactions. However, for priority purposes with respect to certain competing claimants, there are certain special rules as discussed below.

#### **Grace period for the registration of purchase-money security rights**

26. The registration process is enhanced by permitting a short specified period ("grace period") within which a retention-of-title right may be registered (e.g. 20 or 30 days following delivery of the goods to the grantor). The use of the grace period has the advantage that it permits delivery of the goods without delay until registration is made. If the notice is registered within the grace period, the purchase money security right has priority over a judgement right in the goods or the rights of creditors in the insolvency of the grantor (buyer), acquired during the grace period.

#### **Exceptions to registration**

27. In some legal systems, purchase-money lending transactions with respect to consumer goods (i.e. goods bought for the buyer's personal, household or family purposes) are generally exempted from the registration requirement. This means that the purchase-money seller of consumer goods is not burdened with a requirement to register. Such transactions become effective against third parties as of the time they are made. In any case, the need to warn potential third-party financiers is less acute (unless consumers resell those goods), in particular in the case of transactions relating to low-value consumer goods. In other legal systems, only low-value consumer transactions are exempted from registration (e.g. consumer transactions up to a maximum of Euro 3,000.00, or their equivalent that, are subject to the jurisdiction of small-claim courts), while the significant car market involving credit to consumers is served by a system requiring, not registration in the secured transactions registry, but a notice on a title certificate. Even if business and consumer transactions relating to low-value assets are excepted from registration, the exception does not in any event apply to low-value inventory transactions (individual items of low-value inventory may have a large value when all low-value inventory is pooled).

28. If a grace period were adopted for registering the notice of a purchase-money lending transaction relating to equipment in the secured transactions registry, that grace period may in itself serve as an exemption for short-term transactions completed (i.e. fully paid) within the grace period because, as a practical matter, the purchase-money lender

would not have to register before the expiry of that period. However, as for equipment-related purchase-money lending transactions with longer repayment periods, and for short-term inventory-related purchase-money lending transactions in general, an exemption may not be necessary if the purchase-money lender could register a single notice in the secured transactions registry for a series of short-term transactions occurring over a longer period of time (e.g. five years).

## **6. Priority over competing claimants**

29. In legal systems that treat retention-of-title transactions as non-security devices, the retention-of-title seller effectively prevails with respect to the goods sold over all other competing claimants (except bona fide purchasers). In legal systems with unitary and functional secured transactions systems, this result is possible, provided that the retention-of-title seller, who is treated in the same way as the purchase-money lender or the financial lessor, registers a notice in the secured transactions registry within a short grace period and, in the case of inventory, takes certain steps discussed below to obtain priority over a pre-existing secured creditor with a security right in future inventory of the buyer. Thus, title retention outside of the secured transactions regime is not essential to achieve the desired priority results.

### **Priority of purchase-money security rights over pre-existing security rights in future equipment**

30. In an effort to support the provision of new credit for the acquisition of additional goods which stimulates the production and trade of goods, it is important that special priority rules apply to conflicts of priority with pre-existing non-purchase-money secured creditors holding rights in future assets of the grantor. Upon registration with respect to equipment, within a certain period of time after delivery of the goods to the grantor, the purchase-money security right is given priority over pre-existing security rights in future equipment of the grantor. This means that, as long as a notice is registered about it in the secured transactions registry within the grace period, the purchase-money security right in new equipment obtains priority over pre-existing security rights in future equipment of the grantor (often referred to as “super-priority” as it overcomes the general rule based on priority in time of registration).

### **Priority of purchase-money security rights over pre-existing security rights in future inventory**

31. Where the additional goods acquired by the grantor are inventory, in order for the purchase-money security right to have priority over a non-purchase-money security right in future inventory, the registration of a notice in the secured transactions registry must be made prior to the delivery of the additional inventory to the grantor. In addition, in some jurisdictions, pre-existing inventory financiers on record must be directly notified that a higher-ranking purchase-money security right is being claimed in the additional inventory. The reason for requiring such notification of pre-existing inventory financiers on record is that inventory financiers typically extend credit in reliance upon a pool of existing or future inventory on a short periodic and perhaps even daily basis. The pool of inventory may be constantly changing as some inventory is sold and new inventory is manufactured or acquired (with the grantor presenting invoices or certifications as the basis for obtaining each new advance of inventory credit). In these circumstances, it would be inefficient for the inventory financier to be required to search the secured transactions registry each time before advancing credit in reliance upon a pool of ever-changing inventory. In addition, if

the purchase-money creditor were not required to notify the pre-existing inventory financiers and they did not otherwise discover in time the notice registered in the secured transactions registry with respect to the acquisition of new inventory, the new advances that the pre-existing inventory financiers would make could be used by the grantor for other purposes (which would result in double financing of the same inventory).

32. To avoid placing an undue burden on purchase-money financiers, a single, general notification to pre-existing inventory financiers on record may be effective for all shipments to the same buyer occurring during a significant period of time (e.g. five years or the same period that registration lasts to make a security right effective against third parties). This would mean that, once notification was given to pre-existing inventory financiers on record, it would not be necessary to give a new notification within the given time period for each of the multiple inventory transactions between the purchase-money lender and the party acquiring the inventory.

### **Cross-collateralization**

33. In addition, in jurisdictions with a unitary and functional approach, the super-priority of purchase-money security rights is not impaired by cross-collateralization. This means that, if the purchase-money creditor provides additional credit to the grantor secured by a security right in additional equipment or inventory, the super-priority is still effective for the security right to the extent that it secures payment of the purchase price or obligations incurred to pay the purchase price of the equipment or inventory. Similarly, if the purchase-money lender obtains a security right in other assets of the grantor to secure the purchase price or obligations incurred to pay the purchase price of equipment or inventory, the super-priority of the financier in the equipment or inventory remains effective (although the super-priority does not extend to other assets that themselves were not financed by the purchase-money creditor).

### **Super-priority in proceeds**

34. In some jurisdictions with a unitary and functional approach, the super-priority extends only to the goods the acquisition of which is financed, while in other jurisdictions it extends to their proceeds and products as well, at least in the case of transactions relating to equipment.

35. As equipment is not usually acquired by the grantor with a view to resale, there is little concern if the super-priority of a purchase-money security right in equipment is extended to the proceeds of the equipment. If the equipment, perhaps because it is obsolescent or no longer needed by the grantor, is later to be sold or otherwise disposed of by the grantor, the secured creditor will often be approached by the grantor for a release of the security right to enable the grantor to dispose of the equipment free of the security right. That is because, without that release, the disposition would be subject to the security right, and it would be unlikely that a buyer or other transferee would pay full value to acquire the equipment subject to the security right. In exchange for the release, the secured creditor will typically control the payment of the proceeds. For example, the secured creditor might require that the proceeds of the disposition be paid directly to the secured creditor for application to the secured obligations. Under these circumstances, it is unlikely that another creditor, in extending credit to the grantor, will be relying upon a superior security right in an encumbered asset that is proceeds of the disposition of the equipment.

36. However, the situation is different with inventory because its proceeds usually consist of receivables. It will often be the case that a pre-existing secured creditor, in extending working capital credit to the grantor, will be advancing credit to the grantor on short periodic and perhaps even daily basis in reliance upon a superior security right in an

ever-changing pool of existing and future receivables as original encumbered assets. It may not be possible or practical for the grantor to segregate the receivables that are the proceeds of the purchase-money inventory from other receivables being financed by the pre-existing secured creditor. Even if it were possible or practical for the grantor to do so, it may not be possible for the grantor to segregate the purchase-money inventory proceeds promptly. And, even if it were possible or practical for the grantor to segregate the purchase-money inventory proceeds promptly, it would have to do so in a way that was transparent to both financiers and which minimized monitoring by both financiers.

37. Without such a prompt segregation that is transparent to both financiers and which minimizes monitoring, there would be a significant risk that the pre-existing secured creditor extending credit against receivables would mistakenly assume that it had a higher-ranking security right in all of the grantor's receivables. There is likewise a risk of a dispute between the pre-existing secured creditor and the retention-of-title seller, purchase-money lender or financial lessor as to which financier has a priority right in which proceeds. All of those risks and any concomitant monitoring costs may result in the withholding of credit or charging for the credit at a higher cost.

38. Of course, if the priority of the purchase-money security right in the inventory does not extend to the receivables proceeds, the inventory purchase-money secured creditor may itself withhold credit or offer credit only at higher cost. However, that risk may be ameliorated in a significant respect. First, if the priority of the purchase-money security right in the inventory does not extend to the receivables proceeds, a pre-existing secured creditor with a prior security right in future receivables of the grantor will be more likely to extend credit to the grantor in reliance upon its higher-ranking security right in the receivables to enable the grantor to pay for the purchase-money inventory acquired by the grantor. The amount of the advance by the pre-existing secured creditor should be sufficient for the grantor to pay the purchase price to the grantor of the purchase-money inventory. This is because usually advance rates against receivables are much higher than those against inventory and because the amount of the receivables reflects a resale price for the purchase of the inventory well in excess of the cost of the inventory to the seller. Thus, there is a greater likelihood that the purchase-money obligation will be paid on a timely basis. Such a result would be both efficient and convenient for the parties to the transaction.

## **7. Enforcement**

39. In some legal systems where retention of title is treated a non-security device, the seller may on default of the buyer terminate the sales agreement and demand return of the goods as an owner. In that event, the seller is required to refund any portion of the price paid, after deducting the rental value of the goods while in the possession of the buyer, the amount by which the value of goods has decreased as a result of their use by the buyer or damages determined under a similar formula. A seller who has priority over competing claimants is not obliged to account to the buyer for any of the profits made on any subsequent resale of the goods by the seller but, at the same time, has no claim against the buyer for any deficiency beyond any damages resulting from the buyer's breach of the original sales contract. In some of those legal systems, in some instances courts have ruled that there is an implied term in retention-of-title arrangements that the seller cannot repossess more of the goods than is necessary to repay the outstanding balance of the purchase price.

40. In other legal systems where retention of title is treated as a security device, the purchase-money lender may repossess the goods as would any other secured creditor. The secured creditor has to return to the grantor any surplus on the resale of the goods and has

an unsecured claim for any deficiency. Thus, the buyer and its other creditors have the same protections regardless of the form of the transaction.

41. Arguably, either remedial scheme might be appropriate for a State to consider so long as the scheme applied equally to retention-of-title sellers, purchase-money secured creditors and financial lessors. However, the secured credit scheme might be preferable as a policy matter as it would provide the creditor with a deficiency claim, which usually will be more valuable to the seller than a surplus claim. Almost invariably, except in the rare case when only a conservatively small portion of the purchase price is being financed, the likelihood of there being a surplus on enforcement to be retained by the creditor is not as high as the likelihood that there will be a deficiency.

42. A rule that would deny a deficiency claim to a purchase-money secured creditor would encourage the creditor to finance a smaller portion of the purchase price of the goods so as to minimize the amount of any lost deficiency claim. The result would be that grantors without sufficient funds to pay the balance of the purchase price will be denied the purchase-money credit or will have to obtain the purchase-money credit at a higher cost. This result could discourage the manufacture, supply and financing of the acquisition of goods.

## **8. Insolvency**

43. Generally, but not universally, in legal systems that treat retention of title as a non-security device, a sales contract with a retention-of-title clause is treated in the insolvency of the buyer not as a security right but instead under the rules relating to partly performed contracts (or, in other words, as a title device). In legal systems that recognize purchase-money security rights in separate but essentially identical rules or integrated into their secured transactions law, a purchase-money security right is treated in the grantor's insolvency in the same way as a non-purchase-money security right (with recognition given to any super-priority status accorded to the purchase-money security right under non-insolvency law).

44. Where retention of title is treated as a partly performed contract (or title device), the insolvency administrator has the right, within a prescribed time and if willing and able to do so, to perform the contract, pay the outstanding balance of the price and retain the goods in the estate. Alternatively, in some cases, the insolvency administrator can sell the contract, together with the right to use the goods, to a third party; or the insolvency administrator can reject the contract, return the goods and claim the return of the part of the purchase price paid by the buyer. But if the goods are critical to the success of the buyer's reorganization, only the first option (performance of the contract as agreed) would in practice be available to the insolvency administrator. The need for the insolvency administrator to perform the contract as agreed (and keep, for example, useful equipment, although its value is less than their price) will usually result in other assets of the insolvency estate being used to satisfy that performance rather than being used to fund other aspects of the reorganization of the grantor. In such a case, the diversion of other assets of the insolvency estate to enable the insolvency administrator to perform the contract may be especially of concern where the value of the goods is less than the amount of the price to be paid.

45. In contrast, where the purchase-money security right is treated in the same way as an ordinary (non-purchase-money) security right, typically: (i) the insolvency administrator could use, sell or lease the goods so long as it gives substitute assets to the secured creditor or the value of the secured creditor's right in the goods is otherwise protected; (ii) any portion of the secured obligations in excess of the value of the secured creditor's right in

the goods is treated as a general unsecured claim; and (iii) in the grantor's reorganization, the secured creditor's claim, up to the value of the security right, can be restructured (as is the case with other non-purchase money security rights) with a different maturity, payment schedule, interest rate and the like.

46. If retention of title and its functional equivalents purchase-money security rights and financial leases are treated as partly performed contracts (or title devices), the retention-of-title seller (the purchase-money lender and the financial lessor) will have stronger rights at the expense of other creditors of the insolvency proceedings. The exercise of the stronger rights might result in some reorganizations not being successful, with possible loss of jobs and with other creditors of the insolvency estate not obtaining as much of a recovery on their claims. Thus, a State considering the treatment of retention of title, purchase-money security rights, financial leases and the like in insolvency proceedings should consider whether the State's policy of encouraging the manufacture, supply and financing of equipment or inventory through the strengthening of the rights of retention-of-title sellers, purchase-money secured creditors or financial lessors outweighs or is subordinate to the State's policy favouring reorganization proceedings.

## 9. Conflict of laws

47. Whether retention of title is treated as a security device or not, the law applicable to its creation, effectiveness and priority should be the law of the State in which the goods are located. Different rules should apply to mobile goods, goods in transit and goods intended for export. In addition, a rule is needed to ensure the cross-border recognition of those rights (see Chapter X. Conflict of laws in A/CN.9/WG.VI/WP.16/Add.1).<sup>2</sup>

## 10. Transition

48. The rules regarding treatment of retention of title as a security device will be a significant change in legal systems that do not have a unitary and functional secured transactions law. Chapter XI of the Guide (see A/CN.9/WG.VI/WP.9/Add.8) discusses transition issues so as to allow parties to prepare for the application of the new law and to avoid abrupt changes to the rights of parties under transactions existing before enactment of the new law. With respect to retention-of-title devices, this result could be achieved if, consistent with the transition rules applicable to non-purchase money transactions, the pre-effective date effectiveness against third parties and priority of retention-of-title devices are preserved so long as an appropriate notice is registered in the secured transactions registry. Alternatively, the law could provide an effective date that would be sufficiently long so as to cover the life span of most retention-of-title arrangements existing at the time of the enactment of the law (e.g. 3 to 5 years).

[Note to the Working Group: Part B. Recommendations is contained in document A/CN.9/WG.VI/WP.17/Add.1.]

<sup>2</sup> Article 4 of EC Directive 35/2000 of 29 June 2000 on combating late payment in commercial transactions obliges member States to recognize title retention created in another member State in accordance with the rules of private international law. It is widely acknowledged that the applicable law is the *lex rei sitae*. Articles 5 (on *in rem* rights) and 7 (on reservation of title) of EC Regulation 1346/2000 of 29 May 2000 on insolvency proceedings are also based on the *lex rei sitae*.



## A/CN.9/WG.VI/WP.17/Add.1

**Report of the Secretary General on of the draft legislative  
guide on secured transactions, submitted to  
the Working Group on Security Interests  
at its seventh session**

## ADDENDUM

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## XII. Acquisition financing devices

*[Note to the Working Group: Part A. General remarks is contained in document A/CN.9/WG.VI/WP.17.]*

### B. Recommendations

#### Purpose

[...]

#### Equivalence of [acquisition financing] [purchase-money] devices to security rights

1. The law should treat [acquisition] [purchase-money] rights arising under transactions, such as sales with retention of title arrangements, purchase-money lending arrangements and financial leases, as security rights by including such rights within the definition of “security rights” and, thus, applying the rules governing security rights to these rights directly. Alternatively, the law might exclude such rights (or some of them) from the definition of “security rights,” but govern those rights under a parallel regime that is substantively identical to the rules governing security rights. In either case, the recommendations applicable to [acquisition] [purchase-money] security rights should apply, as supplemented by the recommendations applicable to [non-acquisition] [non-purchase-money] security rights.

*[Note to the Working Group: The Working Group may wish to consider replicating the detailed recommendations presented in the succeeding paragraphs in the other Chapters of the Guide. Alternatively, these recommendations might be stated in the other Chapters of the Guide and incorporated in this Chapter by reference.]*

### **Creation of [acquisition] [purchase-money] security rights as between the parties**

2. The law should provide that the agreement creating [an acquisition] [a purchase-money] security right must be evidenced by a writing. Writing includes a purchase order, invoice, general terms and conditions and the like. It also includes an electronic communication (see article 6 of the UNCITRAL Model Law on Electronic Commerce and article 9, para. 2, of the draft Convention on Electronic Contracting, as well as recommendations 10 and 11 in A/CN.9/WG.VI/WP.16). The writing need not be signed by the buyer, grantor or financial lessee (referred to in these recommendations as “grantor”), provided that the seller, purchase-money lender or financial lessor (referred to in these recommendations as “acquisition financier”) can evidence by other means (e.g. course of conduct) that the arrangement has been accepted by the grantor.

*[Note to the Working Group: The Working Group may wish to consider whether, in order to avoid having one recommendation for purchase-money security rights (i.e. a flexible notion of writing without signature) and a different recommendation for non-purchase-money security rights (i.e. a less flexible notion of writing with signature, see recommendations 10 and 11 in A/CN.9/WG.VI/WP.16), recommendation 2 above should apply to both purchase-money and non-purchase-money security rights.]*

### **Effectiveness of [acquisition] [purchase-money] security rights against third parties**

3. As with security rights generally, the law should provide that, in order for a non-possessory [acquisition] [purchase-money] security right to be effective against third parties, the acquisition financier has to register a notice covering its right in the relevant secured transactions registry. If the acquisition financier registers the notice not later than [specify a short time period, such as 20 or 30 days] after delivery of the goods to the grantor, the right should also be effective against third parties whose rights arose between the time the [acquisition] [purchase-money] security right was created and its registration. If the acquisition financier registers the notice after the expiration of that period, the [acquisition] [purchase-money] security right is effective against third parties from the time the notice is registered.

### **Exceptions**

4. The law should provide that the following non-possessory [acquisition] [purchase-money] security rights are effective against third parties when they are created without the necessity of registration:

(a) [Acquisition] [purchase-money] security rights in consumer goods [, with the exception of consumer goods with a value higher than [specify value]];

[(b) [Acquisition] [purchase-money] security rights in goods other than inventory as to which the total obligation owed by the grantor to the acquisition financier with respect to this [acquisition] [purchase-money] security right and all other [acquisition] [purchase-money] security rights created within [specify time] is lower than [specify value]; and

(c) Short-term transactions with respect to which the obligation of the grantor is satisfied within [specify time]].

*[Note to the Working Group: The Working Group may wish to consider the question whether the consumer goods exception and the low-value exception should apply to inventory-related transactions, taking into account that consumer goods cannot be inventory for the grantor and that inventory normally would not fall under the low-value exception. In addition, the Working Group may wish to consider the question whether the short-term transactions exception should apply also to inventory-related transactions.]*

*Moreover, if the Working Group decides to make an exception for short-term or low value transactions, the Working Group may wish to consider whether what is short-term and low value should be included in the recommendation or left to be dealt with in the general remarks by way of examples.]*

**Priority of [acquisition] [purchase-money] security rights over pre-existing [non-acquisition] [non-purchase-money] security rights in future goods other than inventory**

5. In the case of goods other than inventory, the law should provide that [an acquisition] [a purchase-money] security right has priority over a pre-existing security right in the same goods (even if a notice covering that pre-existing security right was registered in the secured transactions registry before the [acquisition] [purchase-money] security right was registered) if: (i) the acquisition financier retains possession of the goods; (ii) notice of the [acquisition] [purchase-money] security right was registered within a period of [the same number of days specified in recommendation 3] after delivery of the goods to the grantor; or (iii) the [acquisition] [purchase-money] security right became effective against third parties at the time it was created under recommendation 4 (non-possessory [acquisition] [purchase-money] security rights as to which no registration is required for effectiveness against third parties).

**Priority of [acquisition] [purchase-money] security rights over pre-existing [non-acquisition] [non-purchase-money] security rights in future inventory**

6. In the case of inventory, the law should provide that [an acquisition] [a purchase-money] security right has priority over a pre-existing security right in the grantor's inventory (even if that pre-existing right became effective against third parties before the [acquisition] [purchase-money] security right became effective against third parties) if: (i) the acquisition financier retains possession of the goods; or (ii) before delivery of the inventory to the grantor, the acquisition financier: (a) registers a notice covering its right in the relevant secured transactions registry; and (b) notifies the holder of the pre-existing security right in writing that the acquisition financier intends to enter into one or more transactions pursuant to which that person will have a higher-ranking [acquisition] [purchase-money] security right with respect to the additional inventory of the grantor described in the notification. The notification to holders of pre-existing security rights may cover multiple [acquisition] [purchase-money] transactions between the same parties. However, the notification should be effective only for [acquisition] [purchase-money] security rights created within a period of [specify time, such as five years] after the notification is given.

*[Note to the Working Group: The Working Group may wish to consider whether a grace period should be given for the registration of a purchase-money security right in inventory (but not for the notification of non-purchase money inventory financiers on record).]*

**Cross-collateralization**

7. The law should provide that [an acquisition] [purchase-money] security right is subject to the recommendations in this Chapter regarding effectiveness against third parties and priority even if the acquisition financier: (i) also has a security right in the goods securing [non-acquisition] [non-purchase-money] obligations of the grantor; or (ii) has a security right in other assets of the grantor securing the payment obligation relating to the [acquisition] [purchase-money] security right.

**Priority of [acquisition] [purchase-money] security rights in proceeds of inventory**

8. The law should provide that the priority, provided under recommendation 6, for [an acquisition] [a purchase-money] security right in inventory over a pre-existing security right in the same goods does not apply to the proceeds of such inventory. [*Note to the Working Group: As to purchase-money proceeds of goods other than inventory, the recommendation applicable to non-purchase-money proceeds should apply (see recommendation 41 in A/CN.9/WG.VI/ WP.16).*]

**Enforcement**

9. [Except as provided in recommendation 10,] the law should provide that, in the case of default on the part of the grantor, the acquisition financier is entitled to repossess and dispose of the goods subject to the same rules applicable to security rights generally.

10. [If, after default of the grantor, the acquisition financier who has priority over competing claimants with respect to the goods repossesses the goods, the acquisition financier is under no obligation to dispose of the goods. If such an acquisition financier does not dispose of the goods, that person has no further claim against the grantor with respect to the obligation secured by the [acquisition] [purchase-money] security right. If such an acquisition financier disposes of the goods, that person shall be entitled to retain any surplus remaining after application of the proceeds of disposition to its claim against the grantor, but has no further claim in the event that there is a deficiency remaining after such application beyond a claim of damages for breach of contract.]

**Insolvency**

11. [Except as provided in recommendation 12,] the law should provide that, in the case of the insolvency of the grantor, the acquisition financier has the same rights and duties as a person holding a security right.

12. [The insolvency administrator of the grantor may pay the outstanding balance of the purchase price and retain the goods, sell the contract to another person who may pay the outstanding balance of the purchase price and retain the goods, or reject the contract and return the goods subject to reimbursement by the acquisition financier of the price paid by the grantor after deducting the rental value of the goods while in the possession of the grantor, the amount by which the value of the goods has decreased as a result of their use by the grantor or damages determined under a similar formula.]

**[Conflict of laws]**

[*Note to the Working Group: The following recommendations are the same as the recommendations for non-purchase-money security rights. However, they are included here because of slight modifications in terminology. The Working Group may wish to consider the formulation of these recommendations.*]

13. The law should provide that the creation as between the parties, effectiveness against third parties and priority over competing claimants of [acquisition] [purchase-money] security rights are governed by the law of the State in which the asset is located, except for:

(a) tangible assets of a type ordinarily used in more than one State in which case such issues are governed by the law of the State in which the grantor is located;

(b) goods in transit, with respect to which such rights may also be created as between the parties and made effective against third parties under the law of the State of destination, provided that the goods arrive in that State within a certain specified time period; and

(c) export goods, with respect to which such rights may also be created as between the parties and made effective against third parties under the law of the State of destination if the goods [arrive in the State of destination] [leave the enacting State] within a specified period of time from the time of creation of the right.

14. The law should also provide that [acquisition] [purchase-money] security rights created as between the parties and made effective against third parties under the law of a State other than the enacting State are effective against third parties under the law of the enacting State for a period of [to be specified] days after the location of the grantor or the assets (as applicable) has changed to the enacting State. If the requirements of the enacting State to make such rights effective against third parties are fulfilled prior to the end of that period, the third-party effectiveness acquired in the State other than the enacting State also continues thereafter in the enacting State.]

#### **Transition**

*[Note to the Working Group: The Working Group may wish to consider a longer transition period or other exceptions to the transition rules applicable to non-purchase-money security rights for the new law to take effect with respect to purchase-money security rights.]*

## A/CN.9/WG.VI/WP.18

**G. Report of the Secretary General on the draft legislative  
guide on secured transactions, submitted to the Working  
Group on Security Interests at its seventh session**

**(A/CN.9/WG.VI/WP.18 and Add.1) [Original: English]**

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## **XVI. Security rights in bank accounts**

### **A. General remarks**

#### **1. Introduction**

1. Security rights in a depositor's rights in a bank account play an important role in a number of credit transactions. A secured transactions regime which recognizes security rights in bank accounts and provides clear rules relating to the creation, effectiveness against third parties, priority and enforcement of security rights in bank accounts will encourage the extension of credit at lower rates in those transactions where a security right in a bank account is a necessary or significant part of the decision of the creditor to extend credit.

2. This Chapter addresses issues arising in the context of security rights in cash in bank accounts (expressing a claim of the account holder against the depositary bank for payment of money). It does not address security rights in securities accounts.

3. Part A of this paper discusses a variety of issues relating to security rights in bank accounts. Part B of this paper sets out proposed recommendations. More specifically, Part

A.2 provides some background of the types of credit transactions in which a security right in a bank account might be an important element and which would be facilitated by a secured transactions law that recognized security rights in bank accounts. With that background, Part A.3 addresses the meaning of the term “bank account”. In Part A.4, this paper then discusses issues relating to the creation of a security right in a bank account; in Part A.5, it discusses the effectiveness of a security right in a bank account against third parties; and in Part A.6, it discusses the priority of the security right in the bank account against competing claimants. In Part A.7, the paper addresses issues involving the enforcement of a security right in a bank account, and in Part A.8, it addresses issues relating to the rights and duties of the depository bank. After discussing insolvency law in Part A.9 and conflict of laws issues in Part A.10, this paper makes several concluding remarks in Part A.11, before setting forth the proposed recommendations in Part B.

## **2. Commercial background**

4. A potential borrower’s credit balance in a bank account may constitute a significant asset and, as with other property, should be available to serve as an asset in which a security right may be granted to facilitate the extension of credit. In States in which such a security right may be created, there are, in fact, a number of common credit transactions in which a security right in a bank account is an important element. Those transactions, which include, but are not limited to, trade finance, asset-based lending, real estate lending, project finance, securitization, derivative and securities lending transactions, would be facilitated by a secured transactions law that recognized security rights in bank accounts.

5. Some examples of transactions in which a security right in a bank account is the primary basis on which credit is granted include the following:

(a) A grantor may apply to a bank or other creditor for the creditor to issue or arrange for the issuance of a stand-by letter of credit, independent bank guarantee or surety bond in favour of a party with which the grantor has a contractual relationship, whether relating to the domestic or international purchase of tangible property, the performance of a construction contract or even the mere payment of a promissory note or other monetary obligation. In such a case, the grantor will have an obligation to reimburse the creditor for any amount paid by the creditor in respect of a draw under the stand-by letter of credit, independent bank guarantee or surety bond. To lower the risk of loss in the event that the grantor does not fulfil its reimbursement obligation, the creditor may also require the grantor to secure that obligation by granting to the creditor a security right in a bank account of the grantor containing funds in an amount sufficient to fulfil the maximum reimbursement obligation should the creditor be required to pay the undrawn amount of the stand-by letter of credit, independent bank guarantee or surety bond;

(b) A security right in a bank account is often a key part of the structure of a derivatives or securities lending transaction. For example, a holder of securities may “lend” to a borrower counterparty securities which the lender counterparty owns with the agreement of the borrower counterparty to return to the lender counterparty those securities, or securities of the same type and quantity, on a date certain. The obligation of the borrower counterparty to the lender counterparty will often be secured by a security right in a bank account of the borrower counterparty in an amount at least equal to the value of the securities to be returned;

(c) Under some credit arrangements, a grantor is permitted to sell an encumbered asset, such as a piece of equipment or other fixed asset, for cash and deposit the cash proceeds in a bank account. For an agreed period of time (e.g. twelve months) thereafter the grantor is permitted to decide whether it wishes to use the funds in the bank account to purchase a

new asset to become subject to a security right in favour of the secured creditor. If, at the end of the agreed period, the funds have not been used to purchase the new asset, the grantor must use the funds in the bank account to reduce the secured obligation. The secured creditor is typically provided a security right in the bank account during the period between the sale of the original encumbered asset and the use of the funds either to purchase the new asset or to reduce the secured obligation;

(d) A creditor might extend credit to a business that uses its revenues to pay its current expenses on a periodic basis before using the balance of the revenues to pay obligations owed to the creditor. The business may be a real estate project, such as a commercial building that leases space to tenants, or a power project, such as a power plant, which provides power to customers. The creditor may require, as a condition to extending the credit, that the grantor provide to the creditor a security right in the grantor's bank account to which the business's revenues are credited. The documentation for the financing of the commercial building or of the power project often provides a clause which creates a "waterfall" for the business revenues deposited into the bank account. Under the "waterfall" arrangement, applicable unless the grantor defaults, certain amounts are released from the bank account to pay budgeted expenses, with the balance of the funds being used to pay interest and principal on the loans advanced and to create reserves for future needs of the building or the project. The reserves themselves are often deposited into a separate bank account in which the creditor has a security right;

(e) In a structured finance transaction, a third party agent or trustee may be required to receive revenues from receivables purchased by a special purpose company from the originator of the receivables and to apply the revenues to obligations owed to investors after certain expenses are paid. The documentation for the structured finance transaction may contain a "waterfall" provision much like that described above for commercial building or project financings, but it is usually a simpler one since the special purpose company is not itself engaging in business operations. In any event, the agent or trustee will typically receive a security right in all bank accounts of the special purpose entity;

(f) A security right in a bank account may be of significance in an asset-based financing transaction, i.e. a credit transaction in which the secured creditor is looking to the encumbered assets in which it has a security right as its primary means of repayment. This is particularly the case when the encumbered assets are working capital assets, those that "turn over" and are transformed into cash in the ordinary course of the grantor's business. Inventory may be sold in the ordinary course of the grantor's business, creating receivables which are in turn reduced to payments deposited to a bank account. In order for the secured creditor to obtain a security right in the value of the encumbered assets for which it bargained with the grantor, the secured creditor will either desire to be paid immediately from the bank account or, alternatively, to obtain a security right in the bank account in replacement for the secured creditor's security right in the inventory sold or receivables collected;

(g) In States that recognize the concept of a security right continuing in proceeds of other encumbered assets and where the proceeds consist of cash deposited to a bank account, the secured creditor's proceeds interest, as a replacement for the secured creditor's security right in original encumbered assets, will often continue in the bank account itself to the extent that the proceeds may be identified to the credit balance of the bank account. In those States that do not recognize the concept of a security right continuing in proceeds of other encumbered assets, the secured creditor, if it wishes to obtain a security right in the proceeds which have replaced its original encumbered assets, will need to obtain a separate security right in the bank account to which the proceeds have been deposited.



### **3. The meaning of the term “bank account”**

6. This paper uses the term “bank account” to mean an account with a bank into which funds are deposited by the bank’s customer. The bank account might be a checking account or a time deposit or savings account. If the account is a savings account, it may or may not be evidenced by a savings book.

#### **Bank account as a claim against the bank**

7. A bank account is, in effect, a special type of receivable, i.e. a claim of the customer against the depositary bank for the money deposited in the bank by the customer. In that sense, the customer is the bank’s creditor, the bank is the customer’s debtor, and the credit balance is the amount of the claim. The notion that a bank account is a mere claim of the customer against the depositary bank may not be consistent with the colloquial perception of a bank account as a specific sum of money set aside in specie or otherwise by the bank for the benefit of the customer. However, because banks deploy the pool of funds deposited by their customers by making loans and other investments with the funds, it is not possible for any one bank customer to identify its funds deposited to the bank account as constituting any particular cash at the bank, let alone any particular loan or investment by the bank. Accordingly, the characterization of the bank account as a mere claim is a more accurate characterization of a typical bank account transaction.

#### **Ownership of the claim**

8. Usually the bank’s customer is both the legal and the beneficial owner of the bank account, i.e. the legal and beneficial holder of the monetary claim against the bank with respect to the bank account. However, in some cases the bank account may be held in legal title by the bank’s customer acting as a trustee, escrow agent or other fiduciary for one or more third party beneficiaries.

#### **What constitutes a “bank”**

9. What type of legal entity constitutes a “bank” varies from State to State. In addition, the type of legal entity that may constitute a “bank” under a specific statute or rule of law of a particular State may be different than under other statutes and rules of law of that State, depending upon scope and purpose of the specific statute or rule of law. Nevertheless, the term would normally include any lending institution which accepts cash deposits from its customers.

#### **The bank/customer relationship**

10. The relationship between a bank customer and its bank pertaining to a bank account is usually governed by general law (although some States have specific statutes). These laws are generally not part of the State’s secured transactions law.

#### **Bank account distinguished from a negotiable instrument**

11. A bank account should be distinguished from a negotiable instrument issued by a bank representing the bank’s monetary obligation to its customer. Some banks issue notes or “certificates of deposit” which meet the requirements for a negotiable instrument under applicable law.

12. Security rights in such notes and certificates of deposit issued by banks are governed by the portion of the secured transactions law addressing security rights in negotiable instruments rather than security rights in bank accounts. There is no reason to distinguish

under the secured transactions law negotiable instruments issued by banks from those issued by other persons. Moreover, treating negotiable notes and negotiable certificates of deposit issued by banks as negotiable instruments under the secured transactions law will be consistent with commercial expectations. Parties that deal in negotiable notes or negotiable certificates of deposit typically deal with them as negotiable instruments and not as bank accounts.

### **Bank account distinguished from a securities account**

13. A bank account should also be distinguished from a securities account. While a bank account is a claim of the customer against the depositary bank for a money deposited in the bank account and credited by the bank to the account of the customer, a securities account is a credit owed to the customer by the a bank, broker or other intermediary for specific securities and other financial assets carried by the intermediary on its books for the account of the customer. [*Note to the Working Group: The Working Group may wish to adopt the same functional approach as in the Unidroit draft Convention. Under the Unidroit draft Convention, “ ‘securities account’ means an account maintained by an intermediary to which securities may be credited or debited”, while “ ‘securities’ means any shares, bonds or other transferable financial instruments or financial assets (other than cash) or any interest therein.”*] The customer of a securities account usually has a claim against the intermediary for the value of the securities and other financial assets credited to the securities account. The customer also, under the laws of some States, has a rateable proprietary interest in the specific securities and other financial assets held by the intermediary for all of its customers.

14. When a bank maintaining bank accounts also acts as an intermediary maintaining securities accounts, it normally separates bank accounts from securities accounts and uses different numbers or symbols. However, sometimes it may not be apparent whether the bank is acting as a depositary bank with respect to a bank account or as an intermediary with respect to a securities account. If the bank invests the cash deposited to the account in securities and other financial assets and shows on its books the securities and other financial assets as credited to the account, the account is likely to be a securities account rather than a bank account. However, even in that case, at any point in time the account may hold only a cash balance and may arguably at that time be a bank account rather than a securities account.

15. Given the difficulty in some cases in determining whether a particular account at a bank is a bank account or a securities account, it may be important that the secured transactions rules draw a clear distinction between cash and securities, so as to allow market participants to determine in advance the set of conditions that must be met in order to obtain a security right. [In addition, it would be useful if rules relating to bank accounts and securities accounts could either be substantially identical or, if not substantially identical, at least be coordinated so that the secured creditor may generally comply with one general set of rules to be assured that its security right has been created, is effective against third parties, has the requisite priority and is capable of being enforced, regardless of whether the account is viewed as bank account or a securities account.]

16. For the substantive law rules governing security rights in securities accounts, reference should be made to the rules to be proposed by the International Institute for the Unification of Private International Law (Unidroit) Study on Transactions and Transnational and Connected Capital Markets (Study LXXVIII)—Securities Held with an Intermediary. For the conflict-of-laws rules relating to security rights in securities, reference should be made to the Convention on the Law Applicable to Certain Rights in

Securities Held with an Intermediary, prepared by the Hague Conference on Private International Law.

#### **4. Creation of the security right as between the parties**

17. A secured transactions regime that governs security rights in bank accounts should provide rules by which the security right may be created. Such regimes typically set forth several conditions to be met for the security right to be created.

##### **Secured Obligation**

18. As with other security rights, a security right in a bank account must secure an obligation. For example, the creditor may extend credit to the grantor with the security right in the bank account securing the grantor's obligation to pay the credit obligations.

##### **Rights in the bank account**

19. Another condition, derived from the general principle that a grantor must have some property right in an encumbered asset, is that the grantor must be the bank's customer on the bank account or otherwise have sufficient rights in the bank account that may be conveyed by way of a security right. In some cases, even if the grantor is a customer of the bank, the grantor may not have sufficient rights in the bank account to create a security right in the bank account without the consent of another customer of the bank. For example, in the event that two or more persons are the joint customer of the bank, it may be that, under the applicable law, no one customer has a right to create a security right in the bank account without the consent of the other joint customers.

##### **Anti-assignment terms**

20. If the agreement between the bank and the customer establishing the bank account contains a term by which the customer may not create a security right or otherwise assign its rights in the bank account without the consent of the depositary bank, the consent of the depositary bank may be required for the customer to create a security right in the bank account in favour of the creditor. Even in those States whose laws override anti-assignment terms relating to trade receivables, the override of anti-assignment terms may not go so far as to override an anti-assignment term in an agreement between the customer and the depositary bank relating to the bank account (see articles 4 (f) and 9 (3) of the United Nations Assignment Convention).

21. It may be desirable, however, for the anti-assignment term not to be given effect beyond its intended purpose, which is usually to protect the depositary bank from having to deal with a stranger/assignee as its customer. With this purpose in mind, there would seem to be little justification for applying the anti-assignment term so as to prevent the creation of the security right, so long as the law provides that such a grant of a security right does not create any duty of the depositary bank to recognize the secured creditor, or otherwise impose any obligations on the part of the depositary bank to the secured creditor, without the depositary bank's consent.

##### **Consumer bank accounts**

22. The law of a particular State may also prohibit, or apply special rules to restrict, an individual grantor from creating a security right in a bank account where the bank account contains funds used for the grantor's personal, family or household purposes or would secure credit extended to the grantor for such purposes.

23. A State enacting a secured transactions law should consider if and to what extent a security right in a bank account may be created by an individual grantor if the funds in the bank account or the credit obtained are for the grantor's personal, family or household purposes. The State should consider whether the policy favouring the availability of credit at affordable rates outweighs or should be subordinate to any policy of the State protecting the individual from improvident borrowing and the possible loss of funds needed for the support of the individual and his or her family. Possible approaches may be to prohibit such a security right, to limit the right to certain types of transactions, or to require that the bank account be described more specifically in the security agreement. The policy underlying a requirement for the bank account to be described more specifically in the security agreement is better to inform the individual grantor that the security right is being granted and to indicate that the secured creditor is actually relying on the bank account as an encumbered asset in making its decision to extend credit to the grantor.

#### **Required formalities**

24. There may be formality requirements under the laws of a particular State to evidence that the grantor intended to create a security right in the bank account. In some States it may be sufficient for the grantor to evidence the creation of a security right by a writing signed by the grantor and delivered to the secured creditor. Other States may require, additionally or alternatively, that the depositary bank either receive notice of or acknowledge the security right or that the depositary bank agree that it will follow instructions from the secured creditor as to the bank account without further consent from the grantor. It may also be possible for the formality requirements to be met by the secured creditor replacing the grantor as the bank's customer with respect to the bank account.

25. In some States, the formality requirements may include a requirement that the bank account be specifically described in the writing creating the security right. In other States, the bank account may be described more generally. In those States that require, additionally or alternatively, that the depositary bank either receive notice of or acknowledge the security right, or that the depositary bank agree that it will follow instructions from the secured creditor as to the bank account without further consent from the grantor or that the secured creditor replace the grantor as the bank's customer with respect to the bank account, the requirement of a specific description of the bank account is inherent in the requirement of notice to or acknowledgement or agreement by the depositary bank or the substitution of the secured creditor for the grantor as the bank's customer with respect to the bank account.

26. Under the laws of a State, there may be circumstances in which a secured creditor obtains a security right in a bank account automatically (by operation of law or by way of general terms and conditions). First, in some States a depositary bank that extends credit to a customer automatically obtains a security right in the customer's bank account maintained with it. Second, in those States which recognize the concept of a security right continuing in proceeds of other encumbered assets, a secured creditor holding a security right in an encumbered asset may obtain an automatic security right in a bank account to which proceeds of the encumbered asset are credited when the encumbered asset is sold or otherwise disposed of or collected on.

27. However, some States may view any security right of the depositary bank in a bank account maintained with it as nothing more than a right of recoupment or set-off and, accordingly, may not recognize the security right as such.

28. At least as far as formalities are concerned, there seems to be little justification for a State to require, as part of its secured transactions law, different formalities requirements for bank accounts than for receivables or other encumbered assets generally.

#### **Transactional bank accounts**

29. The examples described above have not distinguished between transactions in which the grantor retains the right to draw funds from the bank account by issuing cheques or otherwise and those in which that right is restricted. In some States, the ability of the grantor to draw funds from the bank account may be viewed as inconsistent with the State's traditional notion of a pledge by which the secured creditor has the equivalent of possession of the encumbered asset. Similarly, a bank account from which the grantor may draw funds might not be regarded as sufficiently within the possession of the secured creditor so as to permit a security right to have been created.

30. In other States the security right may be created by a grantor even if the grantor has a right to draw funds from the bank account. In those States, the secured creditor's right to stop the grantor from drawing funds from the bank account may be a remedy available to the secured creditor with respect to the security right upon the grantor's default in the payment or performance of the secured obligation. However, the delayed exercise of that remedy by the secured creditor does not impair the creation of the security right.

#### **5. Effectiveness of the security right against third parties**

31. As with security rights in other types of property, creation of a security right in a bank account as between the grantor and the secured creditor is an issue that is distinct from effectiveness of that right against third parties. Thus, a secured transactions law which recognizes security rights in bank accounts should set forth what additional steps may need to be taken for the security right, once created, to be effective as against third parties.

32. In some States, a security right in a bank account may become effective against third parties by the secured creditor making a notice or other filing covering the bank account in a security rights registry. For the security right to be effective against third parties under the laws of other States, it may be required that the bank account be assigned to the secured creditor, with the bank either receiving notice of or acknowledging the assignment or the bank agreeing that it will follow instructions from the secured creditor as to the bank account without further consent from the grantor. It may also be possible for a security right in bank account to be effective against third parties by the secured creditor replacing the grantor as the bank's customer with respect to the bank account.

33. In addition, under the laws of some States, if the secured creditor is itself the depositary bank and the security right is recognized as not merely being the depositary bank's right of recoupment or set-off, the security right may be effective against third parties automatically. Even those States that permit a security right to become effective against third parties by a filing in a security rights registry often permit the depositary bank's security right in a bank account maintained with it to be automatically effective against third parties without such a filing. The justification is that most third party creditors relying on the bank account as an encumbered asset would assume in any event that the depositary bank would have rights of recoupment or set-off that in a large part are the economic equivalent of a security right and which are likely to be superior to a competing security right or judgment right. Of course, such recoupment and set-off rights are not the subject of public filings. Under those circumstances, imposing a filing requirement on the depositary bank for its security right to be effective against third parties would have only

marginal, if any, benefit in informing third parties that the depositary bank may have a superior interest in the bank account. However, the cost of imposing a filing requirement upon the depositary bank may be significant depending upon the number of customers of the depositary bank granting security rights in their bank accounts maintained at the depositary bank.

34. When a secured creditor has the legal authority to direct the depositary bank as to the disposition of funds in the bank account without further consent of the grantor as the secured creditor, it is considered that the secured creditor has “control” over the bank account (see definition in A/CN.9/WG.VI/WP.11/Add.1, para. 17 (bb)). Under this definition, the secured creditor would have “control” where: (i) the secured creditor is the depositary bank; (ii) the depositary bank has agreed to follow instructions from the secured creditor with respect to the bank account without further consent of the grantor (the agreement by which the depositary bank has agreed to follow instructions from the secured creditor with respect to the bank account without further consent of the grantor is referred to in this Chapter as a “control agreement”); or (iii) the secured creditor is the bank’s customer as to the bank account.

35. Under the laws of some States, a security right in a bank account is effective against third parties when the secured creditor obtains control. Even if the State permits a security right to become effective against third parties by a filing in a security rights registry, the State will often permit the security right to be effective against third parties by the secured creditor achieving control of the bank account as an alternative to such a filing. The justification for doing so is best understood in the context of the State’s priority rules in which a security right effective against third parties as a result of the secured creditor achieving control has priority over other security rights. Priority obtained by control is discussed below.

## **6. Priority of the security right over the rights of competing claimants**

36. In addition to rules governing the creation of a security right in a bank account and the effectiveness of such a security right against third parties, the law should set forth priority rules, i.e. rules for ranking claims against the bank account among the secured creditor and competing claimants.

### **General priority rules based on first in time**

37. In those States in which a security right in a bank account can be made effective against third parties by the secured creditor making a filing covering the bank account in a security rights registry, then, once the filing has been made, the security right will usually be entitled to priority over the interests of a competing secured creditor who later asserts priority by making such a filing covering the bank account, of a creditor of the grantor who later obtains a judgment right in the bank account or of an insolvency administrator of the grantor in the event that an insolvency proceeding is later commenced by or against the grantor.

38. Similarly, in those States in which, for the security right to be effective against third parties, it is required that the bank account be assigned to the secured creditor with the bank either receiving notice of or acknowledging the assignment or the bank agreeing that it will follow instructions from the secured creditor as to the bank account without further consent from the grantor or that the secured creditor replace the grantor as the bank’s customer with respect to the bank account, then, once the notice has been given or the acknowledgment or agreement of the bank has been obtained or the secured creditor has become the bank’s customer with respect to the bank account, the security right will

usually be entitled to priority over the interests of a competing secured creditor who later asserts priority by giving such a notice or obtaining from the bank such an acknowledgment or agreement, of a creditor of the grantor who later obtains a judgment right in the bank account or of an insolvency administrator of the grantor in the event that an insolvency proceeding is later commenced by or against the grantor (if the first secured creditor has obtained priority by becoming the bank's customer with respect to the bank account, then that method of obtaining priority will presumably not be available to a subsequent secured creditor).

39. There may be circumstances under the laws of many States in which a secured creditor's security right in a bank account, which arises automatically, also has automatic priority. In those States in which a depositary bank automatically obtains a security right in a bank account maintained with it, the security right may have automatic priority over other competing interests. In those States that recognize the concept of a security right continuing in proceeds of other encumbered assets, a secured creditor's proceeds interest in a bank account may have automatic priority over certain competing interests, such as a creditor with a judgment right or who had a junior security right in the original encumbered asset.

#### **Exceptions to general priority rules based on first in time**

40. While priority disputes relating to a security right are generally resolved on the basis of a "first in time" rule, such a rule may not always be appropriate with respect to a security right in bank account. This is especially the case where it is possible for a security right in a bank account to become effective against third parties by a method, such as making a notice filing in a security rights registry, without the consent or other involvement of the depositary bank.

41. Many parties may deal with the bank account or funds credited to it. In a number of transactions, especially those involving repurchase agreements, securities lending and derivatives, parties act quickly; in some cases on a daily basis. It is not customary or efficient to require these parties to make a notice or other filing in a security rights registry before entering into these transactions. Nor should these parties be burdened with searching in a security rights registry or making other inquiry of possible secured creditors before entering into any bank-account-related transaction.

42. In fact, in some States a security right which has become effective against third parties by the secured creditor making a notice or other filing in a security rights registry may be junior in priority to a security right of which the bank has been notified or to which the bank has consented or for which the bank has agreed to follow instructions from the secured creditor without further consent from the grantor or where the secured creditor has replaced the grantor as the bank's customer with respect to the bank account. Likewise, in those States that recognize the priority of a security right in a bank account as proceeds, the security right in proceeds may be junior in priority to a security right of which the bank has been notified or to which the bank has consented or for which the bank has agreed to follow instructions from the secured creditor without further consent from the grantor or for which the secured creditor has become the bank's customer with respect to the bank account. In these cases, a "first in time" priority rule may not apply. A security right which becomes effective against third parties on a "first in time" basis may become junior to a later security right if the bank has been notified of or consented to the later security right, or has agreed to follow instructions from the secured creditor relating to the bank account without further consent from the grantor or the secured creditor has become the bank's customer with respect to the bank account, after the first security right has become effective against third parties.

43. Indeed, in those States in which a depositary bank automatically has a security right in a bank account maintained with it, the depositary bank's security right may have priority over all other security rights, whether or not the other security rights have become effective against third parties on a "first in time" basis, unless the depositary bank agrees otherwise.

44. Awarding priority to the depositary bank in this circumstance would appear to be justified in practice. The priority given to a secured creditor that is also the depositary bank is consistent with the superior rights of recoupment and set-off usually enjoyed by the depositary bank. If the secured creditor is not the depositary bank and is relying upon its security right in the bank account, it will in practice either want to become the bank's customer with respect to the bank account or will want to enter into a control agreement or like agreement with the depositary bank to enforce its security right so that following the grant's default the depositary bank will be obligated to turn over the funds in the bank account to the secured creditor. It will also want to the agreement to contain a subordination term by which, if the depositary bank claims a security right in the bank account or has a right of recoupment or set-off, the depositary bank's security right or right of recoupment or set-off will, in most respects, be junior to the security right of the third party secured creditor. If the secured creditor has become the bank's customer with respect to the bank account, the depositary bank may thereafter have no right to set-off funds in the bank account against obligations owed to the depositary bank by the grantor. That is because the mutuality of obligations between the parties (the grantor and the depositary bank) owing money to each other, and typically required for set-off under applicable law, is no longer present.

#### **Transferees of funds from the bank account**

45. Of course, a "first in time" priority rule has even less justification with respect to transferees of funds from the bank account, such as payees on cheques drawn on the bank account and recipients of funds transfers. In those States in which the grantor may draw funds from the bank account in which the secured creditor has a security right, transferees of those funds usually take the funds free of any security right in the bank account including, in those States which recognize the concept of proceeds, free of any proceeds security right in the funds received by the transferee. Otherwise, the secured transactions law of the State would unduly interfere with negotiable instrument law or impair the negotiability of money, cheques and credit transfers among banks and other persons.

### **7. Enforcement of the security right as against the grantor**

46. A secured transactions law which recognizes a security right in a bank account should contain clear legal rules for the efficient enforcement of the security right.

#### **Enforcement in general**

47. When a secured creditor has a security right in a bank account, and the grantor has defaulted on its obligation, the secured creditor will be entitled to enforce the security right. Enforcement in this context typically consists of the secured creditor obtaining from the depositary bank the funds credited to the bank account and then applying the funds to the secured obligation. In the case where the secured creditor is the depositary bank or is the depositary bank's customer with respect to the bank account, the secured creditor may simply apply the credit balance in the bank account to the secured obligation.



### **Necessity for resort to judicial process or court supervision**

48. As with other types of property in which a security right may be created, the secured transactions law must determine the extent to which enforcement of the security right may be accomplished without resort to judicial process and otherwise without court supervision. A requirement for the secured creditor to use judicial process or be under court supervision to enforce its security right increases the costs of and delays enforcement, thereby increasing the costs of credit both for those obligors who default on their credit obligations and for those obligors who do not. On the other hand, a requirement that the secured creditor use judicial process or be under court supervision to enforce its security right may be necessary where there is a good faith dispute as to the secured creditor's right to enforce its security right, where there is a danger to the public order or where there is a strong possibility of secured creditor abuse.

49. There would seem to be little justification for a State to require that a secured creditor use judicial process or be under court supervision to enforce its security right in a bank account, especially in three cases. The first is where the depositary bank is itself the secured creditor. In that case, it would seem of little value to require the secured creditor to use judicial process or be under court supervision in order to apply a claim owed to its customer to a claim owed by its customer to it. This is especially true where the secured creditor, as depositary bank, also has under the law of the State a right of recoupment or set-off that could be exercised by the secured creditor as depositary bank without resort to judicial process or court supervision. The exercise of the right of recoupment or set-off largely produces the same economic result as the exercise of a security right. It would seem to make little sense to require resort to judicial process or court supervision in one case but not the other.

50. The second case is where the depositary bank has already agreed by contract with the secured creditor and the grantor to transfer the funds in the bank account to the secured creditor upon its instructions, without further consent of the grantor. In that case, since the contract was specifically negotiated with the grantor and the depositary bank, the need for use of judicial process or court supervision would likewise appear to be superfluous so long as the agreement of the grantor is a binding contractual one.

51. The third case is where the secured creditor has replaced the grantor as the depositary bank's customer with respect to the bank account. Here also there would appear to be no need for judicial process or court supervision since the secured creditor already has the right to deal with the bank account as the bank's customer.

52. There may perhaps appear to be a greater justification to require that a secured creditor use judicial process or be under court supervision in some circumstances to enforce its security right in a bank account when the credit extended or the bank account itself is for the personal, family or household purposes of an individual grantor. Even then it would seem of little value to require the use of judicial process or court supervision for enforcement of the security right when the depositary bank is the secured creditor and would have a right of recoupment or set-off in any event.

### **8. Rights and duties of the depositary bank**

53. Any method of enforcement of a security right in a bank account by a secured creditor that is not the depositary bank raises issues as to the rights and duties of the depositary bank in the absence of the secured creditor's resort to judicial process or court supervision of enforcement and the issuance of a judicial order covering those rights and duties. A secured transactions law that recognizes a security right in a bank account should

provide clear legal rules setting forth the rights and duties of the depositary bank relating to the security right.

54. While one could argue that the subject of the rights and duties of the depositary bank is largely a question of priority, a fuller discussion of the subject may be useful to illustrate the importance of addressing the subject with respect to creation, effectiveness against third parties, priority and enforcement of the security right even if already discussed above. This is because of the unique role played by the depositary bank in its capacity as a debtor with respect to the claim of the bank's customer against the depositary bank on the bank account.

#### **Contrast with rights and duties of a debtor on a trade receivable**

55. Indeed, to address the rights and duties of the depositary bank in the absence of a judicial order doing so, it is important to distinguish the rights and duties of a debtor on a trade receivable from the rights and duties of a depositary bank with respect to a bank account. In the case of a security right in a trade receivable, the security right might still be effective against the debtor on the receivable even if the original contract under which the trade receivable arose contained an anti-assignment term (see article 9 of the Assignment Convention). Moreover, in the case of a security right in a trade receivable, the secured creditor is usually entitled to notify the debtor on the receivable to pay the secured creditor (see article 13 (1) of the Assignment Convention). The debtor may then not be entitled to a discharge on its payment of the receivable unless the debtor pays the secured creditor (see article 17 of the Assignment Convention).

56. However, where the debtor is a depositary bank with respect to a bank account, the depositary bank may not necessarily be subject to the same rules under the laws of a particular State (see article 4 (f) of the Assignment Convention). Instead, the depositary bank may have certain rights, and no or few duties, to accept or refuse the creation, priority or enforcement of a security right in the bank account in some circumstances.

#### **Depositary bank's consent to the creation of the security right as between the parties, the effectiveness of the security right against third parties and the priority of the security right**

57. As explained above, under the laws of some States, the depositary bank's consent or other involvement may be required for the grantor to create a security right in a bank account, for the security right to be effective against third parties or for the security right to have priority.

(a) The depositary bank's consent may be required for the grantor to create a security right in a bank account. This may be the case if the agreement between the grantor and the depositary bank establishing the bank account contains a term restricting the grantor's right to create a security right without the consent of the bank. It may also be the case under the laws of some States that the depositary bank's consent, by way of acknowledgment of the security right or agreement with the secured creditor, may be required for the grantor to create the security right even if the agreement between the grantor and the depositary bank establishing the bank account does not contain a term restricting the grantor from creating the security right;

(b) The involvement of the depositary bank, by way of acknowledgment of the security right or agreement with the secured creditor, may likewise be required for the secured creditor's security right to be effective against third parties under the laws of some States;

(c) The involvement of the depositary bank, by way of acknowledgment of the security right or agreement with the secured creditor, may be required for the secured creditor's security right to have priority over any security right in the bank account in favour of the depositary bank itself.

**Enforcement of the security right as against the depositary bank**

58. In addition, under some circumstances the consent of the depositary bank may be required for the secured creditor to enforce a security right in the bank account.

59. In those States in which the security right in a bank account is effective against third parties on account of a notice or other filing in a security rights registry or by reason of notice of assignment to or acknowledgment of assignment by the depositary bank, the filing, notice or acknowledgment may or may not impose duties on the depositary bank to follow instructions from the secured creditor as to the funds in the bank account when the secured creditor wishes to enforce the security right. If such duties are not imposed on the depositary bank under the applicable laws of a particular State, the secured creditor's right to obtain the funds in the bank account upon enforcement of the security right would usually depend upon whether the customer has instructed the depositary bank to follow the secured creditor's instructions as to the funds or the depositary bank has agreed with the secured creditor to do so.

60. In the absence of such instructions or agreement, the secured creditor may need to enforce the security right in the bank account by using judicial process to obtain a court order requiring the depositary bank to turn over the funds in the bank account to the secured creditor.

*[Note to the Working Group: Part A. General Remarks, the rest of Section 8 and Sections 9 to 11, as well as Part. B, Recommendations, are contained in document A/CN.9/WG.VI/WP.18/Add.1.]*

## A/CN.9/WG.VI/WP.18/Add.1

**Report of the Secretary General on the draft legislative  
guide on secured transactions, submitted to  
the Working Group on Security Interests  
at its seventh session**

## ADDENDUM

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**XVI. Security rights in bank accounts****A. General remarks (continued)**

*[Note to the Working Group: Part A. General remarks, Sections 1 to 8, are contained in document A/CN.9/WG.VI/WP.18.]*

**8. Rights and duties of the depositary bank (continued)****Other rights and duties of the depositary bank**

61. In those circumstances in which the secured creditor is not the depositary bank's customer with respect to the bank account and the depositary bank's consent is required for the creation of a security right in the bank account, for the security right to be effective against third parties, for the security right to have priority or for the secured creditor to enforce the security right, the depositary bank may have no duty under the law of the applicable State to provide the consent.

62. Even when the secured creditor is able to enforce the security right against the depositary bank, the depositary bank may have a right to recoup or set-off any funds in the bank account that might otherwise be claimed by the secured creditor against obligations owed by the grantor to the depositary bank. Indeed, the entitlement of the secured creditor

to the funds in the bank account may always be subordinate to depositary bank's right of recoupment or set-off unless the depositary bank has agreed otherwise.

63. Moreover, the depositary bank may have no duty under the laws of a particular State to reorder its favourable priority contractually by subordinating its right of recoupment or set-off, or by subordinating any security right which it may obtain automatically in the bank account as a depositary bank, to the security right of another creditor of the grantor.

64. Of course, even if, to facilitate the creation as between the parties, effectiveness against third parties, priority and enforcement of a security right in a bank account, the secured creditor is willing to become the depositary bank's customer with respect to the bank account, the depositary bank may have no duty to accept the secured creditor as the bank's customer.

**Position of the depositary bank justifying not imposing duties on the depositary bank without its consent**

65. While it may seem unjustified for a secured transactions law not to impose various duties upon the depositary bank with respect to the security right without the depositary bank's consent, nevertheless the alternative of imposing such duties as a rigid legal rule may subject the depositary bank to undue risks that it is not in a position to manage without having appropriate safeguards in place.

(a) The depositary bank is subject to significant operational risks, with funds being debited or credited to bank accounts on a daily basis, often with credits being made on a provisional basis, and sometimes involving other transactions with its customers;

(b) These risks are compounded by legal risk to the depositary of failing to comply with laws dealing with negotiable instruments, wire transfers and other payments systems rules in its day to day operations as well as the risk of not complying with certain duties imposed on the depositary bank by other laws, such as laws requiring it to maintain the confidentiality of its dealings with its customers;

(c) In addition, the depositary bank is typically subject to regulatory risk under laws and regulations of the State designed to insure the safety and soundness of the depositary bank;

(d) The depositary bank is also subject to reputational risk in choosing which customers with which it agrees to enter into transactions.

66. Given these risks faced by the depositary bank, and its need to implement and maintain appropriate safeguards to manage those risks, a rule that imposes duties on the depositary bank with respect to a security right in a bank account only with depositary bank's consent is understandable and well justified.

67. The experience in those States where the depositary bank's consent to such duties is required suggests that the parties are often able to negotiate satisfactory arrangements so that the depositary bank is comfortable that it is managing the risks involved given the nature of the transaction and of the bank's customer.

**9. Relationship with insolvency law**

68. The secured transactions law of a State which recognizes a security right in a bank account should set forth rules to relate the secured transactions law to the insolvency law of the State.

69. The secured creditor holding a security right in a bank account will normally be subject to the rules applicable in the grantor's insolvency proceeding. For example, the secured creditor will typically still be subject to rules in the grantor's insolvency proceeding relating to any stays of enforcement against the grantor, preferential or fraudulent transfer and the like. Under some circumstances, the grantor's insolvency administrator may, notwithstanding that the secured creditor's security right otherwise is effective against third parties and has priority, be entitled to draw funds from the bank account for use in the insolvency proceeding so long as the secured creditor is given a security right in other assets of equal value or the value of the security right is otherwise protected.

70. Even if for some reason the insolvency tribunal does not have jurisdiction over the secured creditor, the secured creditor may in practical effect find itself subject to the rules applicable in the grantor's insolvency proceeding to the extent that the insolvency tribunal has jurisdiction over the depositary bank and the depositary bank may not, under the insolvency rules, honour the instructions from the secured creditor as to the funds in the bank account without the consent of the insolvency administrator or the insolvency tribunal.

## **10. Conflict of laws**

71. The law of a State that recognizes a security right in a bank account should provide clear rules that address conflict-of-laws issues relating to security rights in bank accounts.

72. States have taken different approaches to address conflict-of-laws issues involving security rights in bank accounts. Under the laws of some States, all issues relating to security rights in bank accounts are governed by the law of the State in which the grantor is located, typically the State in which the central administration of the grantor is exercised or the State in which the grantor habitually resides (see article 5 (h) of the Assignment Convention).

73. Under the laws of other States, all issues relating to security rights in bank accounts are governed by the law of the State in which the depositary bank is located. The depositary bank would typically be located in the State in which it has its place of business or, if the depositary bank has a place of business in more than one State, in the State which has the closest relationship with the secured transaction. It is possible, however, that the law of a particular State may permit the grantor and the depositary bank to designate the State in which the depositary bank is considered to be located for purposes of its secured transactions law.

74. A few States take a bifurcated approach. Under this approach, issues relating to the effectiveness of the security right against the grantor and the enforcement of the security right against the grantor may be governed by the law of the State in which the grantor is located or perhaps by the law of the State applicable under the private international law rules for the contract creating the security right. Issues relating to the effectiveness of the security right against third parties and the priority of the security right, to the extent not involving the acknowledgment, consent or agreement of the depositary bank or the secured creditor becoming the bank's customer with respect to the bank account, may in turn be governed by the law of the State in which the grantor is located. However, under a bifurcated approach any issues relating to the effectiveness of the security right against third parties or priority of the security right requiring the acknowledgment, consent or agreement of the depositary bank or the secured creditor becoming the bank's customer

with respect to the bank account, or relating to the rights and duties of the depositary bank with respect to the security right, may be governed by the law of the State in which the depositary bank is located or by the law of the State governing the agreement between the grantor and the depositary bank establishing the bank account.

75. The Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (the “Hague Convention”) suggests a modified approach. Under the Hague Convention, issues relating to the priority of a security right in a securities account and the rights and duties of the intermediary with respect to the securities account are determined by the law of the State whose laws govern the agreement between the grantor and intermediary establishing the securities account.

76. Given that it is sometimes difficult to determine whether an account maintained at a bank is a bank account or a securities account, it would seem to be most efficient for the conflict-of-laws rules relating to security rights in bank accounts to be as consistent as practicable with those relating to security rights in securities accounts. Accordingly, deference to the rules of the Hague Convention would appear to be appropriate and justifiable, i.e. that issues relating to the effectiveness of the security right in a bank account against third parties, the priority of the security right, the rights and duties of the depositary bank with respect to the bank account and the enforcement of the security right be determined by the law of the State whose laws govern the agreement with the depositary bank establishing the bank account. This approach, for purposes of determining the effectiveness against third parties and priority of a security right in a bank account and the rights and duties of the depositary bank with respect to the security right, has substantially the same effect as it would under the laws of a State which permitted the grantor and the depositary bank to designate the State in which the depositary bank is considered to be located for purposes of its secured transactions law.

77. Another policy reason for referring to the law governing the agreement establishing the bank account is that anyone extending credit in reliance on a security right in a bank account will be well aware that the value of that bank account as an encumbered asset is dependent not only on whether the creditor’s security right is effective, as a security right, against the grantor and third parties, but also on whether the bank account has any value. The value of the bank account will depend, in large part, on the right of the bank at which the account is maintained to diminish the value of the bank account by setting off its claims against the grantor against the balance in the bank account. Thus, the secured creditor will, as a practical matter, need to learn something about the bank’s rights against the grantor under the law of the State that governs the bank account to ascertain the value of the security right. In the course of this investigation of matters governed by the law of that State, the secured creditor can take steps to learn whether a competing secured creditor has “control” over the bank account under the laws of that State because of an agreement with the bank. Accordingly, having effectiveness against third parties by “control” governed by the law of the State whose law governs the bank account does not place unfair burdens on those considering the extension of credit to the grantor.

78. It may be that, in deferring to the rules of the Hague Convention for security rights in deposit accounts, there may be instances in which a security right made effective against third parties by the making of a notice filing in a security rights registry is not recognized (an issue referred to in the context of a multi-unit State in article 12.2.b of the Hague Convention). For example, if the grantor is located in State A but the law governing the agreement between the grantor and the depositary bank establishing the bank account is that of State B, a notice filing made in State A may not be recognized as a method for

making the security right effective against third parties under the material law of State B. Nevertheless, in other instances, such as where the grantor is located in the same State whose laws govern the agreement between the grantor and the depositary bank establishing the bank account and that State permits a security right to be effective against third parties by the making of a notice filing in the security rights registry of that State, the notice filing will be recognized.

79. An alternative rule might be to look to the law of the State of the grantor on issues relating to the effectiveness of the security right in a bank account against third parties, the priority of the security right, the rights and duties of the depositary bank with respect to the bank account and the enforcement of the security right. However, there may be practical objections to such an approach. A conflict-of-laws rule which looks to the law of the State of the grantor may possibly subject the depositary bank to differing material law rules depending upon the locations of its many customers. Such a result would increase the operational and other risks to the depositary bank in ways which would not seem justified. Indeed, avoiding the multiplicity of conflict-of-laws rules applicable to intermediaries was one of the goals of the Hague Convention itself. Moreover, if the conflict-of-laws rule looked to the location of the grantor on such issues as priority, the inconsistency between the conflict-of-laws rules governing bank accounts and those governing security accounts may well create confusion in practice, especially in circumstances where it is not clear whether an account is a bank account or a securities account.

## **11. Conclusion**

80. Security rights in bank accounts play an important role in many credit transactions. A modern secured transactions law should recognize security rights in bank accounts and provide clear rules for the creation as between the parties, effectiveness against third parties, priority and enforcement of the security rights. The law should address as well the rights and obligations of the depositary bank with respect to a security rights in bank accounts maintained with it. The legal rules should be integrated into the State's insolvency law and should provide conflict-of-laws rules to address cross-border transactions involving security rights in bank accounts.

## **B. Recommendations**

81. The law should define a "bank account" that is governed by that law. The definition should distinguish a bank account from a negotiable instrument issued by the depositary bank and from a securities account maintained at the depositary bank.

82. Because it may be difficult at times to determine whether an account at a bank is a bank account or a securities account, the rules governing security rights in bank accounts should draw a clear distinction between a bank account and a securities account. [These rules should also be substantially identical to those governing security rights in securities accounts or, if not substantially identical, at least coordinated so that the security creditor may comply with a single set of rules to insure creation, third party effectiveness, priority and ability to enforce the security right. The law governing security rights in bank accounts should accordingly follow as much as practicable the recommended rules for security rights in securities accounts contained in the International Institute for the Unification of Private International Law (UNIDROIT) texts on Transactions on Transnational and



Connected Capital Markets, including the draft Convention on Harmonised Substantive Rules regarding Securities held with an Intermediary.]

83. The requirements for the creation of a security right in a bank account should, as a general matter, permit a security right to be created in any type of bank account, including a transactional bank account and a bank account in which the depositary bank is the secured creditor. Generally the requirements for creation of the security right should be the same as the requirements for the creation of a security right in other encumbered assets. However, an anti-assignment term in an agreement between the grantor and the depositary bank should not prevent the creation of a security right in a deposit account so long as the depositary bank has no duty to recognize the secured creditor, and no obligations are otherwise imposed on the depositary bank with respect to the security right, without the depositary bank's consent. Moreover, the enacting State should consider whether and to what extent, consistent with its consumer-protection laws and policies, a security right in a bank account may be created by an individual grantor if the funds in the bank account or the credit extended to the individual grantor is for the grantor's personal, family or household purposes.

84. A security right in a bank account should be effective against third parties when the security right has been created and either the secured creditor has made a notice filing in the security rights registry covering the bank account or has obtained control of the bank account.

85. A security right which has become effective against third parties by control should be superior in priority to a security right which has become effective against third parties by other methods, including by the making of a notice filing in the security rights registry. If the secured creditor is the depositary bank, the depositary bank's security right should have priority over any other security right unless the depositary bank otherwise agrees. Likewise, unless the depositary bank otherwise agrees, the depositary bank's right to recoup or setoff against the bank account obligations owed to the depositary bank by the grantor should have priority over the security right of another secured party other than a secured party who has become the customer of the depositary bank with respect to the bank account.

86. A transferee of funds from a bank account should take free of a security right in the bank account.

87. A secured creditor whose security right in a bank account is enforceable against third parties on account of the secured creditor obtaining control of the deposit account should generally be permitted to enforce the security right against the grantor without the need for judicial process or court supervision. Any exceptions should be clearly stated and should generally relate only to the case where the State permits a security right in a bank account to be granted by an individual and the funds in the bank account or the credit secured by the security right is for the grantor's personal, family or household purposes.

88. A depositary bank should not be required to enter into a control agreement without its consent and should not be required to assume any other duties with respect to a security right in a bank account without the depositary bank's consent.

89. Issues relating to the creation of a security right in a bank account as between the parties, the effectiveness of the security right against third parties, the priority of the security right over the rights of competing claimants, the rights and duties of the depositary bank with respect to the security right in the bank account, and the rules for enforcement of

the security right should be determined by the law of the State whose laws govern the agreement between the account holder and the depositary bank establishing the bank account (i.e. the rule of the Hague Convention).

*[Note to the Working Group: The Working Group may wish to consider whether reference should be made instead to the law of the grantor's location (see article 22 of the Assignment Convention) or another law. The Working Group might also wish to consider whether reference might be made to the law of the grantor's location for effectiveness against third parties based upon filing of a notice in a secured transactions registry even if reference is made for all other issues to the law of the State whose laws govern the agreement between the account holder and the depositary bank establishing the bank account.]*

**H. Report of the Secretary General on the draft legislative  
guide on secured transactions, submitted to the Working  
Group on Security Interests at its seventh session  
(A/CN.9/WG.VI/WP.19) [Original: English]**

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## **X. Conflict of laws**

### **A. General remarks**

#### **1. Introduction**

##### **a. Purpose of conflict-of-laws rules**

1. This chapter discusses the rules for determining the law applicable to the creation of a security right as between the grantor and the secured creditor, effectiveness against third parties (“third-party effectiveness”), priority and enforcement. These rules are generally referred to as conflict-of-laws rules and also determine the territorial scope of the substantive rules envisaged in the Guide (i.e. if and when the substantive rules of the State enacting the regime envisaged in the Guide apply). For example, if a State has enacted the substantive law rules envisaged in the Guide relating to the priority of a security right, these rules will apply to a priority contest arising in the enacting State only to the extent that the conflict-of-laws rule on priority issues points to the laws of that State. Should the conflict rule provide that the law governing priority is that of another State, then the

relative priority of competing claimants will be determined in accordance with the law of that other State, and not pursuant to the substantive priority rules of the enacting State.

2. After a security right has become effective, a change might occur in the connecting factor for the choice of the applicable law. For instance, if the third-party effectiveness of a security right in tangible goods located in State A is governed by the law of the location of the goods, the question arises as to what happens if those goods are subsequently moved to State B (whose conflict rules also provide that the location of the goods governs the third-party effectiveness of security rights over tangible property). One alternative would be for the security to continue to be effective in State B without the need to take any further step in State B. Another alternative would be for new security to be obtained under the laws of State B. Yet another alternative would be for the secured creditor's pre-existing right to be preserved subject to the fulfilment in State B of certain formalities within a certain period of time (e.g. 30 days after the goods have been brought into State B). These issues are addressed by the conflict-of-law rules of some legal systems. This chapter proposes in this regard a general rule based on the latter alternative.

3. Conflict-of-laws rules should reflect the objectives of an efficient secured transactions regime. Applied to the present chapter, this means that the law applicable to the property aspects of a security right should be capable of easy determination: certainty is a key objective in the elaboration of rules affecting secured transactions both at the substantive and conflict-of-laws levels. Another objective is predictability. As illustrated by the question in the preceding paragraph, the conflict-of-laws rules should permit the preservation of a security right acquired under the laws of State A if a subsequent change in the connecting factor for the selection of the applicable law results in the security right becoming subject to the laws of State B. A third key objective of a good conflict-of-laws system is that the relevant rules must reflect the reasonable expectations of interested parties (creditor, grantor, debtor and third parties). According to many, in order to achieve this result, the law applicable to a security right should have some connection to the factual situation that will be governed by such law.

4. Use of the Guide (including this chapter) in developing secured transactions laws will help reduce the risks and costs resulting from differences between current conflict-of-laws rules. In a secured transaction, the secured creditor normally wants to ensure that its rights will be recognized in all States where enforcement might take place (including in a jurisdiction administering the insolvency of the grantor). If those States have different conflict-of-laws rules in relation to the same type of encumbered assets, the creditor will need to comply with more than one regime in order to be fully protected. A benefit of different States having harmonized conflict-of-laws rules is that a creditor can rely on one single law to determine the priority status of its security in all such States. This is one of the goals achieved in respect of receivables by the United Nations Assignment Convention and in respect of indirectly-held securities by the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary.

5. It is worth noting that conflict-of-laws rules would be necessary even if all States had harmonized their secured transactions laws. There would remain instances where the parties would have to identify the State whose requirements will apply. For example, if the laws of all States provided that a non-possessory right is made effective against third parties by filing in a public registry, one would still need to know in which State's registry the filing must be made.

**b. Scope of conflict-of-laws rules**

6. This chapter does not define the security rights to which the conflict-of-laws rules will apply. Normally, the characterization of a right as a security right for conflict-of-laws purposes will reflect the substantive security rights law in a jurisdiction. In principle, a court will use its own law whenever it is required to characterize an issue for the purpose of selecting the appropriate conflict-of-laws rule. The question arises, however, as to whether the conflict-of-laws rules for security rights should also apply to other transactions that are functionally similar to security, even if they are not covered by a secured transactions regime. To the extent that title reservation agreements, financial leases, consignments and other similar transactions would not be governed by the substantive law provisions governing secured transactions, a State might nonetheless subject these devices to the conflict-of-laws rules applicable to secured transactions.

7. A similar issue arises in respect of certain transfers not made for security purposes, where it is desirable that the applicable law for creation as between the parties, third party effectiveness and priority be the same as for a security right over the same category of property. An example is found in the United Nations Assignment Convention, which (including its conflict-of-laws rules) applies to outright transfers of receivables as well as to security rights in receivables (see art. 2 (a)). This policy choice is motivated, *inter alia*, by the necessity of referring to one single law to determine priority between competing claimants with a right in the same receivable. In the event of a priority dispute between a purchaser of a receivable and a creditor holding security in the same receivable, it would be more difficult (and sometimes impossible) to determine who is entitled to priority if the priority of the purchaser were governed by the laws of State A but the priority of the secured creditor were governed by the laws of State B.

8. Whatever decision a jurisdiction makes on the range of transactions covered by the conflict-of-laws rules, the scope of the rules will be confined to the property aspects of these transactions. Thus, a rule on the law applicable to the creation of a security right only determines what law governs the requirements to be met for a property right to be created in the encumbered assets. The rule would not apply to the personal obligations of the parties under their contract. Personal obligations, in most legal systems, subject to certain limitations, are governed by the law chosen by the parties in their agreement or, in the absence of such a choice, either by the law of the State with which the security agreement is most closely connected or by the law governing the security agreement.

9. A corollary to recognizing party autonomy with respect to the personal obligations of the parties is that the conflict-of-laws rules applicable to the property aspects of secured transactions are matters that are outside the domain of freedom of contract. For instance, the grantor and the secured creditor are normally not permitted to select the law applicable to priority, since this could not only affect the rights of third parties, but also result in a priority contest between two competing secured creditors being subject to two different laws leading to opposite results.

10. It is worth noting that the conflict-of-laws rules of many legal systems now provide that reference to the law of another State as the law governing an issue refers to the law applicable in that State to the exclusion of its conflict rules. The doctrine of *renvoi* is excluded, for sake of predictability and also because *renvoi* may run contrary to the expectations of the parties.

## 2. Conflict-of-laws rules for creation as between the parties, third-party effectiveness and priority

11. The determination of the extent of the rights conferred by a security right generally requires a three-step analysis:

(a) The first issue is whether the security has been created as between the parties (for matters covered by the notion of creation as between the parties, see chapter IV);

(b) The second issue is whether the security is effective against third parties (for matters covered by the notion of third-party effectiveness, see chapter V); and

(c) The third issue is what is the priority ranking of the secured creditor as against a competing claimant, such as another creditor or an administrator in the insolvency of the grantor (for matters covered by the notion of priority, see chapter VI).

*[Note to the Working Group: The Working Group may wish to consider whether there should be a conflict rule on the issue of the extinction of a security right or whether such issue falls outside the scope of the conflict-of-laws rules applicable to security rights.]*

12. Not all legal systems make specific conceptual distinctions among these issues. In some legal systems, the fact that a property right has been validly created necessarily implies that the right is effective against third parties. Moreover, legal systems that clearly distinguish among the three issues do not always establish separate substantive rules on each issue. For example, in the case of a possessory pledge complying with the requirements for the *in rem* validity of a security right of this type generally results in the security being effective against third parties without any need for further action.

13. The key question is whether one single conflict-of-laws rule should apply to all three issues. The alternative is to allow for more flexibility, where it may be more appropriate that the law applicable to third-party effectiveness or priority be different from that governing the creation of the right. Policy considerations, such as simplicity and certainty, favour adopting one rule for creation as between the parties, third-party effectiveness and priority. As noted above, the distinction among these issues is not always made or understood in the same manner in all legal systems, with the result that providing different conflict-of-laws rules on these issues may complicate the analysis or give rise to uncertainty. There are, however, instances where selecting a different law for priority issues would better take into account the interests of third parties such as persons holding non-consensual security.

14. Another important question is, whether on any given issue (i.e. creation as between the parties, third party effectiveness or priority) the relevant conflict-of-laws rule should be the same for tangible and intangible property. A positive answer to that question would favour a rule based on the law of the location of the grantor. The alternative would be the place where the encumbered asset is held (*lex situs*), which would, however, be inconsistent in respect of receivables with the United Nations Assignment Convention (article 22 of which refers to the law of the State in which the assignor, i.e. the grantor, is located).

15. Consistency with the United Nations Assignment Convention would also dictate defining the location of the grantor in the same way as in that Convention. Under the Convention, the grantor's location is its place of business or if the grantor has places of business in more than one State, the place where the central administration of the grantor is

exercised. If the grantor has no place of business, reference is then made to the grantor's habitual residence (see article 5 (h)).

16. Simplicity and certainty considerations support the adoption of the same conflict-of-laws rule (e.g. the law of the grantor's location) for both tangible and intangible property, especially if the same law applies to creation as between the parties, third party effectiveness and priority. Following this approach, one single enquiry would suffice to ascertain the extent of the security rights encumbering all assets of a grantor. There would also be no need for guidance in the event of a change in the location of encumbered assets or to distinguish between the law applicable to possessory and non-possessory rights (and to determine which prevails in a case where a possessory security right governed by the law of State A competes with a non-possessory security right in the same property governed by the law of State B).

17. Not all jurisdictions, however, regard the law of the location of the grantor as sufficiently connected to security rights in tangible property (for "non-mobile" goods at least). Moreover, the law governing a secured transaction would need to be same as the law governing a sale of the same assets. This means that acceptance of the grantor's law for every type of security right would be workable only if jurisdictions, generally, were prepared to accept that rule for all transfers.

18. In addition, it is almost universally accepted that a possessory right should be governed by the law of the place where the property is held, so that adopting the law of the grantor for possessory rights would run against the reasonable expectations of non-sophisticated creditors. Accordingly, even if the law of the grantor's location were to be the general rule, an exception would need to be made for possessory security rights.

19. As the applicable conflict rules might be different depending on the tangible or intangible character of the assets or the possessory or non-possessory nature of the security, the question arises as to which conflict rule is appropriate if intangible property is capable of being the subject of a possessory security right. In this regard, most legal systems assimilate certain categories of intangibles incorporated in a document (such as negotiable instruments and certificated securities) to tangible property, thereby recognizing that such assets may be pledged by delivering the document to the creditor. The pledge would then be governed by the law of the State where the document is held.

20. A related issue arises where goods are represented by a negotiable document of title (such as a bill of lading). It is generally accepted that a negotiable document of title is also assimilated to tangible property and may be the subject of a possessory pledge. The law of the location of the document (and not of the goods covered thereby) would then govern the pledge. The question arises, however, what law would apply to resolve a priority contest between a pledgee of a document of title and another creditor to whom the debtor might have granted a non-possessory security right in the goods themselves, if the document and the goods are not held in the same State. In such a case, the conflict-of-laws rules should accord precedence to the law governing the pledge, on the basis that this solution would better reflect the legitimate expectations of interested parties.

*[Note to the Working Group: The scope of the law envisaged by this Guide is focused on commercial goods, equipment and trade receivables. If the Working Group decides to cover other categories of intangible property, such as non-trade receivables, bank deposits and letters of credit, it may wish to consider whether there should be any special conflict rules for these types of asset.]*

### 3. Conflict-of-laws rules for security rights in proceeds

21. Simplicity and certainty considerations would dictate applying to proceeds the same conflict rules as those governing the creation as between the parties, third-party effectiveness and priority of a security right directly obtained over assets that are of the same type of property as the proceeds. For instance, if a creditor claims rights in receivables as proceeds from the sale of inventory previously subject to a security right in its favour, the creditor's entitlement to the receivables should be determined using the same law as would have been applicable to a security right directly obtained in the receivables as original encumbered assets. In this example, if the law of State B were to govern a security right originally granted in receivables, that law would also determine whether the creditor is entitled to the receivables as proceeds from inventory, even if the creditor's security right over the inventory was governed by the law of State A. The third-party effectiveness and the priority of the creditor's entitlement to the receivables (as proceeds from inventory) would also be governed by the law of State B.

22. It is arguable, however, that the above solution should be subject to an exception, namely, that the creation as between the parties of a security right in proceeds should be governed by the law that was applicable to the creation as between the parties of the security right in the original encumbered assets from which the proceeds arose. This would meet the expectations of a creditor obtaining a security right in inventory under a domestic law providing that such security right automatically extends to proceeds. Under this approach, the question of whether a security right extends to proceeds would be governed by the law applicable to the creation as between the parties of a right in the original encumbered assets from which the proceeds arose, while the third-party effectiveness and priority of an entitlement to proceeds would be subject to the law that would have been applicable to such issues if the proceeds had been original encumbered assets.

### 4. Effect of a subsequent change in the connecting factor

23. Whatever connecting factor is retained for determining the most appropriate conflict-of-laws rule for any given issue, there might occur a change in the relevant factor after a security right has been created. For example, where the applicable law is that of the jurisdiction where the grantor has its head office, the grantor might later relocate its head office to another jurisdiction. Similarly, where the applicable law would be the law of the jurisdiction where the encumbered assets were located, the assets might be moved to another jurisdiction.

24. If these issues are not dealt with specifically, an implicit rule might be drawn. The general conflict-of-laws rules on creation as between the parties, third-party effectiveness and priority might be construed to mean that, in the event of a change in the relevant connecting factor, the original governing law continues to apply to creation issues (because they arose before the change, while the subsequent governing law would apply to events occurring thereafter that raise third-party effectiveness or priority issues. For instance, in a situation where the law applicable to the third-party effectiveness of a security right is that of the grantor's location, the effectiveness of the right against the insolvency administrator of the grantor would be determined using the law of the State of the new location of the grantor at the time of commencement of the insolvency proceedings.

25. The silence of the law on these matters might, however, give rise to other interpretations. For example, one interpretation might be that the subsequent governing law also governs creation as between the parties in the event of a priority dispute occurring after the change (on the basis that third parties dealing with the grantor are entitled to



determine the applicable law for all issues relying on the actual connecting factor, being the connecting factor in effect at the time of their dealings).

26. Providing guidance on these issues would appear to be necessary to avoid uncertainty, in particular where the connecting factor changes from a State that has not enacted a law based on the recommendations of this Guide to a State that has enacted such a law.

27. Related issues arise with respect to security rights in goods in transit and export goods. Some legal systems provide that a security right over such goods (which can only be non-possessory as possession is understood under the Guide as actual, not fictive, possession) may be created as between the parties and made effective against third parties under the law of the place of destination if they reach that place within a specified time limit. With respect to goods intended to be exported, an alternative would be to require that they leave the enacting State within a specified time limit. However, a special rule on goods in transit and export goods should not prevent the creditor from also establishing its right pursuant to the law of the actual location of the goods in order to obtain priority under that law in the event the goods were to remain in that location.

## 5. Conflict-of-laws rules for enforcement issues

28. Where a security right is created and made effective against third parties under the law of one State, but is sought to be enforced in another State, an issue arises regarding what remedies are available to the secured creditor. This is of great practical importance where the substantive enforcement rules of the two States are significantly different. For example, the law governing the security right could allow enforcement by the secured creditor without prior recourse to the judicial system unless there is a breach of peace, while the law of the place of enforcement might require judicial intervention. Each of the possible solutions to this issue entails advantages and disadvantages.

29. One option is to subject enforcement remedies to the law of the place of enforcement, i.e. the law of the forum (*lex fori*). The policy reasons in favour of this rule include that:

(a) The law of remedies would coincide with the law generally applicable to procedural issues;

(b) The law of remedies would, in many instances, coincide with the location of the property being the object of the enforcement (and could also coincide with the law governing priority if the conflict-of-laws rules of the relevant State point to such location for priority issues);

(c) The requirements would be the same for all creditors intending to exercise rights against the assets of a grantor, irrespective of whether such rights are domestic or foreign in origin.

30. On the other hand, the *lex fori* might not give effect to the intention of the parties. The parties' expectations may be that their respective rights and obligations in an enforcement situation will be those provided by the law under which the priority of the security right will be determined. For example, if extra-judicial enforcement is permitted under the law governing the priority of the security right, it may also be available to the secured creditor in the State where the latter has to enforce its security right, even if it is not generally allowed under the domestic law of that State. Another reason for applying the law governing priority to substantive enforcement matters is that such matters are closely connected with priority issues (e.g. the manner in which a secured creditor will realize on its security may impact on the rights of competing claimants).

31. An approach referring enforcement issues to the law governing the priority of a security right may have another benefit. As the law governing priority is often the same law as the law governing the creation of a security right as between the parties, the end result would be that creation as between the parties, priority and enforcement issues would often be subject to the same law.

32. A third option is to adopt a rule whereby the law governing the contractual relationship of the parties would also govern enforcement matters. This would often correspond to their expectations and, in many instances, would also coincide with the law applicable to the creation of the security right as between the parties since that law is often selected as also being the law of the contract. However, under this approach, parties would then be free to select, for enforcement issues, a law other than the law of the forum or the law governing creation as between the parties, third-party effectiveness and priority. This solution would be disadvantageous to third parties that might have no means to ascertain the nature of the remedies that could be exercised by a secured creditor against the property of their common debtor.

33. Therefore, referring enforcement issues to the law governing the contractual relationship of the parties would necessitate exceptions designed to take into account the interests of third parties, as well as the mandatory rules of the forum, or of the law governing creation as between the parties, third-party effectiveness and priority.

34. The foregoing discussion relates to the substantive aspects of enforcement. Procedural matters would in any case need to be governed by the law of the State where enforcement takes place. The question arises, then, as to the distinction to be made between substantive and procedural enforcement matters. Although a Court would use its own law to determine what is substantive and what is procedural, the following are examples of issues generally considered to be substantive: the nature and extent of the remedies available to the creditor to realize the encumbered assets, whether such remedies (or some of them) may be exercised without judicial process, the conditions to be met for the secured creditor to be entitled to obtain possession and dispose of the assets (or to cause the assets to be judicially realized), the power of the secured creditor to collect receivables that are encumbered assets and the obligations of the secured creditor to the other creditors of the grantor.

## **6. The impact of insolvency on conflict-of-laws rules**

35. As pointed out in the Insolvency chapter, subject to avoidance actions, a security right effective against the grantor and third parties outside of insolvency should continue to be effective in insolvency proceedings. Similarly, the commencement of insolvency proceedings should not displace the conflict-of-laws rules applicable to the creation as between the parties, third-party effectiveness and, subject to some exceptions (e.g. with respect to privileged claims), the priority of a security right. However, all aspects of the enforcement of a security right in insolvency proceedings should be subject to the law governing the insolvency proceedings (for the principle and limited exceptions, see recommendations 30-34 of the UNCITRAL Legislative Guide on Insolvency Law).

## **B. Recommendations**

*[Note to the Working Group: As documents A/CN.9/WG.VI/WP.16 and Add.1 include a consolidated set of the recommendations of the draft legislative guide on secured transactions, the recommendations on conflict of laws are not reproduced here. Once the recommendations are finalized, the Working Group may wish to consider whether they should be reproduced at the end of each chapter or in an appendix at the end of the guide or in both places.]*

## **VI. MONITORING IMPLEMENTATION OF THE 1958 NEW YORK CONVENTION**

### **Note by the Secretariat on the interim report on the survey relating to the legislative implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards**

**(A/CN.9/585) [Original: English]**

#### **Introduction**

1. The Secretariat of UNCITRAL, in cooperation with Committee D of the International Bar Association, prepared a questionnaire calling upon State parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter referred to as the “New York Convention”) to send replies and copies of their laws that deal with the recognition and enforcement of foreign arbitral awards (A/50/17, paras. 401-404).
2. This questionnaire arose out of a decision made by the Commission at its twenty-eighth session to undertake a survey with the aim of monitoring the implementation in national laws of the New York Convention.
3. The questionnaire was drafted with the aim of considering the procedural mechanisms various countries have put in place to make the New York Convention operative. The central issues, which were to be considered in analysing the responses to the survey, were:
  - How was the Convention incorporated into the national legal system so that its provisions had the force of law?
  - In implementing the New York Convention, have State parties added to the uniform provisions of the New York Convention?
  - If reservations were taken in implementation, did the implementation of these reservations add or broaden the reservations that are permitted under the New York Convention?
  - In implementation, have State parties included additional requirements for the recognition and enforcement of arbitral awards that are not provided for in the New York Convention?
4. The project was not, however, to consider individual court decisions applying the New York Convention as this went beyond the purpose of the project.
5. While no firm decision was taken as to whether any proposal could develop from the project, a tentative proposal was made that a guide for legislators, possibly with a model act implementing the New York Convention, could be developed. At a minimum, such a survey could serve to increase awareness and create incentives for improving full implementation of the New York Convention.
6. The purpose of this brief interim report is to provide the Commission with an overview of issues raised by the replies received. As well, the interim report envisages

additional questions that the Commission might request the secretariat to put to States in order obtain more comprehensive information regarding implementation practice. After considering this report, the Commission might wish to provide further guidance to the Secretariat on the information that the final report should contain taking account of the overall purpose envisaged for the report.

7. Noting that there are 135 State parties to the New York Convention, 75 replies to the questionnaire have been received.

## **A. Implementation of the New York Convention**

**Question 1.** How did the New York Convention gain the force of law in your country, binding your courts to apply it?

**1.1 Please specify whether the legislative action was limited to authorizing ratification or accession to the New York Convention, or whether that action included legislation implementing the New York Convention. (In case that the relevant action was not taken by the legislature but by another governmental body, please specify the action).**

8. Legislative action limited to authorizing ratification or accession to the New York Convention was taken in 23 States and took various forms. For instance, 5 States mentioned that the New York Convention gained the force of law by Presidential or Royal Decree. Of these, one stated that, following the signing of the New York Convention by the President and its approval by the Senate (which brought the New York Convention into force in accordance with that State's Constitution), a number of laws were amended to give effect to the New York Convention. Another State noted that the New York Convention gained the force of law by Royal Decree approving accession and that Decree contained a reproduction of the New York Convention. One State mentioned that the New York Convention gained the force of law through legislation permitting adhesion to that Convention and, in that case, the law simply referred to the New York Convention.

9. The remaining 52 States indicated that the New York Convention only gained the force of law in their national legal system when legislation that gave effect to its provisions had been enacted. The implementing legislation took various forms ranging from legislation that merely referred to the New York Convention to legislation that reproduced or paraphrased its text (see below, questions 1.1.1 and 1.1.2).

**1.1.1 Does the implementing legislation incorporate the text of the New York Convention or merely refer to it?**

10. Forty-seven States replied that their implementing legislation incorporated the text of the New York Convention and 5 States replied that their implementing legislation merely referred to it. Legislation that incorporated the text of the New York Convention took various forms, including:

- Legislation amending the existing texts on arbitration, referring generally to international conventions in the field of arbitration rather than specifically to the New York Convention;
- Legislation that merely paraphrased the New York Convention's provisions or incorporated some provisions and paraphrased other provisions (see below, questions 1.1.2 and 1.1.3).

**1.1.2 If the text is incorporated, does the implementing legislation reproduce the text of the New York Convention or does it paraphrase it?**

11. Forty States reproduced the text of the New York Convention in full. Seven States paraphrased that text or imposed additional or special conditions. The Commission may wish to decide whether those should be explained in detail.

**1.1.3 In the event that the text of the New York Convention is paraphrased in the implementing legislation, what is the legal significance of the text of the New York Convention? For example, may, or must, the courts in your country rely on the text of the implementing legislation where it differs from the text appearing in the New York Convention?**

12. For most of the States that enacted implementing legislation, the New York Convention was referred to by the implementing legislation, or reproduced in full, without modification. Seven States, however, mentioned that they adopted implementing regulations, which differed on certain points from the text of the New York Convention (see below, question 1.1.7) and, in that case, indicated that the courts would be bound to give preference to the text of the legislation where it differed from the text of the New York Convention.

***Additional questions***

13. The Commission might wish to consider whether to request the secretariat to undertake a comparative analysis of the constitutional or other norms that apply to determining inconsistencies between domestic legislation and provisions of an international convention and the consequences of non-compliance of domestic legislation with international treaties.

**1.1.4 Does the text of the New York Convention, as implemented in your country, stand-alone or is it incorporated into a larger text (e.g., a code of civil procedure)?**

14. Twenty-five States replied that the legislation implementing the New York Convention was a stand-alone text and 26 States mentioned that it was part of a larger text, such as a Civil or Procedural Code, a Code of Private International Law or legislation implementing other international instruments relating to arbitration.

**1.1.5 If the implementing legislation is part of a broader legislative text, does this affect the practical implementation or interpretation of the New York Convention?**

15. Those States that replied that the implementing legislation was part of a broader legislative text indicated that that fact alone did not affect the practical implementation or interpretation of the New York Convention.

**1.1.6 Generally, what rules of interpretation would the courts apply in interpreting the New York Convention and/or the implementing legislation (*travaux préparatoires* of the New York Convention; court cases from other signatory countries?)**

16. In general, States indicated that a number of rules of interpretation would be applied by courts in the interpretation of the New York Convention. Only 5 States replied that they had so far not detected any form of interpretation, that the question was not applicable or provided no answer to this question.

17. States mentioned the following as potential sources of interpretation of the New York Convention:

- National judicial precedents and/or judicial precedents from other signatory states;
- The *travaux préparatoires* of the New York Convention, of the national implementing legislation and of the UNCITRAL Model Law on International Commercial Arbitration;
- The circumstances of the conclusion of the New York Convention, its purpose or its practical usage;
- The 1969 Vienna Convention on the Law of Treaties, the principles of private international law, or general procedural principles;
- The works of academic writers and opinions of the relevant ministries such as a Ministry of Justice or of legal research institutes.

#### Follow-up

18. The Commission may wish to decide whether the secretariat should provide a more detailed analysis on that question.

**1.1.7 In your view, does the method of implementation result in any substantial differences between the implementing legislation and the provisions of the New York Convention, and if so, in which respect? If feasible, please indicate the places where the implementing legislation is different from the text of the New York Convention.**

19. States replied that the method of implementation of the New York Convention did not impact upon the interpretation or practical application of the New York Convention.

20. The following differences between the New York Convention and implementing legislation were given:

- One State mentioned that it recently adopted implementing regulations which provided that foreign arbitral awards would be enforced only if the enforcing country's diplomatic officer, in the place where the arbitration was held, certified that the party seeking enforcement was a national of a State party to the New York Convention;
- The courts of yet another State required a ten per cent registration fee for an enforcement action as though the dispute were going to be heard for the first time on the merits.

**1.2 If your country has made use of the first (reciprocity) reservation, or the second (commercial) reservation contained in article I(3), is this referred to or reflected in your implementing legislation, and if so, in which manner?**

#### Reciprocity reservation

21. The reciprocity reservation provides a restriction on the application of the New York Convention by allowing States that apply it to only recognize and enforce arbitral awards

made in other Contracting States. Approximately two thirds of the Contracting States have made use of the reciprocity reservation.<sup>1</sup>

22. There was no uniformity in the manner in which the reciprocity reservation was reflected in the implementing legislation of the States, which adopted it. For a number of States, the reciprocity reservation was reflected either in the implementing legislation, legislation separate to that implementing the New York Convention or in the same executive order that published the implementing legislation of the New York Convention. Thirty-eight States indicated that they made use of the reciprocity reservation by including a definition in their implementing legislation providing that a foreign arbitral award was an arbitral award rendered in the territory of a State, which is a party to the New York Convention.

23. Nine States indicated that, while they had made use of the reciprocity reservation, that fact was not referred to or reflected in their implementing legislation or indeed elsewhere. Five States indicated that they had initially made use of the reciprocity reservation but had since withdrawn the reservation.

#### ***Follow-up/Additional questions***

24. To understand the potentially negative impact of the reservations upon the harmonizing effect of the New York Convention, the Commission may wish to seek further information in respect of the following:

- Where States have either maintained or withdrawn the reciprocity reservation, what are the reasons for this?
- Where the reservation is not reflected in legislation or elsewhere, how does the reservation take effect and on what basis do courts refer to it?
- How is the reservation applied in practice (for example, how is a “Contracting State” identified)? Certain States, with common law tradition, mentioned that the inclusion of a given State in an official list is conclusive of the fact that such a State should be taken to be a “Contracting State”, without clarifying whether such lists are exclusive or further explaining how, in practice, reciprocity should be proven to the satisfaction of the courts of the State concerned.

#### ***Commercial reservation***

25. The commercial reservation restricts the field of application of the New York Convention by permitting States to only provide recognition and enforcement of arbitral awards that pertain to differences arising out of legal relationships considered as commercial under the law of the State, which made the reservation. In the absence of such a reservation, arbitral awards arising out of non-commercial relationships would also be enforceable under the New York Convention. Approximately one-third of the Contracting States have made use of the commercial reservation.<sup>2</sup>

26. Although adopted by a large number of States, the commercial reservation has one apparently disunifying feature in that it leaves the determination of whether or not a controversy could be deemed “commercial” to the law of the State that made the reservation. In general, States did not specify in their replies whether the term “commercial” was expressly defined or which definition of “commercial” would be used

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<sup>1</sup> Information available on the website of UNCITRAL, <http://www.uncitral.org>.

<sup>2</sup> Information available on the website of UNCITRAL, <http://www.uncitral.org>.



in applying the reservation. There were however indications that, at least in States that adopted the UNCITRAL Model Law on International Commercial Arbitration, reference might be made to the indicative definition of “commercial” contained therein.<sup>3</sup> In addition, few States referred to national implementing legislation that defined the term “commercial”. It should be noted that the absence of a harmonized definition of the term “commercial” might lead to substantial differences in the scope of the reservation among the different legal systems, and could erode the uniform application of the New York Convention.

#### *Follow-up/Additional questions*

##### **Commercial reservation**

27. Similar questions as set out above in relation to the reciprocity reservation could usefully be put to States in the context of the commercial reservation. Additionally, the Commission may consider that the following additional questions be put to States:

- Is the term “commercial” defined in legislation implementing the New York Convention or in other legislation which could be specified or is reliance placed on other international instruments, such as the definition included in the UNCITRAL Model Law on International Commercial Arbitration?
- If the term is not defined, has the commercial reservation been applied in case law and, if so, what definition was applied?

##### **Other reservations**

28. The questionnaire did not ask States whether other reservations not included in the New York Convention had nevertheless been applied by States. For example, in some cases, either by express legislation or practical application, issues such as the nationality of the parties, the place of arbitration, the location of one of the parties might affect the scope of application of the New York Convention.

#### **1.3 Does your implementing legislation define the scope of article II of the New York Convention, and, for example, specify which arbitration agreements qualify for referral to arbitration under the New York Convention (e.g., international arbitration agreement, and/or agreement between nationals of different States)?**

29. Replies showed that the definition of what States considered to be an “arbitration agreement” qualifying for referral to arbitration under the New York Convention was generally found in a separate law on commercial arbitration and that the implementing legislation did not specify which arbitration agreements qualified for referral to arbitration under the New York Convention. There appeared to be disparity in determining which

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<sup>3</sup> The definition of the term “commercial” in the Model Law is the following: “*The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.*”

arbitration agreements qualify for the referral to arbitration under the New York Convention.

#### *Additional questions*

30. The Commission might wish to consider whether it would be helpful to obtain from States more information on how article II is implemented in legislation, and in particular on the law that determines whether an arbitration agreement qualifies for referral to arbitration under the New York Convention.

#### **1.4 Have any procedural requirements or conditions for enforcement been established by a court decision? If so, please indicate the cases.**

31. States did not report court decisions on procedural requirements relating to enforcement.

### **B. Court or authority competent to decide on recognition and enforcement**

**Question 2. Which court or authority is competent to decide on a request for enforcement? Is it one particular court or authority for the entire country or is it one type of court or authority? What criteria determine the competence of the court or authority?**

32. The replies reflected a great variety of situations; nine States replied there was no specific court competent to decide on a request for enforcement of an arbitral award, nor specific procedural regulation for that type of request, whereas, in the other States, a specific court was competent to decide on enforcement of foreign arbitral awards. In 25 States, the court appointed for examining a request for enforcement was a higher level court (being either a Court of Appeal or High Court) and in forty-one States, it was the court of first instance which was competent on that matter.

#### *Follow-up*

33. The Commission might wish to decide whether more details should be provided on the question of determining the court or authority that is competent to decide on recognition and enforcement, and whether the Secretariat may undertake complementary studies, based on the replies to the questionnaire as well as on other sources of information.

### **C. Procedural rules**

**Question 3. Please describe the procedures or requirements applicable to a request for enforcement of a Convention award. Is the applicant required to present anything else than the arbitral award and the arbitration agreement as provided in article IV of the New York Convention?**

34. In 48 States, the conditions required to be satisfied in requesting enforcement were limited to those set forth in article IV of the New York Convention.

35. Four States indicated that additional requirements applied, such as that the application for enforcement of an arbitral award should also contain:

- Details on the mode of enforcement sought, the name and address of the applicant

and the defendant, and of their representatives, details relating to the claim, the arbitral award and the arbitration agreement;

- Documentation showing that the arbitral award was enforceable in the relevant foreign country;
- A court certificate to the effect that the respondent had been properly notified of the place and date of arbitral proceedings, and a certificate attesting that the parties expressed no objection to the composition of the arbitration body where it was not stated in the arbitral award itself.

#### *Additional questions*

36. Twenty-seven States reported that general principles of civil procedure applied, without clarifying whether that implied that additional conditions would be requested. The Commission may wish to seek further clarifications on this question and on what general principles of civil procedure apply in relation to article IV of the New York Convention.

#### **3.1 Are there any legislative provisions, rules of court, or regulations, detailing the procedure applicable to the enforcement of a Convention award? (See articles III and IV of the New York Convention). (For example, is it stated what “duly authenticated” means in article IV, which requires the applicant to supply “the duly authenticated award or a duly certified copy thereof”?)**

37. States replied that either the general procedural rules relating to applications for enforcement of arbitral awards applied, *mutatis mutandis*, to applications for enforcement of foreign arbitral awards or that there were no legislative provisions on that matter. As article IV does not define the law according to which authentication and certification should take place, that question has given rise to diverging interpretation by State courts, as either the law of the State where the arbitral award was made or the law of the State where the enforcement of the arbitral award was sought could apply.

#### *Additional questions*

38. The Commission might wish to decide whether more details should be provided on that matter, and whether the secretariat may undertake complementary studies, based on the replies to the questionnaire as well as on other sources of information.

#### **3.2 What are the fees, levies, taxes or duties that are to be paid in connection with the application for enforcement of a Convention award, and on which bases are they calculated? Please specify whether any such payment is to be made irrespective of the success of the application or only for an act granting the enforcement of the award.**

39. At the diplomatic conference which concluded the New York Convention, a proposal that it provide for national treatment for foreign arbitral awards (i.e. that the rules of procedure for the enforcement of a foreign arbitral award should be identical to those governing the enforcement of a domestic arbitral award) was rejected. The majority of delegates to the Conference argued that, in their countries, the rules of procedure that governed the enforcement of domestic arbitral awards differed from the procedures governing foreign arbitral awards and unifying the rules of procedure for the recognition or enforcement of foreign arbitral awards would unduly interfere with differing national laws

on procedure.<sup>4</sup> Instead, the formula of not imposing “substantially more onerous conditions” on the recognition or enforcement of foreign arbitral awards than imposed for domestic arbitral awards, was adopted.

40. In 18 States, no fees were provided for in respect of the recognition and enforcement of foreign arbitral awards.

41. In 55 States, which required payment of fees, these fees were payable regardless of the success of the application. These fees ranged from ordinary court and filing fees, such as for an application for leave to enforce the arbitral award, endorsement of the accompanying affidavit, the issuance of originating summons and the sealing of a writ of execution.<sup>5</sup>

42. In general, fees were reported to be payable on actual enforcement of the arbitral award.

43. One State mentioned that this matter was not yet determined.

### **3.2.1 In comparison, what are the fees, levies, taxes, or duties applicable to the request for enforcement of an award made in your country or of an award otherwise considered as domestic in your country?**

44. The results of the survey showed that States had not imposed higher fees or charges for the recognition and enforcement of foreign arbitral awards than were imposed on the recognition or enforcement of arbitral awards rendered under their own law.

45. In certain States, which imposed fees, levies, taxes or duties in respect of a request for enforcement of a foreign arbitral award, these were the same as those imposed in respect of the enforcement of an arbitral award made in their country or otherwise considered a domestic arbitral award.

46. In other States, in which no fee was payable in respect of recognition and enforcement of a foreign arbitral award, no fee was payable in respect of a domestic arbitral award either. In one State, the fee relating to the execution rather than application for recognition and enforcement applied whether the arbitral award was foreign or

<sup>4</sup> See the *travaux préparatoires* of the New York Convention, document referenced UN DOC E/CONF.26/SR.11 (available on the website of UNCITRAL, <http://www.uncitral.org>).

<sup>5</sup> The fees for application for enforcement, and the basis on which they were calculated, had been reported to be either:

- A fixed sum that applied irrespective of the amount of the award;
- A fixed fee imposed regardless of the success of the application, in addition to a further fee (equivalent to 3 per cent of the amount of the arbitral award), payable once execution is granted and the creditor proceeds to execution;
- A standard court fee with an additional fee payable in certain cases depending on the mode of enforcement sought and the stage of enforcement reached;
- A filing fee calculated based on the amount claimed in the arbitral award;
- A court fee applied in the amount of one-fourth of a proportional fee calculated on the value of the subject matter in dispute and a stamp duty might apply if the enforcement resulted in the same effect as civil actions that were subject to a stamp duty;
- A stamp duty payable either as a fixed amount calculated as 0.5 per cent of the amount of the claim or being imposed on the originating summons, the affidavit in support of the application and the order granting leave and the judgement;
- A fee of 2 per cent of the value of the dispute and, if not ascertainable, then a fixed amount would be payable.

domestic. In another State, the ordinary filing fee was the same regardless of whether the arbitral award was foreign or domestic.

47. However, in a number of States, the answer was less clear-cut or some disparity existed. For instance, in one case, the reply stated that it was difficult to compare the fees imposed in respect of the enforcement of domestic as opposed to foreign arbitral awards as fees that applied to each varied depending on the case, its nature, circumstances and merits.

48. In at least 2 States, fees imposed on enforcement of domestic arbitral awards were higher than those imposed on enforcement of foreign arbitral awards. However, in one State, enforcement of the domestic arbitral award attracted lower fees for submission of an affidavit than applied in respect of enforcement of foreign arbitral awards. In another State, while fees were the same, it was noted that foreigners would in some cases have to provide security when claiming a property right. In another State, although the administrative fees collected did not differ as between foreign and domestic arbitral awards, a proportional fee that applied in respect of foreign arbitral awards did not apply to domestic arbitral awards because the procedure as to enforcement of domestic arbitral awards differed from the one applicable to foreign arbitral awards.

### *Additional questions*

49. The Commission might wish to decide whether more details should be provided on the question of, inter alia, fees payable in respect of enforcement of foreign arbitral awards, and whether the Secretariat may undertake complementary studies, based on the replies to the questionnaire as well as on other sources of information.

### **3.3 May an applicant subsequently cure any defect in the documents submitted at the time of the application for enforcement of a Convention award?**

50. There was a disparity in the answers given to this question.

51. In 12 States, the defect might be cured without any conditions being imposed. In 22 States, no specific rules existed on this point and general rules applicable to civil law procedure applied. At least one State referred to the fact that the UNCITRAL Model Law on International Commercial Arbitration applied in this respect. For 11 States, the domestic law did not provide for such a possibility or this question was unsettled and there was no legislation or practice in the area.

52. In 7 States, an applicant might subsequently cure defects in documents submitted for the application for enforcement but various conditions and limitations applied, as follows.

53. Concerning the time limitation, States provided in the implementing legislation that:

- Procedural rules permitted parties to cure any defect in the documents submitted at the time of the application for enforcement of a foreign arbitral award;
- Courts, after undertaking a preliminary examination of the application and detecting errors, would give the applicant a limited time within which to rectify the defects and, if this was not done within the given time-limit, then the court would dismiss the application; or
- If formal requirements were not met, the applicant was given one week to rectify the document.

54. Concerning the other conditions that were imposed on the nature of the defect, which could be cured, the following possibilities were reported in the replies:

- The right to cure defects was limited to situations where a court requested an applicant to explain defects in the documents, requiring all parties to be notified of the intention to correct such defects and no objection was made in relation thereto;
- An applicant might cure defects but there were exceptions in the case of enforcement on immovables;
- An applicant might cure defects provided they were only “formal” defects, defects of a procedural nature or clerical mistakes in court documents;
- Only the application for enforcement might be cured, and not other documents submitted in relation thereto;
- An applicant might request the court hearing the request for enforcement to cure any defect in the documents submitted, with the agreement and knowledge of the other party.

**3.4 Should a translation of the arbitration agreement and arbitral award always be provided by the applicant, even if the court can be deemed to be fully familiar with the foreign language in which these documents are expressed?**

55. It was reported that, either:

- A translation of both the arbitration agreement and the arbitral award was required by law in all cases, and regardless of whether a court could be deemed to be fully familiar with the foreign language in which the documents were expressed; or
- These documents should, as a rule, be translated but the court had a discretion to make an exception to this rule if the court and all relevant parties understood the foreign language in question.

**3.5 Is there a limited time period for applying for recognition and enforcement of a Convention award? Which is the period? Please clarify whether the period is the same for any award or Convention award or does the period depend on the type of claim incorporated in the award?**

56. The implementing legislation of the States varied from no limitation for applying to court for recognition and enforcement of arbitral awards although, in at least one of these States, the response noted that the application should be made within a reasonable time as determined according to the circumstances of the case, to time limits varying from 1 month<sup>6</sup> to 30 years, with various conditions applying. In a large majority of States, the ordinary limitation period applied. Notwithstanding that the New York Convention does not specify a time period during which recognition and enforcement should be sought, a short period could be understood as undermining the stated purpose of the New York Convention to facilitate such recognition and enforcement.

57. No State reported that the period depended on the type of claim incorporated in the arbitral award. However, one State reported that the limitation period depended on whether the request was made against a natural or a legal person (the time limit was one year for natural persons and 6 months for legal persons).

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<sup>6</sup> The State in which the time limit of one month applies mentioned as well that that provision had not been interpreted by courts as yet.

*Additional questions*

58. The Commission might wish to decide whether more details should be provided on that matter, and whether the Secretariat may undertake complementary studies, based on the replies to the questionnaire as well as on other sources of information.

**3.6 Please describe the procedures that the party against whom enforcement is sought can use to raise objections against the request for enforcement with a view to preventing enforcement?**

59. The legislation of various States required that the party raising objections must provide evidence of any circumstances provided for in article V of the New York Convention. A State reported that the grounds for raising objections against the request for enforcement largely reflected those found in the New York Convention, with case law recognizing that a court had residual discretion to refuse enforcement on grounds other than those enumerated in the New York Convention.

60. Various procedures had been described by States:

- General principles of civil procedure applied in this respect;
- In most of the States, the party objecting had to be heard by the court within a defined time period (varying, depending on the States, between 8 to 45 days);
- A party would have the same time limit as that set for the summons for replying to the application in order to make submissions and the court might set a time limit to hear evidence;
- The party against whom enforcement was sought became, by force of law, a participant in the proceeding and there was an obligation that both parties be notified of the date of the hearing and be given the right to be heard, including the right of the party against whom the enforcement was sought to submit any motion with a view to preventing the enforcement of an arbitral award;
- An order giving leave to enforce an arbitral award was normally granted *ex parte* and had to be served upon the debtor, who might, within 14 days, apply to set aside the order; the arbitral award might be enforced against the debtor as any other judgement if, during this period, no application to set aside the order was made or any such application was refused;
- In one State, there was no procedure specified for a party to raise objections although the relevant legislation allowed a court to refuse enforcement and, in another State, this question was not addressed.

*Additional questions*

61. To fully understand the procedures that the party against whom enforcement is sought can use to raise objections against the request for enforcement with a view to preventing enforcement, the Commission may wish to decide whether further questions should be added to the questionnaire, or dealt with in a further study, as follows:

- What is the practice in each State regarding the application of article VII of the New York Convention? As a matter of fact, only one State mentioned that it systematically applied the more favourable provisions of its own legislation instead of the provisions of the New York Convention, as expressly allowed under article VII of the New York Convention. Further information on the content of domestic legislation that States considered as more favourable than the conditions established

under the New York Convention would prove extremely useful, namely in identifying possible trends in that field. On the other hand, it would be useful to gather information on the grounds, other than those enumerated in the New York Convention, on the basis of which enforcement may be refused;

- Concerning the grounds for refusing enforcement defined under article V of the New York Convention, the question arises of how States interpret the term “public policy” referred to under article V(2)(b) of the New York Convention;
- States mentioned that the New York Convention shall be interpreted in accordance with the Constitution; it may be helpful to obtain information on the constitutional principles that States deem applicable in relation to the interpretation of the New York Convention and its implementing legislation.

### **3.7 Please describe the procedures and competent court for any appeal or other possible recourse against a decision refusing to enforce an award.**

62. In 44 States, recourse against a decision refusing to enforce an arbitral award was possible and such recourse was not available in only 5 States. The plaintiff could utilize the same appeal procedure as is applicable to ordinary civil litigation against a judgement refusing to grant enforcement of an arbitral award. The procedures varied with regard to a number of issues, including the competent court reviewing the matter and the time in which parties may lodge an appeal.

#### ***Additional questions***

63. The Commission might wish to decide whether more details should be provided on that matter, and whether the Secretariat may undertake complementary studies, based on the replies to the questionnaire as well as on other sources of information.

### **3.8 Please describe the procedures and competent court for any appeal or other possible recourse against a leave for enforcement.**

64. An appeal or other recourse against leave for enforcement was possible in 66 States and 15 of those States mentioned that the ordinary civil procedure provisions applied. The procedures vary with regard to questions such as the competent court reviewing the matter, or the time in which parties may lodge an appeal. Eight States replied that their legislation did not provide for recourse against leave for enforcement.

#### **3.8.1 Does the lodging of the appeal or other recourse suspend automatically the enforcement of the award? Or may, upon request, suspension be ordered by the court or authority?**

65. There was no uniform solution to this question. Sixty-three States provided that recourse against leave for enforcement was possible. Twenty-six States mentioned that the lodging of the recourse automatically suspended the enforcement of the arbitral award. In 38 States, there was no automatic suspension provided, but in a great majority of those States, suspension could be ordered by a competent court upon request. In 2 federal States, both of these possibilities in relation to suspension were provided for, depending on the place and type of matter. In one State, there was no provision as to the effect of a judgement; one State did not provide an answer.



*Additional questions*

66. The Commission might wish to decide whether more details should be provided on that matter, and whether the Secretariat may undertake complementary studies, based on the replies to the questionnaire as well as on other sources of information.

**D. Comment****Do you have any additional comments with regard to the rules governing the implementation of the New York Convention in your country?**

67. Very few States made comments. Three States mentioned that the New York Convention had not been applied yet in their country, and one State mentioned that the recent reforms of the field of civil procedures might impact the application of the New York Convention in the future. One State highlighted that its domestic legislation on the conditions for recognition and enforcement of arbitral awards was more liberal than the New York Convention, and therefore that domestic legislation, and not the New York Convention, was applied to the recognition and enforcement of arbitral awards, in accordance with article VII of the New York Convention.

**Conclusion**

68. The brief overview above provides a general outline of replies received regarding the implementation of the New York Convention and serves to facilitate discussions as to the next steps.

69. On the first question of incorporation of the New York Convention into the national legal systems, States in general considered that the method of incorporation was neutral as to the implementation of the New York Convention. However, the survey highlighted various areas of uncertainty:

- Certain States have a constitutional system under which an international convention becomes effective only after enactment of implementing legislation; in some of these States, such legislation has not been enacted in respect of the New York Convention; for those States which have not incorporated the New York Convention through implementing legislation, there is a risk that its application by judges might not be acknowledged;
- For States, that have enacted legislation paraphrasing the New York Convention, the discrepancies between the texts is a source of potential obstacles to achieving uniformity in interpretation and application of the New York Convention. On this last point, however, the survey showed that very few States paraphrased the text of the New York Convention in their implementing legislation.

70. On the question of reservations, the survey made it clear that discrepancies in implementation concerning the commercial reservation might come from the fact that the New York Convention does not provide a definition of the term “commercial”. As well, the commercial reservation might give rise to conflict of laws issues, as this provision does not specify if the word “commercial” should be interpreted by referring to the law of the State where the arbitral award was rendered or the law of the State where the party is seeking to enforce the arbitral award.

71. As to the important question of whether State parties to the New York Convention have included additional requirements in their implementing legislation for the recognition and enforcement of arbitral awards that were not provided for in the New York Convention, it was noted that the application of domestic rules of procedures to matters on

which the New York Convention was silent could give rise to diverging solutions to questions such as the requirements applicable to a request for enforcement, fees, levies, taxes or duties to be paid in connection with such an application, correction of defects in the applications, the time-period for applying for recognition and enforcement, and the procedures and competent courts for recourse against a decision refusing to enforce an arbitral award.

72. It should be noted as well that certain countries have adopted a more liberal approach to the recognition and enforcement of foreign arbitral awards, as compared to the conditions set forth by the New York Convention, and therefore, additional study on the application by States of article VII of the New York Convention would be necessary to complement that survey.

73. The Commission might wish to consider requesting the Secretariat to seek further information from States or carry out further studies in order to enable it to prepare a more comprehensive report on the legislation implementing the New York Convention. To achieve that, the following approach is submitted to the Commission for consideration and discussion:

- It might be advisable to recommend that each State appoint a national expert who could provide more detailed information on the issues raised, in particular focusing on additional procedural requirements included by some States and issues of transparency of the requirements for recognition and enforcement of a foreign arbitral award;
- The questionnaire might need to be complemented by additional questions or studies, relating to: rules determining the hierarchy between international instruments and domestic laws (see question 1, particularly 1.1.7) the commercial and reciprocity reservations (see question 1.2), the form of the arbitration agreement (see question 1.3), information relating to procedural aspects of recognition and enforcement (see question 2); or to additional requirements or more liberal provisions for the recognition and enforcement of foreign arbitral awards included by States in their legislation (see questions 2, 3, 3.1, 3.2.1, 3.5, 3.6, 3.7 and 3.8.1);
- The Commission might wish to consider whether the approach taken in preparing the interim report, including the style of presentation and the level of detail, is appropriate or whether it should include as well, for instance, more indications including naming States.



## VII. CASE LAW ON UNCITRAL TEXTS (CLOUT)

The secretariat of the United Nations Commission on International Trade Law (UNCITRAL) continues to publish court decisions and arbitral awards that are relevant to the interpretation or application of a text resulting from the work of UNCITRAL. For a description of CLOUT (Case Law on UNCITRAL Texts), see the users guide (A/CN.9/SER.C/GUIDE/1/Rev.1), published in 2000 and available on the Internet at [www.uncitral.org](http://www.uncitral.org).

A/CN.9/SER.C/ABSTRACTS may be obtained from the UNCITRAL secretariat at the following address:

UNCITRAL secretariat  
P.O. Box 500  
Vienna International Centre  
A-1400 Vienna  
Austria  
  
Telephone (+43-1) 26060-4060 or 4061  
Telex: 135612 uno a  
Telefax: (+43-1) 26060-5813  
E-mail: [uncitral@uncitral.org](mailto:uncitral@uncitral.org)

They may also be accessed through the UNCITRAL homepage on the Internet at [www.uncitral.org](http://www.uncitral.org).

Copies of complete texts of court-decisions and arbitral awards, in the original language, reported on in the context of CLOUT are available from the secretariat upon request.



## VIII. TECHNICAL ASSISTANCE TO LAW REFORM

### Note by the Secretariat on technical assistance

(A/CN.9/586) [Original: English]

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#### I. Introduction

1. Pursuant to a decision taken at the twentieth session (1987) of the United Nations Commission on International Trade Law (UNCITRAL),\* technical assistance activities is one of its priorities. These activities promote awareness and 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. Commercial law reform, based on harmonized international instruments, has a clear impact on the ability of enterprising persons in all States to participate in international trade. This trade plays an important part in increasing the well-being of societies and is an important factor in achieving sustainable development and social stability. The technical assistance activities of the Secretariat could thus play an important role in the economic integration efforts being undertaken by many countries.

2. This note lists the activities of the Secretariat subsequent to the date of the previous note submitted to the Commission at its thirty-seventh session in 2004 (A/CN.9/560 of 21 April 2004), and indicates possible future technical assistance activities in the light of the requests received by the Secretariat.

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\* *Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17)*, para. 335.

## II. Texts of the United Nations Commission on International Trade Law

3. Increasing importance is being attached by Governments, international organizations, including multilateral and bilateral aid agencies, and the private sector to improvement of the legal framework for international trade and investment. UNCITRAL plays an important role in developing that framework because of its mandate to prepare and promote the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law, including sales; dispute resolution; government contracting; banking, payments and insolvency; transport; and electronic commerce. These texts are widely acceptable as offering solutions appropriate to different legal traditions and to countries at different stages of economic development.

4. Those instruments include:

(a) In the area of sales, the United Nations Convention on Contracts for the International Sale of Goods<sup>1</sup> and the United Nations Convention on the Limitation Period in the International Sale of Goods;<sup>2</sup>

(b) In the area of dispute resolution, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>3</sup> (a United Nations convention adopted prior to the establishment of the Commission, but actively promoted by it), the UNCITRAL Arbitration Rules,<sup>4</sup> the UNCITRAL Conciliation Rules,<sup>5</sup> the UNCITRAL Model Law on International Commercial Arbitration,<sup>6</sup> the UNCITRAL Notes on Organizing Arbitral Proceedings,<sup>7</sup> and the UNCITRAL Model Law on International Commercial Conciliation;<sup>8</sup>

(c) In the area of government contracting, the UNCITRAL Model Law on Procurement of Goods, Construction and Services<sup>9</sup> and the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects;<sup>10</sup>

(d) In the area of banking and payments, the United Nations Convention on the Assignment of Receivables in International Trade,<sup>11</sup> the United Nations Convention on

<sup>1</sup> 11 April 1980, United Nations, *Treaty Series*, vol. 1489, p. 3; *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.82.V.5), part I.

<sup>2</sup> *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974* (United Nations publication, Sales No. E.74.V.8), part I; United Nations, *Treaty Series*, vol. 1511, pp. 77 and 99; UNCITRAL *Yearbook* 1980, part three, chap. I, sect. C.

<sup>3</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.

<sup>4</sup> *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, para. 57; UNCITRAL *Yearbook* 1976, part one, chap. II, sect. A.

<sup>5</sup> *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)* chap. V, sect. A, para. 106; UNCITRAL *Yearbook* 1980, part three, chap. II.

<sup>6</sup> *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)* Annex I; UNCITRAL *Yearbook* 1985, part three, chap. I.

<sup>7</sup> UNCITRAL *Yearbook* 1996, part three, chap. II.

<sup>8</sup> *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17)*, Annex I; UNCITRAL *Yearbook* 2002, part three.

<sup>9</sup> *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)*, Annex I; UNCITRAL *Yearbook* 1994, part three, chap. I.

<sup>10</sup> United Nations publication, Sales No. E.01.V.4, A/CN.9/SER.B/4.

Independent Guarantees and Standby Letters of Credit,<sup>12</sup> the UNCITRAL Model Law on International Credit Transfers,<sup>13</sup> and the United Nations Convention on International Bills of Exchange and International Promissory Notes,<sup>14</sup>

(e) In the area of insolvency, the UNCITRAL Model Law on Cross-Border Insolvency<sup>15</sup> and the UNCITRAL Legislative Guide on Insolvency Law;<sup>16</sup>

(f) In the area of transport, the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules),<sup>17</sup> and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade;<sup>18</sup> and

(g) In the area of electronic commerce, the UNCITRAL Model Law on Electronic Commerce<sup>19</sup> and the UNCITRAL Model Law on Electronic Signatures.<sup>20</sup>

### III. Technical assistance to law reform

5. In its resolution 58/75 of 8 January 2004, the General Assembly reaffirmed the importance, in particular for developing countries, of the technical assistance work of the Commission in the field of international trade law and reiterated its appeal to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and regional development banks, as well as to Governments in their bilateral aid programmes, to support the technical 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 to further the progressive harmonization and unification of private law, and to this end urged States that have not yet done so to consider signing, ratifying or acceding to those conventions. The UNCITRAL Secretariat is prepared to provide technical assistance and advice to States considering signature, ratification or accession to UNCITRAL conventions, as well as to States that are in the process of revising their trade legislation.

7. Technical assistance activities undertaken by the UNCITRAL Secretariat include: organizing briefing missions and seminars and participating in conferences to familiarize participants with UNCITRAL texts and their use; undertaking law reform assessments to

<sup>11</sup> UNCITRAL *Yearbook* 2002, part three; *General Assembly resolution* 56/81, annex.

<sup>12</sup> New York, 11 December 1995, United Nations, *Treaty Series*, vol. 2169, p. 163; *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17) annex I.

<sup>13</sup> *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), annex I.

<sup>14</sup> UNCITRAL *Yearbook* 1988, part three, chap. I; *General Assembly Resolution* 43/165, annex.

<sup>15</sup> UNCITRAL *Yearbook* 1992, part three, chap. I.

<sup>16</sup> *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 55.

<sup>17</sup> Hamburg, 31 March 1978 United Nations, *Treaty Series*, vol. 1695, p. 3; *Official Records of the United Nations Conference on the Carriage of Goods by Sea, Hamburg, 6-31 March 1978* (United Nations publication, Sales No. E.80.VIII.1), document A/CONF.89/13, annex I.

<sup>18</sup> A/CONF.152/13, annex.

<sup>19</sup> *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), annex I.

<sup>20</sup> *Ibid.*, *Fifty-sixth Session, Supplement No. 17* (A/56/17), annex II.



assist governments, legislative organs and other authorities in developing and other countries to review existing legislation and assess their need for law reform in the commercial field; assisting with the drafting of national legislation to implement UNCITRAL texts; assisting international development agencies, such as the World Bank, to use UNCITRAL texts in their law reform activities and projects; providing advice and assistance to international and other organizations, such as professional associations, organizations of attorneys, chambers of commerce and arbitration centres, on the use of UNCITRAL texts; and organizing group training activities to facilitate the implementation and interpretation of modern commercial legislation based on UNCITRAL texts by judiciaries and legal practitioners.

#### **IV. Technical assistance activities**

8. Since the previous session, the UNCITRAL Secretariat has organized technical assistance activities in a number of States.

(a) The following were financed with resources from the Trust Fund for UNCITRAL Symposia (numbers of participants are approximate only):

- (i) Baku, Azerbaijan (26-27 April 2004), seminar held in cooperation with the Ministry of Foreign Affairs and the Ministry of Economic Development (20 participants);
- (ii) Belgrade, Serbia and Montenegro (4-5 June 2004), seminar held in cooperation with the European Centre for Peace and Development of the University of Peace (12 participants);
- (iii) Bangkok, Thailand (7-9 July 2004), seminar in conjunction with ESCAP Regional Expert Conference on “Harmonized Development of Legal and Regulatory Systems for E-Commerce in Asia and the Pacific” (80 participants);
- (iv) Bangkok, Thailand (12-16 July 2004), consultations with Thai judiciary on relations between court systems and arbitration (150 participants);
- (v) Sao Paulo, Brazil (14-16 September 2004), seminar in cooperation with Ministry of Planning, Budget and Management on procurement and electronic commerce in the context of the Fourth International Seminar on Government Procurement (700 participants);
- (vi) Ljubljana, Slovenia (18-19 February 2005), participation in the Working Group on Reform of Arbitration Law to assist with the drafting of new Slovenian legislation based on the UNCITRAL Model Laws on International Commercial Arbitration and International Commercial Conciliation (5 participants);
- (vii) Ljubljana, Slovenia (18-19 February 2005), consultations with Executive Council of Slovenian Bar Association (8 participants) and seminar on international trade law for LLM program (25 participants);
- (viii) Cape Town, South Africa (15-17 March 2005), seminar on UNCITRAL and the use of model laws as a tool for regional harmonization of international trade law, Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) conference (100 participants);

- (ix) Addis Ababa, Ethiopia (18-20 April 2005), seminar on the work of UNCITRAL and the United Nations Convention on Contracts for the International Sale of Goods, COMESA Officials Meeting;
- (b) The UNCITRAL secretariat provided assistance from Vienna with legislative and other drafting in the following instances:
  - (i) EU: comments on discussion paper relating to possible ratification of the United Nations Assignment of Receivables Convention (2004 and ongoing);
  - (ii) Macedonia: insolvency law reform (16-17 December 2004);
  - (iii) Serbia: Law on Mediation (2004 and ongoing);
  - (iv) Commonwealth Telecommunications Organization: arbitration and conciliation rules for a dispute resolution centre (from December 2004);
  - (v) Pakistan: comments on draft legislation to implement the New York Convention (2004);
  - (vi) Indonesia: assistance to bank Indonesia with a draft Funds Transfer Act (2004); and
  - (vii) Jordan: comments on a draft maritime code (2005).

## **V. Extrabudgetary funding**

### **(a) UNCITRAL Trust Fund for symposia**

9. Given the importance of extrabudgetary funding for the implementation of the 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 symposia, 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 legislative assistance. Information on how to make contributions may be obtained from the Secretariat.

10. In the period under review, contributions were received from Switzerland, Singapore and Mexico. The Commission may wish to express its appreciation to those States.

### **(b) UNCITRAL Trust Fund to grant travel assistance to developing countries members of UNCITRAL**

11. 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. In the period under review, no contributions were received.

12. 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.

13. It is recalled that in its resolution 51/161 of 16 December 1996, the General Assembly decided to include the Trust Funds for UNCITRAL symposia and travel assistance in the list of funds and programmes that are dealt with at the United Nations Pledging Conference for Development Activities.

**(c) Other contributions to technical assistance**

14. A number of States and organizations contribute to the Commission's programme of technical assistance by providing funds or staff or by hosting seminars. The Commission may wish to express its appreciation to those States and organizations.

## **VI. Participation in other activities**

15. 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 either by the institution organizing the events, another organization or in some cases, partially or totally, with resources from the United Nations regular travel budget:

(a) International Bar Association regional conference "Insolvency is changing globally—How and Why?" (Seville, Spain 18-20 April 2004);

(b) Global Dispute Resolution Research Conference (The Hague, the Netherlands 22-23 April 2004);

(c) Colloquium on Reform of Secured transactions Law—the draft UNCITRAL Legislative Guide on Secured Transactions (Clermont-Ferrand, France 23 April 2004);

(d) Universidad Pablo de Olavide, lecture on electronic contracting (Seville, Spain 7 May 2004);

(e) 17th Congress of ICCA "New Horizons in International Commercial Arbitration and Beyond" (Beijing and Shanghai, PRC 16-19 May 2004);

(f) Conference sponsored by the Law Center for European and International Cooperation on the United Nations Convention on Assignment of Receivables in International Trade (Cologne, Germany 25 May 2004);

(g) Lectures for the Central European University (Budapest, Hungary 25 May 2004);

(h) ICC Commission on Contract Practices (Rome, Italy 27-28 May 2004);

(i) 38th Conference of the Comité Maritime International (CMI) (Vancouver, Canada 31 May-2 June 2004);

(j) Coordination meeting between UNCITRAL, World Trade Organization (WTO), International Trade Centre (ITC), UNIDROIT and the Hague Conference on Private International Law (Geneva, Switzerland 1 June 2004);

(k) Fourth Annual Conference on International Commercial Arbitration sponsored by the Canadian Bar Association (Ottawa, Canada 10-12 June 2004);

- (l) UNCTAD XI (Sao Paulo, Brazil 13-18 June 2004);
- (m) Symposium on Online Dispute Resolution sponsored by UN/ECE (Geneva, Switzerland 14-16 June 2004);
- (n) Dispute Resolution in the Global Economy conference (Bologna, Italy 18 June 2004);
- (o) Regional Expert Conference sponsored by ESCAP on harmonized development of legal and regulatory systems for E-commerce in Asia and the Pacific (Bangkok, Thailand 7-9 July 2004);
- (p) Briefing on the legal framework for E-commerce in cooperation with the International Telecommunications Union (ITU) (Dar Es Salaam, Tanzania (13-16 July 2004);
- (q) Undergraduate Student Summer Programme sponsored by the University of Economic and Law, Hamburg and the University of Technology, Sydney (Hamburg, Germany 19-20 July 2004);
- (r) Symposium “1er Symposium sur le Renforcement des Centres d’arbitrage et de mediation” (Chamonix, France 2-3 September 2004);
- (s) Balkan Legal Forum 2004, Business and law in South East Europe (Sofia, Bulgaria 17 September 2004);
- (t) UNIDROIT Study Group on Harmonized Substantive Rules regarding Securities Held with an Intermediary (Budapest, Hungary 18-22 September 2004);
- (u) Consultations with the Ministry of Foreign Affairs and Ministry of Justice (Paris, 20 September 2004) and the European Commission (Brussels, 27 September 2004);
- (v) Symposium “The Swedish Arbitration Act 1999: 5 Years On: A Critical Review of Strengths and Weaknesses” (Stockholm, Sweden 7-8 October 2004);
- (w) INSOL Regional Conference (Prague, Czech Republic 7-8 October 2004);
- (x) Meeting of UNCTAD Trade and Development Board (Geneva, Switzerland 14 October 2004);
- (y) Conference on Alternative Dispute Resolution Administered by Chambers of Commerce sponsored by the Naples Chamber of Commerce (Naples, Italy 22 October 2004);
- (z) Annual Conference of the International Bar Association (Auckland, New Zealand 25-28 October 2004);
- (aa) Conference on the private international law issues raised by electronic commerce sponsored by the Hague Conference on Private International Law (The Hague, the Netherlands 25-28 October 2004);
- (bb) Conference sponsored by the International Association of Lawyers on international arbitration in Spain (Madrid, Spain 3-5 November 2004);
- (cc) Follow-up meetings to foster regional cooperation sponsored by USAID and Chemonics (Almaty, Kazakhstan and Bishkek, Kyrgyzstan 15-17 November 2004);
- (dd) Consultations with German Ministry of Justice on the draft Legislative Guide on Secured Transactions (Berlin, Germany 15 November 2004);
- (ee) International Chamber of Commerce Commission on Commercial Practice

and Law (Paris, France 17 November 2004);

(ff) Seminar sponsored by the T.M.C. Asser Institute on private international law and arbitration in the enlarged European Union (Prague, Czech Republic 19 November 2004);

(gg) Consultations with the Director, Division of International Trade in Goods, Services and Commodities, UNCTAD; conference sponsored by the Swiss Arbitration Association on on-line dispute resolution (Geneva, Switzerland 24-25 November 2004);

(hh) Lecture on the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on International Commercial Conciliation sponsored by the University of Valencia (Valencia, Spain 26 November 2004);

(ii) Twelfth Croatian Arbitration Conference (Zagreb, Croatia 2-3 December 2004);

(jj) Symposium on International Financing Instruments sponsored by APEC (Singapore, 14-16 December 2004);

(kk) Consultations with Ministry of Justice, Serbia and SEED Working Group on draft law on mediation (Belgrade, Serbia 14 December 2004);

(ll) Enterprise and Development Lawyers Course sponsored by IDLO (Rome, Italy 9-10 February 2005);

(mm) Comité Maritime International (CMI) and Government of Sweden Roundtable on E-Commerce, Transport Documents, Rights of Control and Transfer of Rights (London, 23-25 February 2005);

(nn) Conference on arbitration law sponsored by R.I.Z., UNCITRAL and DIS and Petersberger Arbitration Days 2005 (Cologne and Petersberg, Germany 2-5 March 2005);

(oo) Sixth Multinational Judicial Colloquium sponsored by INSOL and UNCITRAL and the Seventh World Congress of INSOL International (Sydney, Australia 11-16 March 2005);

(pp) Commercial Law Seminar presented by the Commercial Law Development Reform (CDLP) (Manama, Bahrain 27-29 March 2005);

(qq) Conference on conciliation sponsored by Southeast Europe Enterprise Development (SEED) (Belgrade, Serbia 31 March 2005).

## VII. Future activities

16. For the remainder of 2005, seminars and legal assistance briefing missions are being planned in Africa, Asia, Eastern Europe and South America. Since the travel costs of technical assistance activities are 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 symposia.

17. As 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. It is hoped that at least one student from the course will participate in the United Nations internship programme with UNCITRAL, which is discussed below in paragraph 19.

## **VIII. Willem C. Vis International Commercial Arbitration Moot**

18. As it has done since its inception, the Secretariat co-sponsored the eleventh Willem C. Vis International Commercial Arbitration Moot in Vienna from 19 to 24 March 2005. The Moot is principally organized by Prof. Eric Bergsten of the Institute of International Commercial Law at Pace University School of Law and takes place principally at the Faculty of Law of the University of Vienna. With its broad international participation, involving 154 teams from 49 countries in 2005, the Moot is seen as an excellent way of disseminating information about uniform law texts and teaching international trade law. As in the past, the Secretariat offered lectures to participants of the Moot.

## **IX. Internship programme**

19. 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 14 interns, from Argentina, Australia, Austria, Brazil, Canada, Germany, India, Indonesia, Slovenia, Spain, and Tunisia. 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 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.

20. 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. In the past year, research has been conducted at UNCITRAL by 35 scholars from 15 countries.



## **IX. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS**

### **A. Status of conventions and model laws (A/CN.9/583) [Original: English]**

Not reproduced. The updated list may be obtained from the UNCITRAL secretariat or found on the Internet at [www.uncitral.org](http://www.uncitral.org).



## A/CN.9/580

**B. Note by the Secretariat on developments in insolvency law:  
adoption of the UNCITRAL Model Law on Cross-Border Insolvency;  
use of cross-border protocols and court-to-court communication  
guidelines; and case law on interpretation of “centre of  
main interests” and “establishment” in the European Union**

**(A/CN.9/580 and Add.1-2) [Original: English]**

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## **I. Introduction**

1. This note reports on developments in the area of cross-border insolvency law, including with respect to the adoption of the UNCITRAL Model Law on Cross-Border Insolvency, the use of cross-border protocols and guidelines on court-to-court communications in cross-border cases, and interpretation of the terms “centre of main interests” and “establishment” in cases in the European Union under the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (ECR). A brief report on the current activities of international organizations in the area of insolvency law is set forth in A/CN.9/580/Add.1.

## **II. Developments in cross-border insolvency**

### **(a) Adoption of the UNCITRAL Model Law on Cross-Border Insolvency**

2. Legislation based on the Model Law has now been adopted by Eritrea; Mexico;<sup>1</sup> within Serbia and Montenegro; Montenegro;<sup>2</sup> Japan;<sup>3</sup> South Africa;<sup>4</sup> Romania;<sup>5</sup> Poland;<sup>6</sup>

<sup>1</sup> Ley de Concursos Mercantiles, D.O. 12 de Mayo de 2000 (Mex.).

<sup>2</sup> Law on Business Organization Insolvency, February 2002.

<sup>3</sup> Law relating to Recognition and Assistance for Foreign Insolvency Proceedings (Law No. 129 of 2000).

and the British Virgin Islands.<sup>7</sup> The United Kingdom<sup>8</sup> has enacted legislation enabling the Model Law to be implemented by regulation. A number of countries have draft legislation based upon the Model Law under consideration, including the United States of America, Argentina and Pakistan, while other countries have recommended adoption of such legislation, including Australia, New Zealand and Canada. The Spanish Insolvency Act 22/2003, which came into force in 2004, includes international insolvency provisions inspired by the Model Law as well as provisions based on the ECR.

3. While some of the legislation adopting the Model Law has enacted the text largely unchanged, some changes, of varying degrees of significance, have been made. The following summary of those changes is provided by way of illustration, but since it is based upon consideration of much of the legislation in translation, it may not accurately reflect the exact provisions of the original legislation in each case.

(i) *Scope of the legislation—article 1*

4. As foreshadowed in article 1 (2) of the Model Law, countries have excluded certain types of entities from the application of the provisions of the Model Law. Examples include: entities such as banking and insurance institutions (e.g. Romania, Poland); financial and investment institutions, commodity exchange members, clearing houses, brokerage companies and traders (e.g. Romania); persons who hold or have held prescribed financial services licences of a designated type (e.g. British Virgin Islands); and consumers (e.g. Mexico). Reflecting the scope of its insolvency law, one country has limited the provisions to proceedings concerning “merchants” (Mexico).

(ii) *“Centre of main interests”—articles 2 and 16(3)*

5. One example adds to the presumption of article 16 (3) concerning “centre of main interests” the additional possibility of the centre of main interests being the professional domicile of a legal person undertaking an economic activity or independent profession (Romania).

<sup>4</sup> Cross-Border Insolvency Act, 42 (2000), art. 34 (S. Afr.).

<sup>5</sup> Law No. 637 of 7 December 2002 on Regulating Private International Law Relations in the Field of Insolvency.

<sup>6</sup> Law on Insolvency and Restructuring of 28 February 2003.

<sup>7</sup> Insolvency Act, 2003. The Act, which came into force in August 2004, includes provisions on cross-border insolvency (Part XVIII); this Part has not yet entered into force. Part XIX Orders in Aid of Foreign Proceedings, which has entered into force, allows applications from foreign representatives for various types of relief to aid the foreign proceedings and specifies the matters to be taken into account by the court in ordering that relief. This Part includes provisions similar to those included in articles 5, 7 and 10 of the Model Law.

<sup>8</sup> Insolvency Act 2000.

(iii) *Application to commence and participate in proceedings—articles 11 and 12*

6. In one example (British Virgin Islands), an application under article 11 to commence local proceedings and participation in proceedings regarding the debtor under article 12 both require the foreign proceedings to have been recognized.

(iv) *Notification of foreign creditors—article 14*

7. One law (British Virgin Islands), provides for additional time to be given to foreign creditors with respect to notice and submission of claims.

(v) *Application for recognition—article 15*

8. In most examples, applications for recognition can be made, in accordance with article 15, by the foreign representative. In one case, the debtor may also make such an application (Japan).

(vi) *Decision to recognize—article 17*

9. A number of examples have omitted the requirement under article 17(3) that courts should decide upon an application for recognition at the earliest possible time (e.g. Japan, Mexico, Poland).

(vii) *Subsequent information—article 18*

10. A number of countries have extended the obligation to inform the court to cover “any” changes, not only “substantial” changes, as required by article 18, in the status of the recognized foreign proceedings or the status of the foreign representative’s appointment (e.g. Poland, South Africa).

(viii) *Interim relief and relief available on recognition—articles 19 and 20*

11. One law has added a requirement that the insolvency representative must notify the debtor as soon as possible or within a time specified by the court where an order for interim relief is made (British Virgin Islands). Several countries have slightly amended the relief available upon recognition to align article 20(1) with domestic law. In those cases, the legislation provides that the stay does not apply to commencement or continuation of individual actions, but only to enforcement or execution against the debtor’s assets (e.g. Japan, Mexico).

12. In one example, relief is not available automatically on recognition as provided by article 20, but rather upon application to the court (e.g. Japan).

13. In a further example, exercise of the right to alienate, encumber or dispose of the debtor’s assets is suspended from the time of recognition, except where the trader carries out acts, operations and payments in the ordinary course of business (e.g. Romania). Such acts can be the subject of a request for relief by the foreign representative following recognition. The same legislation also provides that a creditor holding a claim guaranteed by a mortgage, pledge or other real movable guarantee or possessory lien can seek relief from the stay.

(ix) *Cooperation and direct communication between courts—articles 25, 26 and 27*

14. One country (Japan) has not adopted article 25, and limits article 26 to cooperation between foreign and local representatives. Article 27, suggesting forms of cooperation, also has been omitted from a few examples (e.g. Japan, Poland), although the Polish law does indicate that specified information should be conveyed or sought. A further variation (Poland) provides for the judge and court to communicate directly with the foreign court and representative, but requires the person administering the proceedings under the local law to communicate with the foreign court or representative through the judge, rather than directly, as permitted by article 26 (2) of the Model Law. One law (British Virgin Islands) specifies that the right to communicate directly (article 25 (2)) be subject to the “rights of parties to notice and participation at hearings”.

(x) *Coordination—articles 28-30*

15. In at least two laws, the provisions of chapter V of the Model Law dealing with concurrent proceedings have been varied or omitted (e.g. Japan, Poland). In one example (Japan), a single proceeding model is adopted, so that there will be either recognition of a foreign proceeding or a domestic proceeding, but not both. Where a domestic proceeding has already commenced, an application for recognition of a foreign proceeding involving the same debtor will be dismissed, unless it is a foreign main proceeding and meets certain other conditions concerning the interests of creditors. If the foreign proceeding is recognized, the domestic proceedings will be stayed. In another example (Romania), the opening of local proceedings following the recognition of foreign main proceedings requires an establishment, rather than the presence of assets referred to in article 28 of the Model Law.

(xi) *Reciprocity*

16. Although rejected as an approach during negotiation of the Model Law, a number of countries have adopted provisions applying the Model Law on a reciprocal basis. The nature of these reciprocity provisions varies. In some examples, the relevant provision states the need for reciprocity (e.g. Mexico) without any indicator as to what might satisfy that requirement or provides that the court should establish the existence of reciprocity (e.g. Argentina). In another example, the legislation provides the Model Law will only apply where a country has been officially designated, a process requiring approval by the Parliament (South Africa). To date, it appears that no countries have yet been designated under that procedure. A similar provision (British Virgin Islands) requires designation by notice in an official publication. Another example, (Romania) specifies that there must be reciprocity of recognition of foreign judgements.

(xii) *Other proposals*

17. New Zealand has taken a decision to enact the Model Law and introduce an additional scheme that would allow a more extensive form of coordination with specified countries than provided for under the Model Law. This scheme is based upon designating specific types of insolvency proceedings under the law of particular countries, which will be entitled, among other things, to automatic recognition and relief upon the foreign representative giving notice to a specific public officer. Local proceedings could not be commenced in New Zealand (other than in exceptional cases with leave of the court), and the foreign representative would have the same powers as a liquidator under New Zealand insolvency legislation.

**(b) Cross-border protocols**

18. Coordination and harmonization of international insolvency proceedings has been greatly facilitated in recent years by the practices and procedures developed by insolvency professionals and courts, starting with individual cases and the need to address particular issues faced by the parties. Agreements or “protocols” were negotiated by the parties and approved by the courts in the jurisdictions involved. These cross-border insolvency protocols might, for example, settle a particular dispute arising from the different laws in concurrent cross-border proceedings, create a legal framework for the general conduct of the case or coordinate the administration of an insolvent estate in one State with an administration in another State.

19. The earliest reported cross-border insolvency protocol was developed in *Maxwell Communication plc* (December 1991/January 1992),<sup>9</sup> which involved two primary insolvency proceedings initiated by a single debtor, one in the United States and the other in the United Kingdom, and the appointment of two different and separate insolvency representatives in the two different jurisdictions, each charged with a similar responsibility. The United States and English judges independently raised with their respective counsel the idea that a protocol between the two administrations could resolve conflicts and facilitate the exchange of information. Under the protocol, two goals were set to guide the insolvency representatives: maximizing the value of the estate and harmonizing the proceedings to minimize expense, waste and jurisdictional conflict. The parties agreed essentially that the United States court would defer to the United Kingdom proceedings, once it was determined that certain criteria were present. Specificities included: that some existing management would be retained in the interests of maintaining the debtor’s going concern value, but the United Kingdom insolvency representatives would be allowed, with the consent of their United States counterpart, to select new and independent directors; the United Kingdom insolvency representatives should only incur debt or file a reorganization plan with the consent of the United States insolvency representative or the United States court; the United Kingdom insolvency representatives should give prior notice to the United States insolvency representative before undertaking any major transaction on behalf of the debtor, but were pre-authorized to undertake “lesser” transactions. Many issues were purposely left out of the protocol to be resolved during the course of proceedings. Some of those issues, such as distribution matters, were later included in an extension of the protocol.

20. Following *Maxwell*, a more modest protocol was developed between courts in Canada and the United States in *Re Olympia & York Developments Limited* (1993)<sup>10</sup> and between courts in the Bahamas and the United States in *Re Commodore Business Machines* (December 1994).<sup>11</sup>

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<sup>9</sup> Between the United States and the United Kingdom. United States Bankruptcy Court for the Southern District of New York, Case No. 91 B 15741 (15 January 1992), and the High Court of Justice, Chancery Division, Companies Court, Case No. 0014001 of 1991 (31 December 1991). The text of this and the other protocols discussed in this Note can be found at [www.iiiglobal.org](http://www.iiiglobal.org).

<sup>10</sup> Between Ontario Court of Justice, Toronto and United States Bankruptcy Court for the Southern District of New York (Reasons for Decision of the Ontario Court of Justice: (1993), 20 C.B.R. (3d) 165).

<sup>11</sup> Between the United States Bankruptcy Court for the Southern District of New York and the Supreme Court of the Commonwealth of the Bahamas, 8 December 1994.

21. Following the successful use of cross-border insolvency protocols in a number of prominent cross-border cases, the International Bar Association (IBA) developed the Cross-Border Insolvency Concordat (formally adopted by the Council of the IBA in May 1996) to serve as a model for future cross-border insolvency protocols.

22. The Concordat provides non-statutory guidelines that the parties or the courts could adopt as practical solutions to cross-border issues arising from insolvency proceedings in different States. It was drafted with the expectation that it would be modified to fit the circumstances of any particular cross-border insolvency case, as well as being a “living document” subject to revision based on experience. Protocols developed after adoption of the Concordat have used it to varying degrees, ranging from limited agreements accomplishing specific, narrow purposes to far-reaching agreements establishing broad cooperative frameworks in line with the principles of the Concordat.

23. The Concordat comprises ten general principles, each followed by a Rationale, which provides further information on the use of the particular principle.<sup>12</sup>

#### *Principle 1*

24. There should be a single primary administrative forum for a cross-border insolvency (although the Rationale recognizes that there may be ancillary/secondary proceedings).

#### *Principle 2*

25. The single main forum will coordinate the administration and collection of assets, and administer the filing of claims and distribution. (See UNCITRAL Model Law Articles 13(2), 14(3), 21(1)(e) & (2), 32).

#### *Principle 3*

26. This largely concerns rights of insolvency representatives and creditors where there is more than one proceeding, including the right to receive notice of and appear in proceedings and have access to information. (See UNCITRAL Model Law Articles 5, 9, 10, 12, 13, 14, 21(1)(d), 22(3)).

#### *Principle 4*

27. The principle addresses the situation where there is no main proceeding, but essentially two competing proceedings in different jurisdictions and focuses on issues of coordination. The principle recommends use of a protocol and contains universal distribution rules. (See UNCITRAL Model Law Article 13(2)).

#### *Principle 5*

28. The ranking of claims in a secondary proceeding is respected for secured and privileged claims.

#### *Principle 6*

29. An insolvency representative may use the administrative rules of the foreign State, although those rules are not available in the domestic State.

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<sup>12</sup> The text of the Concordat can be found at:  
[www.iiiglobal.org/international/projects/concordat.pdf](http://www.iiiglobal.org/international/projects/concordat.pdf).

*Principle 7*

30. Similar to Principle 6, this principle allows an insolvency representative to use the avoidance provisions of the foreign State. The intention of these principles is to provide flexibility in the administration of the insolvency.

*Principle 8*

31. This principle concerns international choice of law principles concerning verification and admission of claims, application of substantive law and application of avoidance provisions of the forum.

*Principle 9*

32. Proceedings with the goal of reorganization should be possible, even if not available in one of the relevant jurisdictions, if those proceedings can be effected in a non-discriminatory manner.

*Principle 10*

33. A State should not give effect to acts of another jurisdiction that invalidate a “valid pre-insolvency transaction”.

34. With increasing use, protocols have become more and more comprehensive and procedures have been streamlined, improved and standardized. In jurisdictions that have become accustomed to using protocols, they have greatly facilitated the conduct of cases and preservation of the value of the insolvency estate. Protocols seek to harmonize procedural rather than substantive issues between jurisdictions (like the Model Law, protocols tend to include some statement respecting the honour and integrity of the respective courts) and typically address coordination of:

- (i) Hearings in the States involved;
- (ii) Filing of claims;
- (iii) Procedures dealing with the financing or sale of assets;
- (iv) Recovery of debts for the benefit of creditors and equality of treatment among unsecured creditors; and
- (v) Reorganization plans in the different jurisdictions.

35. Not all of the detail that would fall under these general categories is unique to protocols. As noted above, providing foreign creditors with the same rights as local creditors, which is a feature of most protocols, is also addressed by Principle 3(c) of the Concordat and by Article 13(1) of the Model Law. Similarly, the *Everfresh*, *Nakash* and *Solv-Ex* protocols (discussed below) all permit the foreign representative direct access to the court in the other State, as does Article 9 of the Model Law.

36. There is no prescribed format for a typical cross-border insolvency protocol. Since protocols are specific to individual cases and designed to facilitate solutions to particular problems, the content will vary from case to case, and generally will not be intended to apply for the duration of the entire case without amendment or modification. As the dynamics in a multinational case change over the course of the case, additional issues may arise which may require provisions to be added to a protocol.

37. The first protocol developed after drafting of the Concordat was finalized (and modelled on the Concordat principles) was in a case involving the United States and Canada, *Everfresh Beverages Inc.* (December 1995).<sup>13</sup> A United States company with Canadian operations filed for reorganization proceedings in both countries at the same time. The protocol explicitly addressed a broad range of cross-border insolvency issues such as choice of law, choice of forum, claims resolution and avoidance actions. Creditors were given, for example, the express right to file claims in either proceeding. The protocol followed many of the principles of the Concordat very closely, using as a starting point Principle 4, which addresses the situation where there is no main proceeding, but essentially two competing proceedings in different jurisdictions. The protocol was finalized approximately one month after proceedings began and was used to hold the first cross-border joint hearing to coordinate the proceedings. It has been estimated that there was a 40 per cent enhancement of preservation of value of the insolvency estate as a result of the use of the protocol and the ensuing cooperation among the parties.<sup>14</sup>

38. In *Re Nakash* (May 1996),<sup>15</sup> the protocol involved the United States and Israel. It required express statutory authorization in Israel and direct court involvement generally in its negotiation. It focused on enhanced coordination of court proceedings and cooperation between the judiciaries, as well as between the parties (previous protocols had focused on the parties). Unlike previous cases involving cross-border insolvency protocols, this case did not involve parallel insolvency proceedings for the same debtor. The relevant conflict and central issue in the case that the protocol sought to resolve was between the pursuit of a judgment against the debtor in Israel and the automatic stay arising from the debtor's insolvency proceedings (pursuant to Chapter 11) in the United States, which should have prevented pursuit of the judgment. The debtor was not a signatory to the protocol and opposed its approval and implementation.

39. The protocol in *Tee-Comm. Electronics Inc* (June 1997),<sup>16</sup> a case involving the United States and Canada, may be characterized as a specific-purpose protocol with a narrow focus. It established a framework under which the administrators in the two jurisdictions would jointly market the debtors' assets, so as to maximize the value of the estate. Accordingly, it addressed the sale of those assets, which was the key issue at the outset of the case, but no other matters, such as entitlement to and distribution of proceeds.

40. In *Re AIOC Corporation* (April 1998),<sup>17</sup> a liquidation protocol was developed between Switzerland and the United States. The difficulties in the case arose not only because of the differences between the Swiss and United States insolvency laws, but also because of the inability of the Swiss and United States insolvency representatives to abstain from their statutory responsibilities to administer the respective liquidations. The parties agreed upon a protocol as a means of providing joint liquidation of resources in a manner consistent with the insolvency laws of both countries. The management of this via the protocol is one of the key features of the case. The protocol is based upon the

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<sup>13</sup> Ontario Court of Justice; Toronto, 15 May 1996.

<sup>14</sup> Justice J. M. Farley, *A Judicial Perspective on International Cooperation in Insolvency Cases*, 17 Am. Bankr. Inst. J. 12, March 1998.

<sup>15</sup> United States Bankruptcy Court for the Southern District of New York, Case No. 94 B 44840, 23 May 1996, and District Court of Jerusalem, Case No. 1595/87, 23 May 1996.

<sup>16</sup> Between Ontario Court of Justice and United States Bankruptcy Court for the District of Delaware, 27 June 1997.

<sup>17</sup> Between the United States and Switzerland: United States Bankruptcy Court for the Southern District Court of New York, Case Nos. 96 B 41895 and 96 B 41896, 3 April 1998).



Concordat, but focused generally on marshalling resources, and specifically on procedures for administering the reconciliation of claims.

41. In *Re Solv-Ex Canada Limited and Solv-Ex Corporation* (January 1998),<sup>18</sup> involving the United States and Canada, a number of simultaneous joint hearings were held during the proceedings. Contrary rulings by the two courts had effectively deadlocked proceedings. Following negotiations between the parties, simultaneous proceedings, connected by telephone conference call, were arranged to approve the sale of the debtors' assets. The courts reached identical conclusions authorizing the sale, and encouraged the parties to negotiate a cross-border insolvency protocol to govern further proceedings in the case. Procedural matters agreed between the parties included that identical materials would be filed in both jurisdictions; the presiding judges could communicate with one another, without counsel present, to (a) agree on guidelines for the hearings, and, subsequently, (b) determine whether they could make consistent rulings. The courts subsequently approved the protocol.

42. More recent cross-border cases between the United States and Canada have seen the development of more comprehensive forms of protocols.

43. In *Loewen Group Inc.* (June 1999),<sup>19</sup> the debtor, a large multinational company, filed for insolvency proceedings in both jurisdictions and immediately presented both courts with a fully developed protocol establishing procedures for coordination and cooperation. The debtor had quickly identified cross-border coordination of court proceedings as vitally important to its reorganization plans, and took the initiative of constructing a draft protocol that was approved as a "first day order" in both proceedings. The protocol provided that: the two courts could communicate with each other and conduct joint hearings, and set out rules for such hearings; creditors and other interested parties could appear in either court; the jurisdiction of each court over insolvency representatives from the other jurisdiction was limited to the particular matters in which the foreign insolvency representative appeared before it; and any stay of proceedings would be coordinated between the two jurisdictions.

44. *Livent Inc.* (June 1999)<sup>20</sup> was the first case in which joint cross-border hearings were conducted via a closed circuit satellite TV/video-conferencing facility. Two hearings were held. The first hearing was conducted to approve a cross border protocol for the settlement of creditor claims against the debtor. The second hearing was to approve the sale of all or substantially all of the debtor's assets. The protocol expressly provided for such hearings, and allowed the two judges some discretion to discuss and resolve procedural and technical issues relating to the joint hearing.

45. *Philip Services Corporation* (June 1999)<sup>21</sup> is noted as being the first "cross-border pre-pack".<sup>22</sup> Prior to the instigation of insolvency proceedings, the debtor negotiated a

<sup>18</sup> Between Alberta Court of Queen's Bench, Case No. 9701-10022, 28 January 1998, and United States Bankruptcy Court for the District of New Mexico, Case No. 11-97-14362-MA, 28 January 1998).

<sup>19</sup> Between United States Bankruptcy Court for the District of Delaware, Case No. 99-1244, 30 June 1999, and Ontario Superior Court of Justice, Toronto, Case No. 99-CL-3384, 1 June 1999.

<sup>20</sup> Between United States Bankruptcy Court for the Southern District of New York, Case No. 98-B-48312, and Ontario Superior Court of Justice, Toronto, Case No. 98-CL-3162, 11 June 1999).

<sup>21</sup> Between United States Bankruptcy Court for the District of Delaware, Case No. 99-B-02385, 28 June 1999, and Ontario Superior Court of Justice, Toronto, Case No. 99-CL-3442, 25 June

reorganization plan with its creditors over several months. It was intended that, following court approval, the plan would be implemented in both jurisdictions. As in the *Loewen Group* case, a fully developed protocol was presented to and approved by the courts as an initial order. The case has been cited as an example of a protocol providing for broad and general harmonization and coordination of cross-border proceedings, in line with the principles of the Concordat (as opposed to the very specific protocol *Tee-Comm Electronics* (see above, para. 39)). The broad goals of the protocol included: promoting orderly, efficient, fair and open administration; honouring the respective courts' independence and integrity; promoting international cooperation and respect for comity; and implementing a framework of general principles to address administrative issues arising from the cross border nature of the proceedings. To achieve these goals, the protocol addressed, among other things, court-to-court coordination and cooperation, the retention and compensation of professionals and joint recognition of stays of proceedings. Under the protocol, the courts also agreed to cooperate, wherever feasible, in the coordination of claims processes, voting procedures and plan confirmation procedures.

46. *Inverworld Inc* (October 1999),<sup>23</sup> involved the United States, the United Kingdom and the Cayman Islands. This was a complicated case in which insolvency proceedings were filed for the debtor and several subsidiaries in the three States. To avoid the ensuing conflicts, various parties created protocols that were agreed by courts in each of the jurisdictions. The protocol arrangements included: dismissal of the United Kingdom proceedings, upon certain conditions regarding the treatment of United Kingdom creditors; strict division of outstanding issues between the other two courts; and each court was to take the other court's actions as binding, preventing parallel litigation and leading to a coordinated worldwide settlement.

47. The protocol in *Manhattan Investment Fund* (April 2000),<sup>24</sup> a case involving the United States and the British Virgin Islands, listed a number of objectives including: coordinating the identification, collection and distribution of the debtor's assets to maximize the value of such assets for the benefit of the debtor's creditors and activities and the sharing of information (including certain privileged communications) between the respective insolvency representatives to minimize costs and to avoid duplication of effort.

48. The increased use of cross-border insolvency protocols has enabled a high level of cross-border cooperation and coordination to be achieved for the benefit of all stakeholders of the businesses involved and the experience gained is likely to continue to be built upon in future cross-border cases. They are complementary to the UNCITRAL Model Law, as the Model Law provides a legislative basis for cross-border cooperation and it is the role of mechanisms such as protocols to tailor the scope and nature of the cooperation to the circumstances of the particular case.

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1999.

<sup>22</sup> A process available in some jurisdictions, where a reorganization plan is negotiated in voluntary negotiations prior to commencement of insolvency proceedings and the plan is subsequently approved by the court.

<sup>23</sup> Between United States District Court for the Western District of Texas, Case No. SA99-C0822FB, 22 October 1999, and U.K. High Court of Justice, Chancery Division (1999), and the Grand Court of the Cayman Island (1999).

<sup>24</sup> Between United States Bankruptcy Court for the Southern District of New York, Case No. 00-10922BRL, April 2000, and High Court of Justice of the British Virgin Islands, Case No. 19 of April 2000, and Supreme Court of Bermuda, Case No. 2000/37, April 2000.

(c) **Court-to-court communications**

49. The *Guidelines Applicable to Court-to-Court Communications In Cross-Border Cases* (2000) were developed as part of the American Law Institute's (ALI) Transnational Insolvency Project begun in 1994 to develop cooperative procedures for use in corporate insolvency cases involving companies with assets or creditors in two or more of the State-parties of NAFTA—Canada, Mexico and the United States. The focus of the Project was to develop approaches that could be implemented by insolvency practitioners and the courts. The Guidelines are largely based on actual cross-border cases involving cross-border insolvency protocols and are intended to encourage communication between courts to ensure timely cooperation and coordination in cross-border insolvency cases as they develop. The Guidelines clearly state that local domestic rules, practices and ethics must be fully observed at all times. They are not mandatory, and are meant to be adapted and modified to fit the circumstances of individual cases. A key objective of the Guidelines is to reduce the time frames set by traditional means of communication between international courts, such as Letters Rogatory or Letters of Request (which can impose significant delay and disrupt the achievement of a successful cross-border insolvency administration), by encouraging the use of modern communication technologies. They are intended to be adopted in any case following appropriate notice to the parties in accordance with local procedures (all related issues, such as the parties entitled to notice are determined by the rules of each jurisdiction and are not addressed in the Guidelines). The Guidelines have been translated into a number of different languages, with additional translations currently being developed, and are available online.<sup>25</sup>

50. The Guidelines have been increasingly used in recent years, both through adoption by courts as a formal procedure, and ad hoc application in specific cross-border insolvency cases.

(i) *Use by courts*

51. The introduction to the Guidelines states that a court intending to employ the Guidelines (with or without modifications) should adopt them formally before applying them. It also states that a court might wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by the other court in a substantially similar form, to ensure that judges, counsel and parties are subject to the same standards of conduct.

52. By early 2004, the Guidelines had been endorsed in a preface signed by judges from Argentina, Canada, Japan, the Republic of Korea, New Zealand, Slovenia, South Africa, Thailand, the United Kingdom and the United States. The Supreme Court of British Columbia, Canada and the Commercial Division of the Ontario Superior Court of Justice, Canada, have adopted the Guidelines (as has the Commercial List Users' Committee of the Ontario Superior Court of Justice).

(ii) *Use in cross-border protocols between Canada and the United States*

53. The Guidelines have now been adopted and approved in several cross-border cases between Canada and the United States.

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<sup>25</sup> See International Insolvency Institute [www.iiiglobal.org/international/guidelines.html](http://www.iiiglobal.org/international/guidelines.html). The Guidelines are currently available in Chinese, Croatian, English, French, German, Italian, Japanese, Korean, Portuguese, Russian, Spanish and Swedish.

54. The Guidelines were first formally adopted in the cross-border insolvency case, *Matlack Systems Inc.*<sup>26</sup> In accordance with the procedural suggestions referred to above, the Guidelines were approved by the Canadian court on the basis that they would not be effective until approved by the United States court. The United States court subsequently approved a cross-border insolvency protocol, which specifically incorporated the Guidelines.

55. In *Re PSINet*,<sup>27</sup> the Guidelines were included, verbatim, in the protocol negotiated in that case to provide a framework for joint hearings between the two jurisdictions.

56. The proceedings in *Re Systech Retail Systems Corp.*<sup>28</sup> featured a joint hearing between a United States court and a Canadian court held in accordance with the Guidelines, which resolved and coordinated a number of cross-border issues in the case.

57. The growing importance placed by North American courts on international judicial communication and cooperation in cross-border insolvency cases is reflected in the statements made by a United States Court of Appeals in *Stonington Partners Inc.*<sup>29</sup> The case concerned concurrent insolvency proceedings in Belgium and the United States and a conflict between the two jurisdictions as to the ranking of claims. The parties unsuccessfully attempted to frame a protocol. The United States appeals court “strongly” recommended that the lower United States court and its Belgian counterpart make an effort to reach an agreement as to how to proceed or, at the very least, an understanding as to the policy considerations underpinning salient aspects of the foreign laws. In its decision, the Third Circuit Court of Appeals strongly emphasized the advantages of court-to-court communications and cooperation in cross-border insolvency cases to facilitate the administration of justice.

**(d) Developments in interpretation of the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (ECR)**

58. A number of cases interpreting various articles of the ECR may be relevant to interpretation of analogous provisions of the Model Law. These include, in particular, cases on “centre of main interest” and “establishment”. While it is clear that the jurisprudence is, at this stage, somewhat unsettled, the Commission may wish to request the secretariat to continue monitoring the decisions of courts of the European Union as they may prove to be of assistance to interpretation of the Model Law.

59. The following brief summary is provided for information and reflects only a selection of decisions on relevant issues. A number of cases are not yet fully reported or available for consideration.

**(i) Interpretation of “centre of main interests” (COMI)**

60. The Model Law does not define the term “centre of main interests”, but article 16(3) contains a rebuttable presumption that it will be the debtor’s registered office or, in the case of an individual, its habitual residence. The ECR Article 3(1) contains a similar

<sup>26</sup> (2001), 26 C. B. R. (4<sup>th</sup>) 45 (Ont. S. C. J.) and United States Bankruptcy Court for the District of Delaware, Case No. 01-01114 (MFW), 24 May 2001.

<sup>27</sup> (2001), 28 C. B. R. (4<sup>th</sup>) 95.

<sup>28</sup> Ontario Superior Court of Justice, Court file No. 03-CL-4836.

<sup>29</sup> United States Court of Appeal for the Third Circuit, November 2002, 310 F.3d 118; 40 Bankr. Ct. Dec. 113.

presumption regarding the registered office and Recital 13 indicates that the COMI is the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties.

61. A number of cases to date in the European Union have referred to ECR Article 3, particularly with respect to what constitutes the COMI of a debtor.<sup>30</sup>

62. *Enron Directo Sociedad Limitada* (United Kingdom, July 2002).<sup>31</sup> A creditor of ENRON Spain sought to commence main proceedings in the United Kingdom. The United Kingdom court accepted evidence that, although the registered office and the company's main assets were in Spain, the head office was in the United Kingdom. This was on the basis that all of the principal executive, strategic and administrative decisions in relation to the finances and activities of the company were conducted in the United Kingdom. The court also found that the main creditors of the company knew it was administered from the United Kingdom.

63. The case of *Cirio Del Monte*<sup>32</sup> (Italy, 2003) also relegates the significance of the registered office in determining COMI. The Italian court declared all of the parent debtor's European and foreign-registered subsidiaries insolvent, and found that the COMI of all the subsidiaries was in Italy, as this was where the decision-making, business and operations of the subsidiaries was centred.

64. *Geveran Trading Co. Ltd. v Kjell Tore Skjevesland* (United Kingdom, November 2002)<sup>33</sup> emphasized that the important test for determining COMI was where a debtor conducted the administration of its interests on a regular basis and where third parties, i.e. creditors, perceived a debtor's COMI to be. With respect to individuals, the court was of the view that a COMI ought to be the place where the debtor could be contacted—if an individual debtor wasn't a professional, its COMI would normally be its place of residence; if it were a professional debtor, the COMI would be its place of "professional domicile".

65. *BRAC Budget Rent-A-Car International Inc* (United Kingdom, February 2003).<sup>34</sup> The United Kingdom court was of the view that the place of registration of a company was of limited importance and that EU insolvency proceedings could be opened for a company registered outside the EU, if the company's COMI was in the EU. The case concerned a company registered in the United States. The court held that the company's COMI was in the United Kingdom, as this was where the company was administered, so that the ECR applied to the insolvency. Relevant findings of fact were that, while the company had for several years been registered in the United Kingdom as a foreign company, it had never traded in the United States, its operations were almost entirely conducted in the United Kingdom and almost all of its employees worked there. The court relied on ECR Recital 13. The court also stated that the Virgos and Schmit Report on the Convention on Insolvency Proceedings<sup>35</sup> could be used to interpret the ECR, as "the

<sup>30</sup> For further information on these and other relevant cases see [www.eir-database.com](http://www.eir-database.com).

<sup>31</sup> High Court, Chancery Division, July 2002.

<sup>32</sup> Tribunale Roma, 26 November 2003 (*Cirio Finance Luxembourg S.A.*).

<sup>33</sup> English High Court [2003 BCC 391].

<sup>34</sup> High Court of Justice, Chancery Division, Companies Court (England) of 7 February 2003 EWHC (Ch) 128 - 0042/2003.

<sup>35</sup> Report on the Convention on Insolvency Proceedings by Professor Miguel Virgos and Mr. Etienne Schmit, issued by the authors as a Guide to the 1995 Convention. Although the report was never finalized or approved by the EC Ministers of Justice, it is regarded as an

Convention covered the same ground as the Regulation and in substantially the same terms". However, the court found the report was essentially neutral on the relevant point.

66. *Re: Daisytek-ISA Ltd* (judgements in United Kingdom, Germany, France 2003).<sup>36</sup> According to the United Kingdom court, the perception of third parties, i.e. creditors, as to the location of a company's COMI was an important determinant of COMI (based upon the words "ascertainable by third parties" in Recital 13). The United Kingdom court ruled that German and French subsidiaries of a United Kingdom company had their COMI in the United Kingdom, as most of the subsidiaries' important creditors were aware that many important functions were carried out at the registered office of the parent company. Both the French and German courts initially made rulings contrary to that of the earlier United Kingdom decision and initiated local proceedings. In both jurisdictions, these decisions were later reversed.

67. *Eurofood/Parmalat* (Ireland, March 2004; Italy, February 2004).<sup>37</sup> This ongoing case involves conflicting decisions by different courts in two Member States. While the Italian courts found that the company, a subsidiary of the Parmalat group, had its COMI in Italy, the Irish courts came to the opposite conclusion that the company's COMI was in Ireland. The Irish court based its decision on the following findings: the company was registered in Ireland; it conducted the administration of its business interests lawfully and regularly in Ireland; and its creditors believed they were transacting with an Irish company. Arguments made by counsel for Parmalat included that the company was a wholly-owned subsidiary, solely formed to provide finance for other members of the corporate group; company policy was decided in Italy; and the company had no employees in Ireland. The Irish court made a strong comment regarding the need to respect the corporate veil, while noting the normality of subsidiaries following group policy.

68. *Interexx* (Netherlands, April 2004).<sup>38</sup> The court had to decide where the location of the debtor's COMI was. The debtor, a United Kingdom company, claimed its COMI was in Cardiff, the location of its registered office. However, the court found that Cardiff was the central place of registration for companies, and could not be a basis for determining COMI; the debtor was registered as an extra-territorial organization in the United Kingdom; and the company management, who held all the shares in the company, were resident in the Netherlands.

69. *Hettlage* (Germany, May 2004).<sup>39</sup> The court held that, if all essential parts of the subsidiary's organization and business activities were performed by the parent company, the COMI of a foreign subsidiary was the registered office of its parent company and that main proceedings for the subsidiary should therefore take place in the parent's jurisdiction. The court found that the German parent company performed numerous services for the Austrian-registered subsidiary, including purchasing, accounting, IT, advertising, marketing and staff administration.

70. *Ci4Net.Com Inc* (United Kingdom, May 2004).<sup>40</sup> The court was of the view that the presumption that the debtor's COMI was its place of incorporation was not necessarily

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unofficial guide to interpretation.

<sup>36</sup> Court of Appeal of Versailles, 4 September 2003 - 03/05038; High Court, Leeds, England, 16 May 2003 [2003] All ER (D) 312; Düsseldorf Regional Court, 6 June 2003, I-3 W 53/04.

<sup>37</sup> Supreme Court of Ireland, 147/04, 27 July 2004; Tribunale Parma, 30 February 2004.

<sup>38</sup> Court of Appeal, The Hague, 8 April 2003.

<sup>39</sup> District Court of Munich of 4 May 2004 - 1501 IE 1276/04.

<sup>40</sup> High Court of Justice, Chancery Division (England) of 20 May 2004 - Nos. 556 and 557 of

strong, and the place of incorporation was only one factor to be taken into consideration. A creditor sought to have two group companies put into insolvency proceedings in the United Kingdom, despite their being incorporated in the United States and Jersey respectively. The court found that the COMI of both companies was in the United Kingdom.

71. *Parmalat Hungary/Slovakia* (Hungary, June 2004).<sup>41</sup> This was another case where the court found a split between the debtor's COMI and place of registration. The company concerned was the Slovakian-registered subsidiary of a Hungarian parent. The Hungarian court found that the main decisions and financial affairs of the subsidiary were managed in Hungary and this could be ascertained by third parties.

72. *Aim Underwriting Agencies (Ireland) Limited* (United Kingdom, July 2004).<sup>42</sup> The court found the COMI of a United Kingdom-owned Irish-registered company to be in the United Kingdom. Relevant facts were that the company was incorporated in Ireland to take advantage of the Irish regulatory regime; it was controlled from London; finance and administrative support came from the parent company; and the parent company was the only known creditor and was aware of how the company was run.

73. It is apparent from the cases to date that the presumption in the ECR that the debtor's registered office will be its COMI is by no means conclusive. In accordance with Recital 13 of the ECR, the place where the debtor conducts the administration of its interests on a regular basis and is ascertainable by third parties is also to be considered. Other factors taken into account include the location of the company's headquarters, its operations and employees and its decision-making mechanism, as well as the rights and expectations of creditors.

74. Once the COMI is determined and main proceedings are opened, article 16(1) of the ECR provides for automatic recognition of those proceedings in the EU. The majority of cases on COMI have led to local main proceedings being opened, while in only a very few cases have the courts found that they did not have jurisdiction. The provision for automatic recognition, when combined with an interpretation of COMI which takes into account a range of different factors, may lead to situations such as those encountered in *Eurofoods/Parmalat* and *Daisytek* where more than one jurisdiction has expectations of being the COMI of a particular debtor. This outcome has the potential to reduce the certainty and predictability surrounding the definition of COMI and thus the extent to which it can be readily ascertained by third parties, so that they will know which domestic insolvency law will apply should a company become insolvent. It might also allow, as some commentators have suggested, the forum shopping that the Regulation was intended to prevent.

75. The Irish court in *Eurofoods/Parmalat* has made a reference to the European Court of Justice under Article 234 of the E.C. Treaty, with a series of specific questions regarding the interpretation of ECR Article 3.

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2004.

<sup>41</sup> Municipal Court of Fejer/Székesfehérvár, Hungary, 14 June 2004.

<sup>42</sup> UK High Court of 2 July 2004 (unreported).

(ii) *Establishment*

76. “Establishment” is defined in Article 2(f) of the Model Law and Article 2(h) of the ECR. The definitions are the same except that the Model Law concludes the definition with the additional words, “or services”.

77. *Telia v Hillcourt* (United Kingdom, October 2002).<sup>43</sup> The court refused an application for insolvency proceedings to be brought against the Swedish debtor in the United Kingdom on the basis that a United Kingdom subsidiary of the debtor had an establishment in the United Kingdom, which was therefore an establishment of the Swedish parent debtor. The court held that the mere presence of a subsidiary was in itself insufficient to constitute an establishment and that it had no jurisdiction to commence proceedings against the debtor.

78. *Automold* (Germany, January 2004).<sup>44</sup> The debtor was incorporated in Germany, but was the subject of United Kingdom insolvency proceedings. The German court held that the existence of a registered office in the State was sufficient evidence of an establishment, and therefore secondary proceedings could be initiated. In support of this conclusion, it ruled that the opening of foreign main proceedings did not prevent the opening of secondary proceedings in the place where the debtor had its registered office.

79. The limited conclusion that might be reached is that the presence of a subsidiary in a State does not necessarily constitute an establishment and that a registered office might be evidence of an establishment. Since these issues are closely related to determination of the COMI, particularly with regard to the presumption concerning location of the debtor’s registered office, greater clarity might result from the reference to the European Court of Justice referred to above.

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<sup>43</sup> High Court of Justice, Chancery Division (England) [2002] EWDC 2377 (Ch).

<sup>44</sup> District Court of Cologne, Germany, 23 January 2004, 71 IN 1/04.



**A/CN.9/580/Add.1****Note by the Secretariat on coordination of work:  
Current activities of international organizations  
related to insolvency law****ADDENDUM**

1. In resolution 36/32 of 13 November 1981 the General Assembly endorsed various suggestions by the Commission to implement further its coordinating role in the field of international trade law.<sup>1</sup> Those suggestions included presenting, in addition to a general report of activities of international organizations, reports on specific areas of activity focusing on work already under way and areas where unification work was not under way but could appropriately be undertaken.<sup>2</sup> This note describes some of the activities of international organizations active in the field of insolvency law.

**1. American Bar Association (ABA)**

2. The Select Advisory Committee on Business Reorganization (SABRE) is a special committee of the ABA Business Law Section appointed to analyze the problems of time and cost of business reorganizations under the U.S. bankruptcy laws and to make recommendations with respect to improvements to the legislation. SABRE I, published in 2001, made three recommendations: (a) to provide for a pre-Chapter 11 “workout proceeding”, in which the debtor would be prohibited from making out-of-the-ordinary course transfers and creditors would be prohibited from enforcement actions. The workout stay would be short, 30-60 days, and could be extended by the court, but not to exceed 120 days; (b) in a Chapter 11 reorganization case, to allow the court to appoint a “plan facilitator” to help achieve consensus on the terms of a reorganization plan; and (c) to allow a court, in a Chapter 11 reorganization case, to appoint one (or more) neutral business experts for the insolvency proceeding to facilitate dissemination of business data. SABRE II, published in 2004, made three additional recommendations. Two recommendations dealt with creditor participation in reorganization proceedings: (a) to limit the number of creditor committees to a single committee, except in extraordinary circumstances; and (b) in smaller reorganization cases where creditors might have little interest in forming a committee, to provide for the appointment of a “creditors’ representative” to monitor the case and negotiate a reorganization plan on behalf of unsecured creditors. The third recommendation was to grant to the courts broad flexibility in appointing examiners and the powers assigned to them in reorganization proceedings beyond merely investigatory powers.

**2. American Law Institute (ALI)**

3. The ALI’s project “Transnational Insolvency: Cooperation Among the NAFTA Countries” was a response to increasing numbers of bankruptcies of multinational economic enterprises in the NAFTA countries. Four volumes were published in 2003: Principles of Cooperation Among the NAFTA Countries, which provides an overview of

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<sup>1</sup> *Official Records of the General Assembly, thirty-sixth Session, Supplement No. 17 (A/36/17)*, paras. 93-101.

<sup>2</sup> *Ibid.*, para. 100.

the project and sets forth specific recommendations. The other three, the International Statement of United States Bankruptcy Law, International Statement of Canadian Bankruptcy Law, and International Statement of Mexican Bankruptcy Law describe the bankruptcy laws of the three NAFTA States, and set out principles governing multinational insolvency cases which involve assets located in one or more of the three NAFTA countries.<sup>3</sup>

### **3. Asian Development Bank (ADB)**

4. The ADB provides assistance to Governments to enhance the performance of public institutions, especially courts, regulatory institutions and ministries of justice, through the establishment of legal training institutions, web-based access to training and legal research materials. Assistance to law reform in the area of insolvency law reform includes the Regional Technical Assistance (RETA) 5975: Promoting Regional Cooperation in Insolvency Law Reforms addressing (a) informal workouts, (b) intersection between insolvency law and secured transactions law and (c) cross-border insolvency. The final report is currently being finalized.

### **4. European Bank for Reconstruction and Development (EBRD)**

5. In 2004, the EBRD completed its Legal Indicator Survey on Insolvency and its Insolvency Sector Assessment to provide stakeholders in insolvency cases with an understanding of the extensiveness and effectiveness of insolvency legal regimes in 25 of the EBRD's countries of operations.<sup>4</sup> The Legal Indicator Survey goes beyond the "law on the books" and assesses how the legislation, together with the local institutional framework (including rules of procedure, courts and judges and insolvency administrators), in each country works to create a functional (or dysfunctional) insolvency legal regime. The Insolvency Sector Assessment uses a comprehensive guideline, developed as a composite of the leading international standards in insolvency, to measure a given country's legislative compliance with these standards. The data collected by the EBRD in the Survey and the Assessment has allowed for a unique comparison of both the extensiveness and the effectiveness of insolvency legal regimes throughout the EBRD's countries of operations.

### **5. European Union**

6. On 31 May 2002, EU Regulation 1346/2000 on cross-border insolvency proceedings came into force. This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community. It does not apply to Denmark. It provides specific rules of jurisdiction, applicable law and recognition of judgements, while enhancing coordination of the measures to be taken regarding an insolvent debtor's assets. The solutions rely on the principle of the opening of main insolvency proceedings with universal scope in the Member State where the debtor has the centre of his main interests, while retaining the possibility of opening secondary local proceedings in another Member State where the debtor has an establishment.

7. Following the European Parliament's discussions on amendment of the Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, an ad hoc group of government experts from the 15 Member States was set

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<sup>3</sup> See <http://www.ali.org>.

<sup>4</sup> See <http://www.ebrd.com/>.

up to consider, in collaboration with the Commission, the main difficulties encountered in enforcing the Directive. As a result of those meetings, which also addressed the legal, social and economic position of the workers affected by new forms of work, the Directive was amended by Directive 2002/74/EC of the European Parliament and of the Council on 23 September 2002.

8. The Enterprise Directorate-General (DG) in its projects relating to Best Procedures to conduct benchmarking exercises on issues identified as essential to reaching the Lisbon goal,<sup>5</sup> embarked on the project “Restructuring, Bankruptcy and a Fresh Start” as one of the Best Procedure Projects. An expert group was set up in 2002 and consisted of experts from 14 Member States, 7 Candidate Countries and Norway. The final report of the Expert Group “Best Project on Restructuring, Bankruptcy and a Fresh Start” was published in September 2003.

9. As a related measure and to set the agenda for entrepreneurship policy, the Commission published a Green Paper “Entrepreneurship in Europe” in 2003.<sup>6</sup> After public debate on ways to make the balance between risk and reward more favourable to entrepreneurship, the Commission presented an Action Plan in February 2004, which outlined a series of key actions to address five strategic priority areas.<sup>7</sup> Under the policy of reducing the stigma of failure, the Commission proposed to draw up in 2004, together with Member States’ experts, principles of bankruptcy, early warning signs of financial difficulties, reasons for failure, barriers to starting afresh and portraits of failed and restarted entrepreneurs.

10. Identified by the Financial Services Action Plan (FSAP) as a top priority, the European Parliament and Council Directive 2001/24/EC on the reorganization and winding-up of credit institutions fills a major gap in the financial services legislation. The objective of the Directive is to ensure, where a credit institution with branches in other Member States fails, that a single winding-up procedure is applied to all creditors and investors. The Directive entered into force on 5 May 2001 and the deadline for implementation of the legislation in the Member States was 5 May 2004.

11. Directive 2001/17/EC on reorganization and winding up of insurance undertakings is also an integral part of the Financial Services Action Plan (FSAP). It provides that the opening of reorganization measures and winding-up proceedings concerning insurance undertakings shall be decided by the competent authorities of the Member State in which the undertaking is authorized (home Member State) and under the home national legislation. The proceedings include all branches of the insurance undertaking in the Community and creditors are to be duly informed and treated without discrimination regardless of the Member State in which they are resident. The Directive entered into force on 20 April 2001 and the deadline for implementation of the legislation in the member states was 20 April 2003.

## 6. Group of Twenty

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<sup>5</sup> At a special meeting held in Lisbon on 23-24 March 2000, the EU leaders agreed on a new strategic goal for the Union in order to strengthen employment, economic reform and social cohesion as part of a knowledge-based economy.

<sup>6</sup> See [http://europa.eu.int/comm/enterprise/entrepreneurship/green\\_paper/green\\_paper\\_final\\_en.pdf](http://europa.eu.int/comm/enterprise/entrepreneurship/green_paper/green_paper_final_en.pdf).

<sup>7</sup> See [http://europa.eu.int/comm/enterprise/entrepreneurship/promoting\\_entrepreneurship/doc/com](http://europa.eu.int/comm/enterprise/entrepreneurship/promoting_entrepreneurship/doc/com).

12. The sixth meeting of Finance Ministers and Central Bank Governors of the G-20 in Berlin, Germany, from 20-21 November 2004, issued the following communiqué:

“Based on an exchange of experience over the past two years, we emphasized that strong domestic financial sectors are essential in supporting economic growth and reducing external vulnerabilities. We agreed that high priority should be given to establishing stable and efficient institutions. Progress in institution building is also important for a well-sequenced liberalisation of the capital account. Emphasis must be given to implementing the relevant internationally recognised standards and codes. We highlighted the crucial role of financial sector supervision, which should pay due regard to efficiency, operational independence and accountability of the agencies involved. We welcomed the efforts of the World Bank to develop principles and guidelines for effective insolvency and creditor rights systems and we commend efforts to develop a unified international standard in this area, in collaboration with UNCITRAL, that takes into account different legal traditions. We identified stable and efficient payment systems as pivotal for the financial infrastructure and emphasised the role of central banks as a supplier and overseer of payment services. We welcomed the efforts of the IMF, the World Bank and others in promoting institution-building and the development of local capacity and agreed on the importance of closely coordinating such activities.”

#### **7. Hague Conference on Private International Law**

13. The Hague Conference collaborated closely with UNCITRAL in developing the chapter of the UNCITRAL Legislative Guide on Insolvency Law dealing with law applicable in insolvency proceedings.

#### **8. International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL)**

14. INSOL is currently developing a number of publications on (i) deposit insurance systems (covering six country studies of their respective Deposit Insurance Systems: USA, Canada, UK, Hong Kong, the Netherlands and Japan); (ii) employee entitlements (25 country studies of issues affecting employees where their employer faces financial difficulty or becomes insolvent, including how an employee is defined for the purpose of formal insolvency, their entitlements in insolvency, priority of treatment, personal liability of directors in respect of unpaid wages, statutory safety nets in place, and, in the event an insolvent company is sold, the acquirers responsibilities in respect of employee claims); (iii) Directors in the Twilight Zone (2nd edition, covering 21 countries); (iv) qualifications and skills of insolvency practitioners (a global survey of information in respect of appointments, qualifications, selection process, supervision, remuneration and the regulation of the professionals); (v) global market survey; and (vi) credit derivatives project (promoting awareness and better understanding of credit derivative issues that affect corporate restructuring). INSOL continues to co-sponsor with UNCITRAL the Multinational Judicial Colloquia on Cross-border Insolvency.

#### **9. International Bank for Reconstruction and Development (World Bank)**

15. The World Bank staff have produced draft Principles and Guidelines for Effective Insolvency and Creditor Rights Systems. The draft Principles benchmark the effectiveness of insolvency and creditor rights systems and offer guidance to policymakers on the policy choices required to establish or strengthen a functional system for healthy debtor-creditor

relations. The draft Principles have been used by World Bank staff in assessing countries' insolvency and creditor rights systems, in the form of Reports on the Observance of Standards and Codes (ROSCs). In the area of institutional frameworks related to insolvency, the World Bank has convened Global Judges Forums in 2003 and 2004 to encourage a dialogue among judges that oversee commercial enforcement and insolvency cases and to assist the World Bank to develop an Insolvency Court Practices Guide.

16. Consultations between the World Bank, the UNCITRAL secretariat and the International Monetary Fund continue towards achieving (a) consistency between the World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, on the one hand, and the UNCITRAL Legislative Guide on Insolvency Law and the draft UNCITRAL Legislative Guide on Secured Transactions, on the other hand, and (b) the development of a unified international standard in the area of insolvency law.

#### **10. International Bar Association (IBA)**

17. The Section on Insolvency, Restructuring and Creditors' Rights (SIRC) of the Legal Practice Division of the International Bar Association undertakes a number of activities in the area of insolvency law. For example, it works with other international organizations (e.g. UNCITRAL, World Bank, IMF) to enhance certainty through insolvency law reform and, in particular, members have been active in developing proposals to UNCITRAL on future work on insolvency law. It liaises with multinational and national regulatory bodies and with other international institutions, such as the Group of Thirty and INSOL International. In May 2005, the Section will meet with INSOL Europe to discuss, among other things, cross-promotion and cooperation on international insolvency projects. On 20 May 2005, the Section will present a resolution to the council of the Legal Practice Division of the IBA to recognize and endorse the UNCITRAL Legislative Guide on Insolvency Law. If the resolution is adopted, the Section hopes to present the same resolution on behalf of the LPD to the Council of the IBA on 21 May. SIRC members contribute annually to the World Bank's Doing Business Report concerning the status and content of domestic insolvency laws of countries throughout the world. Originally undertaken by the former Committee J in 2002, SIRC members continue to provide annual updates to questionnaires designed through a joint effort of the IBA, the World Bank and the Harvard Graduate School of Economics.

#### **11. International Insolvency Institute (III)**

18. The III has a number of committees that research and assess various insolvency topics including: cross-border insolvency financing (developing systems and/or procedures that will facilitate the ability of a reorganizing business that is operating internationally to obtain funding to carry on in business); corporate and professional responsibilities (comparing the responsibilities of insiders and professionals in connection with insolvency proceedings); cross-border communications in insolvency cases (promote application of the Guidelines for Court-to-Court Communications in Cross-Border Cases); expedited international reorganization procedures (developing expedited procedures to facility international reorganizations and restructurings); sovereign insolvency; transnational litigation (establishing an international database of major decisions in the international insolvency field); tax priorities in bankruptcy; European Union developments; Latin America developments; and Asian developments.

## 12. International Monetary Fund (IMF)

19. The IMF Fund provides expert training and advice to the authorities of member countries to help strengthen their legal infrastructure, where such issues are macroeconomically relevant. Work of relevance to insolvency includes reports comparing country practices with internationally recognized standards and codes in the areas of data dissemination, fiscal transparency, monetary and financial policy transparency, banking supervision, securities markets, insurance regulations, and accounting and auditing standards. IMF staff have produced a number of reports on corporate insolvency, bank insolvency and the restructuring of unsustainable sovereign debt, including *Orderly and Effective Insolvency Procedures—Key Issues* (1999) (analysing major policy choices to be addressed in the design of an effective corporate insolvency system).<sup>8</sup>

## 13. Organization for Economic Cooperation and Development (OECD)

20. Since 1992, the Privatisation and Enterprise Reform Unit of the OECD has been involved in a process of developing rules and policies for transition and emerging market governments in the area of legal reform, focusing on privatization, insolvency and corporate law. In the context of its special programme for Asia, the OECD has undertaken to develop a dialogue, involving member-country experts and officials, policy makers and experts from emerging market economies, on the design and implementation of insolvency systems.

21. The Forum for Asian Insolvency Reform (FAIR) was established by the OECD in cooperation with the Asia-Pacific Economic Cooperation forum (APEC) and the Asian Development Bank (ADB) with assistance from the Governments of Japan and Australia to: further develop and sustain policy dialogue on insolvency reform among Asian policy makers and senior private-sector participants; monitor and review progress in the implementation of reforms in each economy of the region; identify the main topics of interest to regional policy makers and practitioners; and help to identify country-specific technical assistance needs, which could then be addressed by bilateral donors or multilateral institutions. To date, four meetings have been held (Bali, February 2001; Bangkok, December 2002; Seoul, November 2003; and New Delhi, November 2004), with another planned for 2005.

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<sup>8</sup> See <http://www.imf.org/external/pubs/ft/orderly/>.

**A/CN.9/580/Add.2****Note by the Secretariat on insolvency law - Developments  
in insolvency law: Adoption of the UNCITRAL  
Model Law on Cross-Border Insolvency****ADDENDUM**

1. This note provides an update on adoptions of the Model Law on Cross-Border Insolvency occurring subsequent to the date of document A/CN.9/580.
2. On 20 April 2005, the new chapter 15 of the United States Bankruptcy Code was signed into law and will enter into force on 17 October 2005. Chapter 15 incorporates the UNCITRAL Model Law on Cross-Border Insolvency, largely following the terms of the Model Law. A few modifications are noted below.
  - (i) *Scope of the legislation—Model Law article 1*
    3. Section 1501 excludes certain natural persons who may be considered ordinary consumers (by reference to specified debt limitations) who are either citizens or permanent residents of the USA, certain stock and commodity brokers and other entities subject to specialized insolvency regimes under United States law.
  - (ii) *Competent courts—Model Law article 4*
    4. The designation of the competent court is addressed elsewhere in the United States Bankruptcy Code. Section 1504 introduces and emphasizes the policy in favour of a general rule that countries other than the home country of the debtor, where main proceedings would be brought, should usually act through ancillary proceedings in aid of main proceedings, in preference to a system of full bankruptcies in each state where assets are found.
  - (iii) *Authorization to act abroad—Model Law article 5*
    5. Section 1505 varies the automatic authorization for a person or body charged with administering a reorganization or liquidation under the law of the enacting State to act abroad, requiring prior court approval to be obtained.
  - (iv) *Right of direct access, application to commence and participate in proceedings—Model Law articles 9, 11 and 12*
    6. Section 1509 imposes recognition of a foreign representative as a condition to further rights and duties of the foreign representative, which include making an application under article 11 to commence local proceedings and participation in proceedings concerning the debtor under article 12. A provision has been added to ensure that a foreign representative cannot seek relief in United States' courts after being denied recognition. An exception to the requirement for recognition is given for collection of claims which are property of the debtor, such as accounts receivable.

(v) *Notification of foreign creditors—Model Law article 14*

7. Section 1514 provides for additional time to be given to foreign creditors with respect to notice and submission of claims.

(vi) *Relief available on recognition—Model Law article 20*

8. Section 1520 imports to Chapter 15 the relief available from existing provisions of the Bankruptcy Code, which is broader than that available under article 20. It includes, for example, grounds for providing relief from the stay, and an automatic right for the foreign representative of main proceedings to operate the debtor's business. While it allows an action to be commenced to preserve a claim, it does not permit the action to be further pursued. The stay does not apply to commencement of full insolvency proceedings in the United States, although those proceedings would be subject to the provisions on coordination and cooperation.

(vii) *Actions to avoid acts detrimental to creditors—Model Law article 23*

9. Section 1523 confers standing on a recognized foreign representative to initiate an avoidance action only where a case is pending under another part of the Bankruptcy Code. The section leaves it to the court to determine the nature and extent of any such action and the national law that may apply to such action.

(viii) *Coordination of proceedings—Model Law article 28*

10. Section 1528 makes it clear that in addition to the provisions of article 28, the court may dismiss or suspend United States proceedings in order to cooperate and coordinate with foreign proceedings.





## **X. COORDINATION AND COOPERATION**

### **A. Note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade**

**(A/CN.9/584) [Original: English]**

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### **I. Introduction**

1. In resolution 34/142 of 17 December 1979, the General Assembly requested the Secretary-General to place before the United Nations Commission on International Trade Law a report on the legal activities of international organizations in the field of international trade law, together with recommendations as to the steps to be taken by the Commission to fulfil its mandate of coordinating the activities of other organizations in the field.

2. In resolution 36/32 of 13 November 1981, the General Assembly endorsed various suggestions by the Commission to implement further its coordinating role in the field of international trade law.<sup>1</sup> Those suggestions included presenting, in addition to a general report of activities of international organizations, reports on specific areas of activity focusing on work already underway and areas where unification work was not underway

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<sup>1</sup> *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17)*, paras. 93-101.

but could appropriately be undertaken.<sup>2</sup> Two reports of that nature have been prepared for consideration by the Commission at its thirty-eighth session in 2005 on electronic commerce and insolvency, contained in documents A/CN.9/579 and A/CN.9/580/Add.1, respectively. Accordingly, those two topics are not addressed in this note.

3. This general report, prepared in response to resolution 34/142, is the first in a new series which the Secretariat proposes to update and revise on an annual basis for the information of the Commission. It focuses on activities of international organizations primarily undertaken since 2000 to develop harmonized and unified international trade law instruments and is based upon publicly available material and consultations undertaken with the listed organizations.

The work of the following organizations is described in this report:

(a) United Nations bodies and specialized agencies

UNECE	United Nations Economic Commission for Europe
IMO	International Maritime Organization
UNCTAD	United Nations Conference on Trade and Development
UNIDO	United Nations Industrial Development Organization
WIPO	World Intellectual Property Organization

(b) Other intergovernmental organizations

ADB	Asian Development Bank
AfDB	African Development Bank
ASEAN	Association of South East Asian Nations
CARICOM	Caribbean Community
COMESA	Common Market for Eastern and Southern Africa
EBRD	European Bank for Reconstruction and Development
Hague Conference	Hague Conference on Private International Law
OTIF	Intergovernmental Organization for International Carriage by Rail
IADB	Inter-American Development Bank
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
OHADA	Organization for the Harmonization of Business Law in Africa
SADC	Southern African Development Community
Unidroit	International Institute for the Unification of Private Law
World Bank	International Bank for Reconstruction and Development
WCO	World Customs Organization

<sup>2</sup> Ibid., para. 100.

## (c) International non-governmental organizations

CEELI	Central European and Eurasian Law Initiative
CMI	Comité Maritime International
FIATA	International Federation of Freight Forwarders Associations
IIDM	Instituto Iberoamericano de Derecho Marítimo
ICC	International Chamber of Commerce
ICN	International Competition Network
ITC	International Trade Centre UNCTAD/WTO
PECC	Pacific Economic Cooperation Council
WAEMU	West African Economic and Monetary Union

## II. Harmonization and unification of international trade law

### A. International commercial contracts

#### Hague Conference

4. In a meeting of the Special Commission on Jurisdiction and the Recognition and Enforcement of Judgment in Civil and Commercial Matters of the Hague Conference (“the Judgments Project”) held from 21-27 April 2004, a preliminary draft convention (“the preliminary draft convention”) on exclusive choice of court clauses was finalized. Following that meeting an explanatory report of that draft convention was prepared by two rapporteurs of that Special Commission. From 18-20 April 2005 the drafting committee of the Judgments Project met in the Hague to discuss a number of matters with regard to the preliminary draft convention, including: obligations of a court not chosen in the original agreement; inconsistent judgments; application and enforcement by courts of agreements concluded before and after entry into force of the preliminary draft convention; party autonomy; and the effect of national and international laws containing provisions contrary to the preliminary draft convention.<sup>3</sup> A Diplomatic Session is to be convened from 14-30 June 2005 in respect of the draft convention.

#### ICC<sup>4</sup>

5. The ICC Commission on Commercial Law and Practice (CLP)<sup>5</sup> is in the process of developing the following model contracts and agreements: Mergers and Acquisitions Model Contracts I: Share Purchase Agreement; Mergers and Acquisitions Model Contracts II: Business and Assets Agreement; Model Turnkey Supply of an Industrial Plant Contract; Model Major Project Turnkey Contract; Model Selective Distributorship Contract; Model

<sup>3</sup> Report on the Meeting of the Drafting Committee of 18-20 April 2005 in Preparation of the Twentieth Session of June 2005: see: [http://hcch.e-vision.nl/upload/wop/jdgm\\_pd28e.pdf](http://hcch.e-vision.nl/upload/wop/jdgm_pd28e.pdf).

<sup>4</sup> <http://www.iccwbo.org/>.

<sup>5</sup> CLP, among others, sets global business rules and standards applicable to business-to-business (B2B) transactions (e.g. Incoterms) and creates model contracts. It is comprised of task forces on: mergers and acquisitions, turnkey transactions on force majeure and hardship, agency and distributorship, Incoterms, licensing, electronic contracting, and on jurisdiction and applicable law. The CLP Commission and its task forces consist of 550 members from over 42 countries, including partners in international law firms, in-house counsels, law professors and trade executives in member companies and international organizations. For more information, see <http://www.iccwbo.org/law/commission/>.

Clauses on Electronic Contracting; Business Guidance on Electronic Contracting; Model Technology Transfer Contract; Model Trademark Licensing Contract; Model Confidentiality Agreement; and a legal handbook on global sourcing contracts. CLP also works with UNCITRAL on electronic contracting; on the European Commission's initiative to harmonize European contract law; with the European Commission on the revision of the Rome Convention; and with the Hague Conference on its Judgments project (see above, para. 4).

#### ITC<sup>6</sup>

6. ITC administers a multilingual collection of legal information on international trade—Juris International ([www.jurisint.org](http://www.jurisint.org))—that provides users with some 160 model contracts selected in light of their practical interest for international commercial transactions (licensing, joint ventures, publishing, procurement, subcontracting, etc.). Model contracts and users' guidelines are publicly available on the ITC web site and on CD ROMs. In 2005, ITC launched LegaCarta—a multilingual web-based system on multilateral trade treaties and instruments designed to assist policy makers and trade promotion organizations in optimizing their country's legal framework on international trade. The system provides information on a core group of some 250 instruments, plus an additional group of approximately 450 referenced amendments and protocols (ratification maps, full texts and abstracts, status of ratifications, relevance of each instrument with regard to its impact on international trade, country analysis).

7. In 2004, an ITC pro bono Committee (comprising experienced practitioners from some fifty countries representing a wide spectrum of economic backgrounds and legal cultures)<sup>7</sup> drafted two international contractual joint venture model agreements for three-or-more-party joint ventures and for two-party joint ventures. The model contracts are intended for joint ventures where the parties organize their cooperation on a contractual basis without forming a corporate body. In 2005, model agreements for incorporated joint ventures are expected to be published.

8. In 2005, ITC jointly published with WIPO a training manual on negotiating technology licensing agreements.<sup>8</sup> The focus of the manual is on the identification and acquisition, or transfer, through licensing, of technology that is owned by virtue of an intellectual property right.

#### OHADA<sup>9</sup>

9. OHADA works, inter alia, in the area of commercial contracts.<sup>10</sup> The OHADA Council of Ministers entrusted Unidroit<sup>11</sup> with the preparation of a draft OHADA Uniform

<sup>6</sup> <http://www.intracen.org/index.htm>.

<sup>7</sup> Information regarding the agreements may be found at: [http://www.tradeforum.org/news/fullstory.php/aid/506/International\\_Joint\\_Ventures.html](http://www.tradeforum.org/news/fullstory.php/aid/506/International_Joint_Ventures.html). The Agreements will be published at: <http://www.juris.int.org>.

<sup>8</sup> For more information, see <http://www.wipo.int/wilma/pressinfo-en/200502/msg00000.html>.

<sup>9</sup> Established by the Treaty on the Harmonization of Business Law in Africa of 17 October 1993. The treaty is available at <http://www.ohada.org/>.

<sup>10</sup> For the programme of harmonization of business law, see article 2 of the Treaty, *ibid* and OHADA's decision (document Dec. 002/2001/CM), adopted by the OHADA Council of Ministers in Bangui in March 2001, available at <http://www.ohada.org/>. The programme includes competition law, banking law, intellectual property law, non-trading company law, the law of mutual societies and cooperative societies, contract law, and the law of evidence.

Act on Contracts on the basis of the Unidroit Principles of International Commercial Contracts (PICC). The proposed Uniform Act will deal primarily with commercial contracts.<sup>12</sup> In early 2005 Unidroit was also entrusted with the preparation of a draft OHADA Uniform Act on evidence of contractual obligations.

10. The UNCITRAL secretariat, in cooperation with the Ministry of Justice of Canada, has assisted OHADA with the production of a draft uniform act on consumer transactions.

#### **Unidroit<sup>13</sup>**

11. Pursuant to the recommendation of the Governing Council of Unidroit, the Principles of International Commercial Contracts (PICC) are included as an on-going project in the work programme of the Institute.<sup>14</sup> The 2004 edition of the PICC was adopted at the eighty-third session of the Unidroit Governing Council (Rome, 19-21 May 2004). Unidroit is currently soliciting comments and suggestions with respect to additional topics to be dealt with in a future edition of the PICC. The Governing Council, at its eighty-fourth session (18-20 April 2005), considered the following topics for inclusion in that future edition: unwinding of failed contracts, illegality, plurality of creditors and debtors, conditions and suretyship and guarantees. A final decision will be taken after a new working group to review the PICC is constituted in 2006.

#### **WIPO<sup>15</sup>**

12. The WIPO Copyright and Related Rights Sector hosted a seminar in April 2005 on copyright and Internet intermediaries with the main focus being to address various ways to approach issues relating to copyright liability of those who act as online intermediaries such as Internet service providers (ISPs), providers of file-sharing services, auction sites and portals. As part of the WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (IGC), WIPO is currently compiling an on-line, searchable database of contractual practices, guidelines, and model intellectual property clauses for contractual agreements on access to genetic resources and benefit-sharing ('the Contracts Database')<sup>16</sup> with a particular emphasis on the intellectual property aspects of such agreements.

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OHADA has completed the following legislative instruments: Uniform Act relating to General Commercial Law of 17 April 1997, Uniform Act relating to Commercial Companies and Economic Group Partnerships of 17 April 1997, Uniform Act organizing Securities of 17 April 1997, Uniform Act organizing Summary Debt Collection Procedures and Measures of Execution of 10 April 1998, Uniform Act organizing Insolvency and Liquidation Proceedings of 4 April 1998, Uniform Act on Arbitration Law of 11 June 1999, Uniform Act organizing and harmonizing the Undertakings' Account in OHADA Member States of March 2000, and the Uniform Act relating to the Transportation of Goods by Road of March 2003, all of which are available at <http://www.ohada.org/>.

<sup>11</sup> For information about the Institute, see <http://www.UNIDROIT.org>.

<sup>12</sup> For further information, see Marcel Fontaine, "The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts", available at <http://www.UNIDROIT.org/english/legalcooperation/ohada/2004-3-fontaine-e.pdf>. In September 2004, Professor Fontaine, member of the Working Group for the preparation of the UNIDROIT Principles, submitted a draft for consideration by the competent organs of OHADA.

<sup>13</sup> <http://www.unidroit.org/>.

<sup>14</sup> For further information, see <http://www.unidroit.org/english/workprogramme/study050/main.htm>.

<sup>15</sup> <http://www.wipo.int/portal/index.html.en>.

<sup>16</sup> The updated version of the Contracts Database is available on the WIPO web site:

## **B. International transport of goods**

### **1. Transport by sea**

#### **CMI<sup>17</sup>**

13. CMI participates regularly in the activities of UNCITRAL Working Group III (Transport Law), which is preparing a draft instrument on carriage of goods [wholly or partly] [by sea] (the UNCITRAL draft instrument on carriage of goods) intended to govern liability arising from the carriage of goods. The text of the UNCITRAL draft instrument on carriage of goods originated largely from considerations and suggestions provided by an ad hoc CMI International Subcommittee and was also the subject of work undertaken by the CMI Committee A at the 38th CMI Conference, held in Vancouver from 30 May-4 June 2004.

14. In 2004, the CMI completed a revision of the York-Antwerp Rules 1994 which are concerned with issues such as salvage remuneration, expenses at port of refuge, temporary repairs, provision of funds, interest on losses and time bar.<sup>18</sup>

#### **FIATA<sup>19</sup>**

15. FIATA has created several documents and forms for use by freight forwarders to establish a uniform standard in the practice of freight forwarding. Also, FIATA participates regularly in the activities of UNCITRAL Working Group III and has paid particular regard to the multimodal aspects of the UNCITRAL draft instrument on carriage of goods.

#### **ICC**

16. The ICC Commission on Transport and Logistics,<sup>20</sup> with its two sector-based Committees (for maritime and air transport), provide forums for discussion of specific maritime and air issues. They mostly monitor legislative and regulatory developments affecting shipping worldwide and focus, inter alia, on the modernization of maritime and multimodal transport regimes, including documentary credit issues relating to transport documents and the use of information technology for the facilitation of transport. The Committee on Maritime Transport also runs the ICC Bill of Lading Review Committee, which issues decisions on the conformity of transport documents with the UNCTAD/ICC Rules for Multimodal Transport Documents. The ICC Commission on Banking Technique and Practice (see below, para. 35) is currently reviewing and revising the UCP, including article 30 on port-to-port bills of lading.

#### **IMO<sup>21</sup>**

17. The objectives of the International Convention on Maritime Liens and Mortgages (Geneva, 6 May 1993)<sup>22</sup> are: (i) to provide a generally acceptable legal framework

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<http://www.wipo.int/tk/en/databases/contracts/index.html>.

<sup>17</sup> <http://www.comitemaritime.org/home.htm>.

<sup>18</sup> For more information, see <http://www.comitemaritime.org/cmidsocs/yar.html>.

<sup>19</sup> [www.fiata.com](http://www.fiata.com).

<sup>20</sup> For more information, see [http://www.iccwbo.org/home/menu\\_transport.asp](http://www.iccwbo.org/home/menu_transport.asp).

<sup>21</sup> <http://www.imo.org/index.htm>.

<sup>22</sup> Entered into force, 5 September 2004, document A/CONF.162/.

governing the recognition and enforcement of maritime liens and mortgages and thus to promote international uniformity, and (ii) to strengthen the international position of the mortgagees and financiers of shipbuilders and ship purchasers and thereby improve conditions for ship financing at the international level. The Convention replaces the 1926 and 1967 Conventions for the unification of certain rules relating to maritime liens and mortgages.

18. In 2002, a Diplomatic Conference adopted the third Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.<sup>23</sup> The Protocol introduces mechanisms to assist passengers in obtaining compensation and, in particular, replaces the fault-based liability system with a strict liability system for shipping-related incidents. The Protocol also mandates compulsory insurance to cover passengers on ships and raises the limits of liability. An “opt-out” clause enables State Parties to retain or introduce higher limits of liability.

19. The amendments to Chapter VII of the International Convention for the Safety of Life at Sea (1 November, 1974) (SOLAS), approved in May 2002, made the International Maritime Dangerous Goods (IMDG) Code contained therein mandatory from 1 January 2004. The IMDG Code provides uniform rules for the safe transport by sea of dangerous goods and marine pollutants in packaged form.

#### OECD<sup>24</sup>

20. The OECD has issued reports on the following maritime and inland transport issues:<sup>25</sup> removal of insurance from substandard shipping; maritime security—ownership and controls of ships: options to improve transparency; and container transport security across modes.<sup>26</sup> On 12 September 2002, the OECD Council agreed that negotiations should commence on a new Shipbuilding Agreement to review and address factors distorting normal competitive conditions in the shipbuilding industry, in particular government support measures, particularly subsidies, pricing and other related practices. The target date for finalizing the negotiations is the end of 2005.<sup>27</sup>

#### UNCTAD

21. UNCTAD participates actively in the work of UNCITRAL Working Group III, and submitted comments on the various provisions of the UNCITRAL draft instrument on

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<sup>23</sup> The Protocol, adopted on 1 November 2002, has not yet entered into force.

<sup>24</sup> For information about the organization, see <http://www.oecd.org/home/>.

<sup>25</sup> In accordance with the decision made in 2003, a joint Transport Research Centre with the European Conference of Ministers of Transport (ECMT) was created from 1 January 2004.

<sup>26</sup> A discussion paper on “Ownership and Control of Ships”, which was published for public comment in December 2003, looked at how governments could change ship registers to make it easier to identify who owns a vessel. Furthermore, OECD and ECMT launched a joint project to examine effective ways of tracking goods along the transport chain from dispatch to final delivery, even if that chain involved several different countries and means of transport. OECD also looked at how states that register ships under their flags could more effectively identify and remove substandard ships, as well as possible ways of creating incentives for ship-owners to be more responsible in this area.

<sup>27</sup> OECD set up a Special Negotiating Group in 2002 to draw up a new Shipbuilding Agreement, with support from all OECD members and major world shipbuilding economies outside OECD. Source: 2004 OECD annual report, available at: <http://www.oecd.org/dataoecd/28/49/31621929.pdf>.



carriage of goods to the UNCITRAL Working Group III at its fourteenth session.<sup>28</sup> These comments focused on freedom of contract questions, in particular, which contracts may be exempt from the mandatory application of the draft instrument and liability of the carrier for cargo loss, damage and delay.

## 2. Transport by land

### UNECE<sup>29</sup>

22. The UNECE is drafting a protocol to the Convention on the Contract for the International Carriage of Goods by Road<sup>30</sup> (Geneva, 19 May, 1956) (CMR), aimed, in particular, at the introduction of electronic consignment notes. The draft protocol is being prepared with the assistance of Unidroit.

### OAS<sup>31</sup>

23. The OAS, through its sixth Inter-American Specialized Conference on Private International Law (CIDIP VI),<sup>32</sup> held in 2002, adopted the Negotiable Inter-American Uniform Through Bill of Lading for the International Carriage of Goods by Road<sup>33</sup> and the Non-Negotiable Inter-American Uniform Through Bill of Lading for the International Carriage of Goods by Road.<sup>34</sup>

### OHADA

24. The UNCITRAL secretariat, in cooperation with the Ministry of Justice of Canada, has assisted OHADA with the production of a draft uniform act on contracts for the carriage of goods by road, which entered into force in January 2004.

### OTIF

25. OTIF is currently seeking to widen the scope of the Convention concerning International Carriage by Rail (9 May 1980)<sup>35</sup> and harmonize it with other transport legislation in order to make possible, in the longer term, through-carriage by rail under a single legal system regime from the Atlantic to the Pacific. In addition, OTIF updates, on an ongoing basis, regulations concerning the carriage of dangerous goods and seeks the removal of obstacles to the crossing of frontiers in international rail transport.<sup>36</sup>

<sup>28</sup> See A/CN.9/WG.III/WP.41.

<sup>29</sup> <http://www.unece.org/>.

<sup>30</sup> Entry into force: 2 July 1961, United Nations Treaty Series, Vol. 399, p. 189. Source: <http://www.untreaty.org>.

<sup>31</sup> For further information, see <http://www.oas.org>.

<sup>32</sup> For information on the Inter-American Specialized Conferences on Private International Law, see [http://www.oas.org/dil/private\\_international\\_law.htm](http://www.oas.org/dil/private_international_law.htm). For information on the CIDIP-VI, see [http://www.oas.org/dil/CIDIPVI\\_home.htm](http://www.oas.org/dil/CIDIPVI_home.htm).

<sup>33</sup> For a copy of the negotiable bill of lading, see <http://www.oas.org/dil/negotiable%20bill%20of%20lading-eng.pdf>. For a copy of the text accompanying the bill of lading, see <http://www.oas.org/dil/CIDIP-VI-billoflading-Eng.htm>.

<sup>34</sup> For a copy of the non-negotiable bill of lading, see <http://www.oas.org/dil/non-negotiable%20bill%20of%20lading-eng.pdf>. For a copy of the text accompanying the bill of lading, see [http://www.oas.org/dil/CIDIP-VI-NON-NEGOTIABLE\\_billoflading-Eng.htm](http://www.oas.org/dil/CIDIP-VI-NON-NEGOTIABLE_billoflading-Eng.htm).

<sup>35</sup> Entered into force on 1 May 1985.

<sup>36</sup> For more information, see [www.otif.org](http://www.otif.org).

### 3. Inland waterway transport

#### UNECE

26. The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI Convention)<sup>37</sup> was adopted at a Diplomatic Conference organized jointly by CCNR, Danube Commission and UNECE (Budapest, 25 September-3 October 2000). The CMNI Convention governs the contractual liability of parties to the contract for the carriage of goods by inland waterway and provides for the limitation of the carrier's liability. The CMNI Convention entered into force on 1 April 2005.

27. The UNECE Working Party on Inland Water Transport has been considering whether two former additional Protocols to the CMNI Convention, originally annexed to a draft of that Convention but not finally included, should be adopted in another form. The protocols relate to loading and discharge times, demurrage and the calculation of freight and distribution of shipping charges in inland water transport. With no consensus for such adoption, it was agreed to invite Governments and private entities that might be interested in the texts of the two former Protocols to use the texts reflected in document TRANS/SC.3/2003/6.<sup>38</sup>

28. A Group of Volunteers on Legislative Obstacles set up by the UNECE Working Party on Inland Water Transport prepared, as a follow-up to the Rotterdam Conference on Inland Waterway Transportation of 2001, a draft "Inventory of existing legislative obstacles that hamper the establishment of a harmonized and competitive Pan-European inland navigation market together with recommendations as to how to overcome those obstacles". The inventory contains a succinct analysis of existing legislative obstacles that hamper the establishment of a harmonized and competitive Pan-European inland navigation market and proposals on possible solutions to the problems identified.<sup>39</sup>

### 4. Intermodal transport

#### UNECE

29. The UNECE Working Party on Intermodal Transport and Logistics had postponed, as a result of the current work of UNCITRAL on international transport instruments, work on the preparation of a civil liability regime applicable to European intermodal transport extending to all contracts of carriage involving a sea leg, irrespective of their length or economic importance. Given the interest in establishing such a regime applicable to European intermodal transport, covering road, rail, inland water and short sea shipping, the UNECE Inland Transport Committee in February 2005 requested the Working Party to continue to closely monitor and evaluate all pertinent activities in this field, particularly those by UNCITRAL and to prepare, if appropriate, proposals for solutions at the Pan-European level.<sup>40</sup>

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<sup>37</sup> Budapest, 22 June, 2001. Entered into force 1 April 2005.

<sup>38</sup> Available at <http://www.unece.org/trans/main/sc3/sc3.html>.

<sup>39</sup> See, further, document TRANS/SC.3/2005/1, <http://www.unece.org/trans/main/sc3/sc3.html>.

<sup>40</sup> See, further, documents ECE/TRANS/162, para. 104 and TRANS/WP24/101, paras. 24-28, available at <http://www.unece.org/trans/main/sc3/sc3.html>.

## C. Commercial arbitration and conciliation

### CARICOM

30. Following the 2001 revision of the Treaty of Chaguaramas establishing CARICOM, art. 74(2) of the Treaty mandates member States of CARICOM to harmonize, *inter alia*, their laws and administrative practices relating to commercial arbitration.

### UNECE

31. In the framework of the UNECE Working Party on International Legal and Commercial Practice, the Expert Advisory Group to Consider Possible Revisions to the European Convention on International Commercial Arbitration of 1961 has been established. The fifty-second session of the Working Party on International Legal and Commercial Practice will take place in September 2005 in Vienna.

### ICC

32. The ICC Commission on Arbitration<sup>41</sup> currently comprises the following groups: task force on criminal law and arbitration; task force on arbitrating competition law issues; task force on guidelines for ICC expertise proceedings; ad hoc group on drafting arbitral awards; forum on ADR; forum on the ICC Rules/Court; and forum on arbitration issues and new fields. The current projects include: (i) a study on the impact of criminal law on arbitration proceedings (jurisdictional, procedural and substantive problems that may arise); (ii) preparation of a report setting forth certain issues that could be considered when drafting an arbitral award; (iii) a study on the jurisdictional, procedural and substantive problems arising in arbitrating competition law issues; and (iv) preparation of explanatory notes for the use of experts in the conduct of expertise proceedings.

### ITC

33. In September 2004, ITC organized an international symposium on the administration of arbitration and mediation services exclusively for managers of arbitration and mediation centres. More than 60 directors of alternative dispute resolution centres from 50 developing and developed economies participated in the symposium. A network has been created through which offers and requests for technical assistance regarding the administration of dispute resolution services are channelled.

34. In 2001, ITC produced and published a training handbook on arbitration and alternative dispute resolution mechanisms. The handbook—which sets out the different alternatives to State proceedings that can be used to prevent or settle business disputes in an international context—aims at creating greater awareness of the various dispute resolution mechanisms and contributing to more effective relationships between partners in international trade. Several national versions—adapted to the national regulatory framework—were subsequently published by Chambers of Commerce and arbitration centres, *inter alia*, in Argentina, Bolivia, Bangladesh, Croatia, Egypt, India, Mexico, the Philippines and Viet Nam.

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<sup>41</sup> Consists of more than 400 international legal specialists named by ICC national committees in some 82 countries. For more information, see [http://www.iccwbo.org/home/international\\_arbitration/commission.asp](http://www.iccwbo.org/home/international_arbitration/commission.asp).

## D. International payments

### ICC

35. The ICC Commission on Banking Technique and Practice<sup>42</sup> is in the process of revising UCP 500, its universally used rules on letters of credit. It is also exploring the possibility of developing common practices in forfaiting. Other current activities include targeting the European Commission and multinational development banks to urge them to make use of the ICC Uniform Rules for Demand Guarantees (URDG), in view of the World Bank's incorporation of these rules into its unconditional guarantee forms, and promoting the recent publication on International Standard Banking Practice (ISBP), which describes how the UCP should be applied in day-to-day practice.

## E. Security interests

36. The Commission may recall that at its thirty-third session in 2000 and its thirty-seventh session in 2004, notes by the Secretariat entitled "Coordination of work: activities of international organizations in the area of security interests" (A/CN.9/475 and 565 respectively) were considered. The following paragraphs update the information included in those notes.

### Unidroit

37. Unidroit, jointly with the Intergovernmental Organization for International Carriage by Rail (OTIF),<sup>43</sup> is finalizing the second Protocol to the Convention on International Interests in Mobile Equipment (Cape Town, 16 November 2001),<sup>44</sup> that deals with matters specific to railway rolling stock (the draft Rail Protocol). The draft Rail Protocol was submitted to the Unidroit Governing Council in April 2005, and will be submitted for adoption by a diplomatic conference to be convened in 2006. The Rail Registry Task Force has been established to prepare an international registry system and related aspects under the draft Rail Protocol. Unidroit is also elaborating a third protocol to the Cape Town Convention that will deal with matters specific to space assets (a preliminary draft Protocol to the Cape Town Convention on International Interests in Mobile Equipment on Matters specific to Space Assets) and is considering elaborating additional protocols that may cover agricultural and construction equipment.

38. Unidroit is also preparing a draft convention on harmonized substantive rules regarding securities held with an intermediary. The first meeting of governmental experts was held in Rome from 9-20 May 2005.

### Hague Conference

39. The Explanatory Report on the Hague Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary, adopted on 13 December 2002,

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<sup>42</sup> For more information, see <http://www.iccwbo.org/home/banking/commission.asp>.

<sup>43</sup> <http://www.otif.org/>.

<sup>44</sup> The Convention entered into force on 1 April 2004. UNIDROIT performs depositary functions under the Cape Town Convention and its Protocol on Matters Specific to Aircraft Equipment Instruments (Cape Town, 16 November 2001) (the "Aircraft Protocol"). In such capacity, it oversees the development of an International Registry for aircraft objects as provided by the Aircraft Protocol.

has recently been published.<sup>45</sup> The Hague Conference is working closely with UNCITRAL on the conflict-of-laws chapter of the draft UNCITRAL Legislative Guide on Secured Transactions.

### **EBRD**

40. In 2004, the European Bank for Reconstruction and Development (“EBRD”), in the context of its work on the modernization of secured transactions legislation, published the EBRD Guiding Principles for the Development of a Charges Registry.

### **European Union**

41. Consultations continue between the Justice and Home Affairs Directorate of the European Commission responsible for Rome I (revision of the Rome Convention on the Law Applicable to Contractual Obligations) and the UNCITRAL secretariat with a view to: (a) ensuring that the new European Union instrument will be consistent with the United Nations Convention on the Assignment of Receivables in International Trade (“the United Nations Assignment Convention”); and (b) facilitating adoption of the United Nations Assignment Convention by European Union Member States. The Secretariat informed the European Commission about UNCITRAL’s request at its thirty-seventh session in 2004 (see A/59/17, para. 165) for a coordination meeting. It appears that the European Commission is in the process of consulting European Union Member States, based on a draft text, as to the approach to be followed on the issue of the law applicable to third-party effects of assignments.

### **OAS**

42. The OAS, through its sixth Inter-American Specialized Conference on Private International Law (CIDIP VI),<sup>46</sup> held in 2002, adopted the Model Inter-American Law on Secured Transactions.<sup>47</sup> The scope of application of the Model Law is the regulation of consensual security interests in movable property securing the performance of any present or future obligations. The aim of the Model Law is to modernize secured transactions laws in OAS member States with a view to significantly increasing the availability and reducing the cost of credit, in particular to small and medium-sized borrowers. The thirty-fifth regular session of the OAS General Assembly, scheduled to meet in June 2005,<sup>48</sup> is expected to approve the agenda items for CIDIP VII, which will include further work on the creation of an electronic secured transactions registry for implementation in conjunction with the Model Inter-American Law on Secured Transactions.<sup>49</sup>

### **WIPO**

43. The Copyright and Related Rights Sector of WIPO held a meeting in May 2005 to seek the input of concerned stakeholders on the impact of the draft UNCITRAL

<sup>45</sup> The report is available at:

[http://www.hcch.net/index\\_en.php?act=publications.details&pid=2955&dtid=3](http://www.hcch.net/index_en.php?act=publications.details&pid=2955&dtid=3)

<sup>46</sup> For information on CIDIP-VI, see [http://www.oas.org/dil/CIDIPVI\\_home.htm](http://www.oas.org/dil/CIDIPVI_home.htm).

<sup>47</sup> For a copy of the text of the Model Inter-American Law on Secured Transactions Law, see: [http://www.oas.org/dil/CIDIP-VI-securedtransactions\\_Eng.htm](http://www.oas.org/dil/CIDIP-VI-securedtransactions_Eng.htm).

<sup>48</sup> See: <http://www.oas.org/xxxvga/english>.

<sup>49</sup> For the agenda for CIDIP-VII, see [http://scm.oas.org/doc\\_public/ENGLISH.HIST\\_05/CP14025E07.doc](http://scm.oas.org/doc_public/ENGLISH.HIST_05/CP14025E07.doc).

Legislative Guide on Secured Transactions on intellectual property rights and on a proposal for future work in the field of security interests in intellectual property rights.

### **World Bank**

44. Consultations between the World Bank, the UNCITRAL secretariat and the International Monetary Fund continue towards achieving (a) consistency between the World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, on the one hand, and the UNCITRAL Legislative Guide on Insolvency Law and the draft UNCITRAL Legislative Guide on Secured Transactions, on the other hand, and (b) the development of a unified international standard in the area of insolvency and creditor rights.

## **F. Competition law**

### **Commonwealth Secretariat**

45. In December 2004, a meeting of experts was held in the Pacific region to consider the draft Commonwealth model bill on competition currently being prepared by the Commonwealth Secretariat Law Development Section. This was the second of such meetings, the first taking place in Singapore in early 2004. The meeting discussed the salient features of a competition law, including: abuse of a dominant position; identifying cartel activities; the significance of transparency, particularly when granting exemptions from the ambit of a competition law; and the importance of consumer protection. The model bill creates a separate body with powers to administer the law.

### **UNCTAD**

46. Consistent with its mandate to assist developing countries, including least developed countries, in formulating, drafting or reviewing competition policies and legislation (as provided in its Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (“the Equitable Principles”),<sup>50</sup> UNCTAD held the sixth session of the Intergovernmental Group of Experts on Competition Law and Policy (IGE on CLP) in Geneva in November 2004.<sup>51</sup> UNCTAD will hold its Fifth Review Conference in November 2005,<sup>52</sup> which will, inter alia, assess the application and implementation of the Equitable Principles in the twenty-five years since their adoption, and discuss proposals for their improvement. It will also consider: techniques for gathering evidence on cartels; the role of economic analysis on competition law and policy enforcement; the role of the judiciary in competition law enforcement; the application of competition law and policy to the informal sector; and how to operationalize special and differential treatment for developing countries in competition law and policy.

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<sup>50</sup> These principles were unanimously adopted by the United Nations General Assembly in Resolution 35/63 (December 1980) and constitute the only fully multilateral code in existence on competition law and policy.

<sup>51</sup> <http://r0.unctad.org/en/subsites/cpolicy/english/cptech.htm>.

<sup>52</sup> A Conference which takes place every five years and reviews all aspect of the Principles.

## WTO

47. The Working Group on the Interaction between Trade and Competition Policy (WGTCP) was established at the WTO Singapore Ministerial Conference in December 1996 and handles the work and development of competition<sup>53</sup> matters in the WTO, focusing on specific trade policy issues. The Doha Ministerial Declaration,<sup>54</sup> adopted on 14 November, 2001, deals, in paragraphs 23-25, with the interaction between trade and competition policy and sets up possible negotiations for a WTO agreement on competition.

## OECD

48. The OECD Competition Law and Policy Committee (CLP)<sup>55</sup> works to build consensus among OECD members on antitrust and competition policy issues and to promote convergence in competition laws among members by promoting similarity in competition laws and enforcement cultures. Issues addressed by the CLP include: capacity-building with non-OECD countries; competition analysis; economic issues; country reviews; and law enforcement and cooperation. Originally adopted on 21 June 1976, the OECD Declaration and Decisions on International Investment and Multinational Enterprises “constitutes a policy commitment to improve the investment climate of OECD members countries and encourage the positive contribution multinational enterprises can make to economic and social progress.” The Declaration, which is subject to periodical review, was reviewed in 1979, 1984, 1991 and 2000.<sup>56</sup>

49. The OECD Guidelines for Multinational Enterprises<sup>57</sup> adopted on 21 June 1976 and most recently revised on 27 June 2000 are a voluntary, multilateral framework of standards and principles on good business conduct.

## G. Public procurement

### ADB/IADB/World Bank

50. At the beginning of 2003, the ADB, the IADB, and the World Bank set up a joint working group on Harmonization of Electronic Government Procurement (e-GP), which was subsequently joined by the AfDB, EBRD and Nordic Development Fund and which is also cooperating with the European Commission in its work on public procurement.<sup>58</sup> The Working Group has been elaborating a number of documents aimed at harmonizing e-GP strategies and solutions of the aforementioned banks in countries of their operation.<sup>59</sup> In March 2005, the Working Group held a joint workshop with representatives of the European Commission and the UNCITRAL secretariat. The UNCITRAL secretariat was advised that the following documents are currently being considered by the Working

<sup>53</sup> [http://www.wto.org/english/tratop\\_e/comp\\_e/comp\\_e.htm](http://www.wto.org/english/tratop_e/comp_e/comp_e.htm)

<sup>54</sup> WT/MIN(01)/DEC/1; see also [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm#interaction](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#interaction).

<sup>55</sup> <http://www.oecd.org/daf/clp/>.

<sup>56</sup> DAF/IME(2000) 20 (November 9, 2000); see also [http://www.oecd.org/olis/2000doc.nsf/LinkTo/daffe-ime\(2000\)20](http://www.oecd.org/olis/2000doc.nsf/LinkTo/daffe-ime(2000)20).

<sup>57</sup> <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

<sup>58</sup> For their joint e-GP portal, see <http://www.mdb-egp.org/data/default.asp>.

<sup>59</sup> Among the documents that have already been prepared are “*Guide for Legislators and Managers, Authentication & Digital Signatures in E-Law and Security*” and “*E-GP Strategic Planning Guide*.” These and other documents can be accessed through the EGP Tool Kit at <http://www.mdb-egp.org/data/default.asp>.

Group: (i) requirements for the use of e-GP tendering systems for multilateral development banks' loans, grants and credits (outstanding issues under consideration are the use of authentication techniques and charging fees in e-tendering);<sup>60</sup> (ii) guidelines for electronic reverse auctions; (iii) guidelines on e-purchasing; and (iv) guidelines on buyer-supplier activation. The Working Group is also at the stage of assessing the first report on electronic reverse auctions in Brazil and a study is being prepared under its auspices on the costs of setting up an e-GP system.

## COMESA

51. The secretariat of COMESA<sup>61</sup> is implementing, with support from the African Development Bank, the COMESA Public Procurement Reform Project that aims to harmonize public procurement rules and regulations, as well as to build the capacity of national procurement systems in the region. At the seventeenth meeting of the COMESA Council of Ministers (Kampala, 4-5 June 2004), the Council decided that the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Service should be used by member States undertaking legislative reform, taking account of the COMESA directives. It also decided that the COMESA secretariat should develop a successor project in the area of public procurement, to be supported by an appropriate donor, which should include capacity-building needs and development of training models and operational syllabi.<sup>62</sup> In December 2004, COMESA launched the COMESA Public Procurement Information System,<sup>63</sup> a centralized regional website<sup>64</sup> for collection and dissemination to relevant stakeholders of procurement information, including information on procurement opportunities and procurement regulations in the COMESA member States.

## UNECE

52. In the framework of the UNECE Working Party on International Legal and Commercial Practice, the PPP Alliance Programme promotes public-private partnerships (PPP), PPP Units and task forces to improve infrastructural development in countries in transition and organized the third PPP Alliance Meeting in Barcelona, Spain, on 14 September 2004. The Working Party has prepared draft guidelines on good governance in PPP in infrastructure and will hold its fifty-second session in September 2005 in Vienna, Austria.

## PECC

53. PECC held a public-private sector partnership workshop in December 2004 with the aim of contributing to the understanding, in the PECC region, of the function, design and impact of partnerships between government and the business sector in the provision of infrastructure services.

<sup>60</sup> The draft is available at [http://www.mdb-egp.org/data/docs/Requirements\\_for\\_the\\_use\\_of\\_e-GP\\_Tendering\\_systems.pdf](http://www.mdb-egp.org/data/docs/Requirements_for_the_use_of_e-GP_Tendering_systems.pdf).

<sup>61</sup> For information about the organization, see <http://www.comesa.int>.

<sup>62</sup> See Report and Decisions: 17th Meeting of the COMESA Council of Ministers Report, 4-5 June 2004, Nile International Conference Centre, Kampala, Uganda, para. 111, available at [http://www.iss.co.za/AF/RegOrg/unity\\_to\\_union/pdfs/comesa/17comjun04.pdf](http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/comesa/17comjun04.pdf).

<sup>63</sup> See the Report of the Procurement Information System Seminar (Lusaka, 15-16 December 2004) (COMESA document COM/PPRP/CPIS/I), <http://simba.comesa.int:90/cpis/uploads/reports/en/Report%20-%20PPRP%20CPIS%20SEMINAR%2015-16%20DEC%202004%20em.doc>.

<sup>64</sup> <http://simba.comesa.int:90/cpis/>.



**WAEMU**

54. The WAEMU has embarked on a programme of modernization and reform in public procurement, in cooperation with other regional organizations and national governments, and with the support of UNDP and the World Bank. The reforms aim to harmonize procurement regimes and to promote best practices as provided for in international legislation, so as to reinforce competency, efficiency and transparency in procurement. The programme has two phases: the first is to establish the tools necessary for the reforms, and the second to implement them. Implementation is scheduled for 2005 and 2006.

**WTO**

55. The WTO is currently revising its plurilateral Agreement on Government Procurement, which is designed to ensure that the procurement laws, regulations, procedures and practices of Parties to the Agreement are open, transparent and non-discriminatory in respect of procurement, to take account of electronic procurement techniques, expand its coverage and eliminate remaining discriminatory aspects.

**H. Trade facilitation****CARICOM**

56. At the thirteenth Inter-Sessional Meeting of CARICOM in February 2002, a programme for the removal of restrictions on the establishment and movement of services and capital that would facilitate the core task of creating a Single Market for, inter alia, free movement of and trade in goods and services was agreed. This programme is scheduled to be completed by December 2005.

**PECC**

57. PECC undertook a study for the Asia Pacific Economic Cooperation (APEC) forum on "The Mutually Supportive Advancement of APEC's Trade Facilitation and Secure Trade Goals post September 11."<sup>65</sup>

**UNCTAD**

58. At UNCTAD's eleventh session (São Paulo, 13-18 June 2004), trade and transport facilitation was addressed in the context of the Global Facilitation Partnership for Transportation and Trade (GFP). The GFP was launched by the World Bank with UNCTAD and other development partners, and is aimed at fostering export-led growth and poverty reduction by promoting trade facilitation, and by bringing together all interested parties, both public and private as well as national and international, to help achieve significant improvements in transport and trade facilitation in developing countries and countries in transition. Concrete activities of the partnership include the preparation of trade and transport facilitation audits with related action plans, development of performance indicators, designing software to measure customs clearance time, a number of distance-learning programmes, support for dissemination efforts, and researching the cost and impact of trade and transport facilitation measures.

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<sup>65</sup> See <http://www.pecc.org/trade/facilitation-and-secure-trade.pdf>.

## UNECE

59. In the framework of the UNECE Working Party 6 on Regulatory Cooperation and Standardization Policies (WP.6), the UNECE adopted in 2001 a new recommendation, the “International model for technical harmonization” (Recommendation “L” in the set of UNECE Recommendations of Standardization Policies). The International Model comprises a set of voluntary mechanisms and principles for good regulatory practices for countries wishing to align their regulatory regimes in specific sectors or product areas. The basic principle of this model is that the technical content of regulations should be drafted in terms of broad, common objectives (addressing safety, environmental and other governmental concerns) and should refer to international standards for more detailed performance-based technical requirements. In 2003, this recommendation was used as the basis for an agreement on the preparation of uniform technical regulations between the twelve member states of the Commonwealth of Independent States. This agreement is expected to enter into force shortly.

60. Industry representatives have expressed their interest in using the international model for technical harmonization as a tool and a format for initiating a regulatory dialogue with interested public authorities. As a result, WP.6 has sponsored pilot projects in two sectors (telecommunications and earth-moving machinery). Draft regulatory objectives have already been drafted for the telecommunications project.<sup>66</sup>

## UNIDO

61. UNIDO’s work in trade facilitation<sup>67</sup> is characterized by a broader trade capacity-building (TCB) approach. In conformity with its mission,<sup>68</sup> the strategy adopted by UNIDO to facilitate trade, overcome barriers to trade, foster export capacity and increase access to markets has been adopted to respond to the Doha Development Agenda and the Millennium Declaration goals. It consists of three-pronged coordinated and integrated Technical Assistance and Capacity Building actions: “the 3Cs Approach”: Compete: to increase the competitiveness of the industrial sector (supply-side) with a focus on priority sub-sectors; Conform: to enable products to conform with market requirements (standards, regulations and conformity assessment practices) and overcome barriers to trade; and Connect: to enable industrial firms to be connected with and access export markets. To implement its approach UNIDO has strengthened strategic and operational alliances with international organizations including: WTO, UNCTAD, ITC, World Bank.

62. Current year technical assistance in the field of TCB amounts to some \$38 million originating from different bilateral and multilateral funding sources. Country-specific TCB projects are under implementation in some 60 countries and some large-scale regional projects are under implementation such as West Africa-UEMOA (8 countries), Mekong

<sup>66</sup> These are available from the UNECE secretariat.

<sup>67</sup> In the context of the WTO, Trade Facilitation is often defined as “the simplification and harmonization of international trade procedures” with trade procedures being the “activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade”. This definition relates to a wide range of activities such as import and export procedures (e.g. customs or licensing procedures); transport formalities; and payments, insurance, and other financial requirements. UNIDO is not specifically involved in trade facilitation in this strict sense.

<sup>68</sup> UNIDO’s mission is to contribute to the achievement of a considerable increase in the share, volume and amount of the Manufacturing Value Added (MVA) and exports of developing countries and countries with economies in transition, with a special focus on LDCs.

Delta Countries (3 countries), South Asian least-developed countries (LDCs) (4 countries), Central America (6 countries). These projects address the needs to enhance conformity with market requirements through upgrading standards, certification and accreditation bodies and metrology and testing laboratories, to boost competitiveness and market access. Furthermore, TCB global forum functions are performed covering development of software, research and publications and holding of expert group meetings.

### **WCO**

63. In 2003, the WCO adopted the International Convention on Mutual Administrative Assistance in Customs Matters. The goal of the Convention is to foster mutual administrative assistance among Contracting Parties to support the proper application of customs law, to facilitate the prevention, investigation and combating of customs offences and to ensure the security of the international trade supply chain.

### **WTO**

64. Trade Facilitation was added to the WTO agenda in December 1996, when the Singapore Ministerial Declaration directed the Council for Trade in Goods “to undertake exploratory and analytical work, drawing on the work of other relevant organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area”. In July 2004, members agreed to launch negotiations on trade facilitation that should “aim to clarify and improve relevant aspects of articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit”. The negotiations are ongoing, with the IMF, OECD, UNCTAD, WCO and the World Bank attending on an ad hoc basis, and are focused on enhancement of technical assistance and support for capacity-building; effective cooperation between authorities on trade facilitation and customs compliance issues; the treatment of developing and least-developed countries; the identification of trade facilitation needs and priorities; and the cost implications of proposed measures.

**A/CN.9/582****B. Note by the Secretariat on possible future work  
in the area of insolvency law****(A/CN.9/582 and Add.1-7) [Original: English]**

1. Working Group V (Insolvency Law) completed its last project, the UNCITRAL Legislative Guide on Insolvency Law, at its thirtieth session in March-April 2004. The Legislative Guide was finalized and adopted at the thirty-seventh session of the Commission in July 2004.
2. The Secretariat has received a number of proposals for possible future work in the area of insolvency law. The proposals have been made by INSOL International and the International Insolvency Institute and deal with different topics including treatment of corporate groups in insolvency, cross-border insolvency protocols, debtor in possession financing in international reorganizations, and directors' and officers' responsibilities and liabilities in insolvency. Additional proposals received after the date of submission of this document will appear as further addenda to A/CN.9/582.
3. The proposals are set forth in the addenda to this document as follows:

A/CN.9/582/Add.1	Treatment of corporate groups in insolvency
A/CN.9/582/Add.2	Extract on treatment of corporate groups in insolvency from the UNCITRAL Legislative Guide on Insolvency Law
A/CN.9/582/Add.3	Cross-border insolvency protocols in transnational cases
A/CN.9/582/Add.4	Post-commencement financing in international reorganizations
A/CN.9/582/Add.5	Extract on post-commencement finance from the UNCITRAL Legislative Guide on Insolvency Law
A/CN.9/582/Add.6	Directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases

**A/CN.9/582/Add.1****Proposal by International Association of Restructuring,  
Insolvency and Bankruptcy Professionals (INSOL):  
Treatment of corporate groups in insolvency****ADDENDUM****A. Introduction**

1. INSOL proposes that the United Nations Commission on International Trade Law (UNCITRAL) consider undertaking a project in the area of insolvency law and its effects upon the treatment of corporate groups and related companies when one or more of the members of such a group becomes insolvent.
2. In its work on the Legislative Guide on Insolvency Law, UNCITRAL recognized the importance of the issues relating to the treatment of corporate groups in insolvency and addressed them in part (Part two, chap. VI, paras. 82-92). It was also recognized, however, that the analysis of current treatment and identification of possible solutions would have undoubtedly distracted from the main body of work on the Legislative Guide. Accordingly, the subject was not pursued in any great detail and no recommendations were proposed.
3. The efficacy of insolvency laws and practices has been a recurring theme in, and major concern of, international forums since the early 1990s. Effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment, as well as fostering entrepreneurial activity and the preserving of employment. Conducting business through the formation of corporate groups is a feature of the increasingly globalized world economy. They are significant to international trade and commerce with respect to, for example, the formation of overseas subsidiaries and joint ventures to manufacture, market and license products. Where business fails, it is important not only to know how those groups will be treated in insolvency proceedings, but also to ensure that that treatment facilitates, rather than hinders, the fast and efficient conduct of those proceedings.

**B. Existing treatment of corporate groups in insolvency****Domestic insolvency law treatment**

4. The great majority of domestic insolvency and corporate law regimes do not address the treatment of corporate groups in specific legislation or at all. In some others, the issues that arise in case of insolvencies within corporate groups are dealt with by somewhat “creative” practices that rely heavily on a pragmatic approach by the courts for their legitimation. For example, in both England and Australia, mechanisms have been developed that enable a “pooling agreement” to be sanctioned by the courts, whereby the assets and liabilities of two or more related companies in a group are, in effect, turned into one pool of assets and one pool of liabilities. The result is that the separate existence of all the companies that are subject to the pooling agreement is, in effect, ignored and all unsecured creditors of all companies participate equally in distributions from a single pool of assets. Case law in the United States of America follows a similar pattern.

5. The development of such case law has often involved a consideration of issues such as:

(a) Whether creditors have dealt with a group of companies as a single economic unit;

(b) Whether the affairs of the group are so entangled that a consolidation would benefit all creditors;

(c) Whether there has been misappropriation of the assets of one entity for the benefit of another; and

(d) A consideration of a balancing test that weighs up the costs and benefit of substantive consolidation.

The Netherlands is an example of a country without any legislative base but where, in a few cases, the courts have been prepared to permit a consolidation of assets and liabilities between insolvent companies in cases where, as mentioned above, the affairs and assets of the companies have been so intertwined that it is impossible to determine which company was the owner.

6. New Zealand does have some specific legislation within its insolvency law, which is principally based on providing a legislative sanction for the pragmatic practices used in other countries as mentioned above.

7. In addition, in Australia, the insolvency legislation provides for the liability of a holding (parent) company for the debts of a subsidiary company that became insolvent if it is established that the subsidiary was permitted by the parent to engage in insolvent trading. Australian legislation also provides for the avoidance, in summary fashion, of pre-bankruptcy transactions entered into by an insolvent company with another company to which it is related.

### **Cross-border insolvency legislation**

8. Cross-border multilateral treaty arrangements do not include provisions dealing with the issues in an international context. For example, neither the European Council Regulation No. 1346/2000 on Insolvency Proceedings nor the UNCITRAL Model Law on Cross-Border Insolvency addresses the issue.

9. There is, thus, at both a domestic and international level, a comparative absence of any guidelines as to the circumstances under which consolidated insolvency proceedings of companies belonging to a group should be considered in insolvency proceedings and how issues such as jurisdiction, filing, secondary proceedings and distribution should be addressed.

## **C. Jurisdictional factors for consideration**

10. There are significant differences between jurisdictions in the way in which some of the issues arising need to be addressed. Among the varied factors of which account should be taken are:

(a) Differences in philosophy and approach between civil and common law traditions concerning management or “control” of corporate groups and related companies and in approaches to director responsibility and liability in the context of corporate groups;

(b) The extent to which the accounting aspects of the issues of groups of companies need to be considered in this context;

(c) The effect of tax legislation, the incidence of which is often the reason for the formation and subsequent growth of a corporate group and the adoption of strategies within the group;

(d) The extent to which inter-company pricing policies drive the consequent distribution of assets and liabilities within corporate groups;

(e) Potential conflict-of-interest issues and consolidated or main-type of proceedings; and

(f) The possible repercussions for secured transactions and secured creditors in the way in which corporate groups are treated in insolvency.

#### **D. Scope of project**

11. INSOL recognizes that different views of the scope of possible work could be taken. At a minimum, it could be strictly confined to establishing the circumstances in which, both in a domestic and cross-border situation, it might be desirable to promote legislation that:

- (a) Allows the separate entity principle to be ignored or disregarded;
- (b) Facilitates pooling of assets and liabilities of group companies; and
- (c) Provides guidelines under which (a) and (b) might be achieved.

12. The scope could, however, be considerably wider and also possibly include the following:

- (d) Guidelines allowing an insolvency representative in the insolvency of a holding company to steer the actions to be taken by the (insolvent) subsidiary;
- (e) Guidelines for dealing with group companies in different jurisdictions, (by possibly adjusting, for example, the concept of centre of main interests for subsidiary or related companies);
- (f) Guidelines that provide for more extensive powers on the part of an office holder to undo and avoid transactions between companies in a group that prejudice creditors; and
- (g) Guidelines that, in certain circumstances, provide for a “parent” company to be liable for the debts of an insolvent subsidiary.

#### **E. Role of UNCITRAL in undertaking further work on this topic**

13. INSOL considers that UNCITRAL is eminently suited to carrying out a project of this complexity and wide-ranging significance. UNCITRAL has a proven track record in insolvency law work, developing both the Model Law on Cross-Border Insolvency and the Legislative Guide on Insolvency Law in comparatively short periods of time. Furthermore, in the course of developing both of these texts, UNCITRAL has formed links with key participants in the area of insolvency law, including Member and non-member States, intergovernmental and non-governmental organizations, as well as individual insolvency experts. Participants in the development of these texts have represented a broad cross-section of nations with different legal traditions and levels of economic development. The UNCITRAL secretariat and Member States are already familiar with many of the national policy issues related to insolvency.

14. Further work by UNCITRAL would not only advance agreement on the technical content that should be included in national approaches to treatment of corporate groups in

insolvency, but would also heighten international awareness of the importance of the topic. That could raise the national priority given to implementing the necessary law reform.

## **F. Proposed study and colloquium**

15. It is suggested that, as a first step, an in-depth study of different approaches to the treatment of corporate groups in insolvency would provide the means for identifying the issues that should be addressed to deliver predictability and transparency to the treatment of corporate groups in insolvency, as well as possible approaches and options for addressing those issues. Such a study would benefit from wide consultation to solicit views and consider, and possibly refine, potential scope, approaches and options.

16. That consultation might take the form of a multinational colloquium, a forum used to good effect in developing both the Model Law on Cross-Border Insolvency and the Legislative Guide on Insolvency Law. The successful conclusion of that first step might indicate that a Working Group should be established to develop an appropriate text.

17. INSOL is willing to join with UNCITRAL in promoting the study and the discussion at a multinational colloquium to be convened in advance of a possible decision to establish a Working Group.



**A/CN.9/582/Add.2****Possible future work in the area of insolvency law:  
Treatment of corporate groups in insolvency****ADDENDUM**

The following extract from the UNCITRAL Legislative Guide on Insolvency Law is provided, for ease of reference, in support of the proposal contained in document A/CN.9/582/Add.1.

**UNCITRAL Legislative Guide on Insolvency Law  
Part two, chapter V****C. Treatment of corporate groups in insolvency****1. Introduction**

82. It is common practice for commercial ventures to operate through groups of companies and for each company in the group to have a separate legal personality. Where a company in a group structure becomes insolvent, treatment of that company as a separate legal personality raises a number of issues that are generally complex and may often be difficult to address. In certain situations, such as where the business activity of a company has been directed or controlled by a related company, the treatment of the group companies as separate legal personalities may operate unfairly. That treatment, for example, may prevent access to the funds of one company for the payment of the debts or liabilities of a related debtor company (except where the debtor company is a shareholder or creditor of the related company), notwithstanding the close relationship between the companies and the fact that the related company may have taken part in the management of the debtor or acted like a director of the debtor and caused it to incur debts and liabilities. Furthermore, where the debtor company belongs to a group of companies, it may be difficult to untangle the specific circumstances of any particular case to determine which group company particular creditors dealt with or to establish the financial dealings between group companies.

83. Three issues of specific concern in insolvency proceedings involving one of a group of companies are:

(a) The responsibility of any other company in the group for the external debts of the insolvent company (being all debts owed by the insolvent company except for those owed to related group companies, i.e. “intra-group debts”);

(b) The treatment of intra-group debts (claims against the debtor company by related group companies); and

(c) Commencement of insolvency proceedings by a group company against a related group company.

84. Reflecting the complexity of this topic, the discussion that follows is intended only as a brief introduction to some of these issues. Insolvency laws provide different responses to these and other issues, which may be distinguished by the extent to which a law allows

the veil of incorporation to be lifted. Some laws adopt a prescriptive approach, which strictly limits the circumstances in which group companies can be treated as other than separate legal personalities and the corporate veil lifted or, in other words, the circumstances in which a related company can be responsible for the debts of an insolvency group member. Other laws adopt a more expansive approach and give courts broad discretion to evaluate the circumstances of a particular case on the basis of specific guidelines. The range of possible results in the latter case is broader than under those laws adopting a prescriptive approach. In either case, however, it is common for insolvency laws to address these issues of intra-group liability on the basis of the relationship between the insolvent and related group companies in terms of both shareholding and management control. One possible advantage of addressing these issues in an insolvency law is to provide an incentive for corporate groups to continuously monitor the activities of companies within the group and take early action in the case of financial distress of a member of that group. Treating companies as other than separate legal entities, however, may undermine the capacity of business, investors and creditors to quarantine, and make choices about, risk (which may be particularly important where the group includes a company with special requirements for risk management, such as a financial institution). It may introduce significant uncertainty that affects the cost of credit, in particular when the decision about responsibility for group debts is made by a court after the event of insolvency; and involve accounting complexities concerning the manner in which liabilities are treated within the group.

85. Although a variety of approaches are taken to these very complex issues, it is important that an insolvency regime address matters concerning corporate groups in sufficient procedural detail to provide certainty for all parties concerned in commercial transactions with corporate groups. Alternatives to direct regulation of corporate groups in insolvency would include providing sufficient definition in other parts of the insolvency law to allow application of these provisions to corporate groups, such as the use of avoidance or subordination provisions with respect to related parties.

## **2. Group responsibility for external debts**

86. Insolvency regimes look to a number of different circumstances or factors in the assessment of whether a related or group company should bear responsibility for the external debts of an insolvent member of the group.

87. It is common in many jurisdictions for the related company to bear responsibility for the debt where it has given a guarantee in respect of its subsidiaries. Similarly, many regimes infer responsibility to compensate for any loss or damage in cases of fraud in intra-group transactions. Further solutions may be prescribed by other areas of law. In some circumstances, for example, the law may treat the insolvent company as an agent of the related company, which would permit third parties to enforce their rights directly against the related company as a principal.

88. Where the insolvency law grants the courts a wide discretion to determine the liability of one or more group companies for the debts of other group companies, subject to certain guidelines, those guidelines may include the following considerations: the extent to which management, the business and the finances of the companies are intermingled; the conduct of the related company towards the creditors of the insolvent company; the expectation of creditors that they were dealing with one economic entity rather than two or more group companies; and the extent to which the insolvency is attributable to the actions of the related group company. Based on these considerations, a court may decide on the degree to which a corporate group has operated as a single enterprise and, in some jurisdictions, may order that the assets and liabilities of the companies be consolidated or

pooled, in particular where that order would assist in a reorganization of the corporate group, or that a related company contribute financially to the insolvent estate, provided that contribution would not affect the solvency of the contributing company. Contribution payments would generally be made to the insolvency representative administering the insolvent estate for the benefit of the estate as a whole.

89. One further and important consideration in insolvency laws that allow such measures is the effect of those measures on creditors. These regimes, in seeking to ensure fairness to creditors as a whole, must reconcile the interests of two (or more) sets of creditors who have dealt with two (or more) separate corporate entities. These collective interests will conflict if the total assets of the combined companies are insufficient to meet all claims. In such a case, creditors of a group company with a significant asset base would have their assets diminished by the claims of creditors of another group company with a low asset base. One approach to this issue is to consider whether the savings to creditors collectively would outweigh the incidental detriment to individual creditors. In the situation where both companies are insolvent, some laws take into account whether withholding a consolidation decision, ensuring separate insolvency proceedings, would increase the cost and length of proceedings and deplete funds that would otherwise be available for creditors and result in benefiting the equity holders of some corporate group companies who receive a return at the expense of creditors in other group companies.

90. The common principle of all regimes with laws of this type is that, for a consolidation order to be granted, the court must be satisfied that creditors would suffer a greater prejudice in the absence of consolidation than the insolvent companies and objecting creditors would from its imposition. In the interests of fairness, some jurisdictions allow for partial consolidation by exempting the claims of specific creditors and satisfying those claims from particular assets (excluded from the consolidation order) of one of the insolvent companies. The difficulties imposed by this reconciliation exercise have resulted in such orders being infrequently made in those States where they are available.

91. It should be noted that insolvency laws providing for consolidation do not affect the rights of secured creditors, other than possibly the holders of intra-group securities (where the secured creditor is a group company).

### **3. Intra-group debts**

92. Intra-group debts may be dealt with in a number of ways. Under some insolvency laws, intra-group transactions may be subject to avoidance proceedings. Under some insolvency laws that provide for consolidation, intra-group obligations are terminated by the consolidation order. Other approaches involve classifying intra-group transactions differently from similar transactions conducted between unrelated parties (e.g. a debt may be treated as an equity contribution rather than as an intra-group loan), with the consequence that the intra-group obligation will rank lower in priority than the same obligation between unrelated parties.

**A/CN.9/582/Add.3****Possible future work in the area of insolvency law:  
Proposal by the International Insolvency Institute (III),  
Committee on Cross-Border Communications****ADDENDUM****Cross-border insolvency protocols in transnational cases**

*(Background information on the use of cross-border protocols in cross-border insolvency cases and the Guidelines for Court-to-Court Communications that was included with this proposal is contained in a Note by the Secretariat, document A/CN.9/580 paras. 16-54, and for reasons of economy has not been reproduced here.)*

1. While a considerable amount has been accomplished in the last 10 years through the use of Cross-Border Insolvency Protocols and the more recent development of the *Guidelines for Court-to-Court Communications*, there remain an enormous number of situations involving comparable issues in which neither Cross-Border Insolvency Protocols nor *Court-to-Court Communications* are available. The value of Cross-Border Insolvency Protocols and of the utilization of *Court-to-Court Communications* however, is now beyond question.
2. The recommendation of the International Insolvency Institute is that UNCITRAL take a position of leadership in developing a higher use of systems such as Cross-Border Insolvency Protocols and *Guidelines for Court-to-Court Communications* in transnational insolvency cases to promote better results for reorganizing debtors, their suppliers, their creditors, their employees and, ultimately, the public interest in the countries involved. There are a number of different approaches that UNCITRAL could consider in assessing the valuable work it could do in this area. UNCITRAL could devise a standard form or forms of Cross-Border Insolvency Protocol to coordinate administrations that involve different countries. It could adopt, with or without changes, the principles of the *Guidelines for Court-to-Court Communications in Cross-Border Cases* to assist in the coordination of international cases. Both of these initiatives are completely consistent with the principles of the *UNCITRAL Model Law on Cross-Border Insolvency* and the *UNCITRAL Legislative Guide on Insolvency Law*. UNCITRAL, in pursuing this work, would enhance its position of leadership within the international commercial community and could bring the cooperation between countries in international financial reorganizations and insolvencies to entirely new levels.

**A/CN.9/582/Add.4****Possible future work in the area of insolvency law:  
Proposal by the International Insolvency Institute (III),  
Committee on Debtor in Possession Financing in  
International Reorganization****ADDENDUM****Post-commencement financing in international reorganizations****Background**

1. The International Insolvency Institute (III) proposes that the United Nations Commission on International Trade Law (UNCITRAL) undertake further work in the area of the law concerning financing in cross-border insolvency cases. The work could take the form initially of a colloquium to discuss the nature of the work or could involve a detailed study of available mechanisms, their shortcomings and the possible approaches to addressing the problems in the area. Ultimately, UNCITRAL should consider establishing a Working Group to address this topic, perhaps in combination with additional work that UNCITRAL might undertake in the areas of finance and insolvency law.
2. The work that UNCITRAL has successfully completed in the area of insolvency law recognizes the need for effective and efficient domestic insolvency regimes which include a framework for cross-border insolvency. Preserving and maximizing the value of a debtor's estate often requires that credit, loans or other financial accommodations be available to a debtor or an insolvency representative to enable continued operation of a debtor's business. Continued business operation, in turn, is necessary to permit realization of value through reorganization or sale as a going concern, both of which foster continued economic benefits including employment.
3. The UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) elaborates the key objectives which an insolvency regime should aim to achieve and recommends consideration of the following key objectives:
  - “(1) In order to establish and develop an effective insolvency law, the following key objectives should be considered:
    - (a) Provide certainty in the market to promote economic stability and growth;
    - (b) Maximize value of assets;
    - (c) Strike a balance between liquidation and reorganization;
    - (d) Ensure equitable treatment of similarly situated creditors;
    - (e) Provide for timely, efficient and impartial resolution of insolvency;
    - (f) Preserve the insolvency estate to allow equitable distribution to creditors;
    - (g) Ensure a transparent and predictable insolvency law that contains incentives for gathering and dispensing information; and

- (h) Recognize existing creditors rights and establish clear rules for ranking of priority claims.
  - (2) The insolvency law should include provisions addressing both reorganization and liquidation of a debtor.
  - (3) The insolvency law should recognize rights and claims arising under law other than the insolvency law, whether domestic or foreign, except to the extent of any express limitation set forth in the insolvency law.
  - (4) The insolvency law should specify that where a security interest is effective and enforceable under law other than the insolvency law, it will be recognized in insolvency proceedings as effective and enforceable.
  - (5) The insolvency law should include a modern, harmonized and fair framework to address effectively instances of cross-border insolvency. Enactment of the UNCITRAL Model Law on Cross-Border Insolvency is recommended” (UNCITRAL Legislative Guide on Insolvency Law, part one, chapter I, section A).
4. The purpose of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) complements and reinforces the key objectives of the Legislative Guide, extending them to multinational situations. The purpose of the Model Law “is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:
- (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
  - (b) Greater legal certainty for trade and investment;
  - (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
  - (d) Protection and maximization of the value of the debtor’s assets; and
  - (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment” (Preamble to the UNCITRAL Model Law on Cross-Border Insolvency).
5. Fulfilment of the purposes of the Model Law and the key objectives of the Legislative Guide will often require that the business operations of a debtor continue to be operated subsequent to the filing of an application to commence insolvency proceedings and then subsequent to the commencement of insolvency proceedings. The Legislative Guide, at paragraph 94 (part two, chapter II, section D), explains the need for post-commencement finance of continuing business operations in language that would apply as well to the period between application and commencement:
- “94. The continued operation of the debtor’s business after the commencement of insolvency proceedings is critical to reorganization and, to a lesser extent, liquidation where the business is to be sold as a going concern. To maintain its business activities, the debtor must have access to funds to enable it to continue to pay for crucial supplies of goods and services, including labour costs, insurance, rent, maintenance of contracts and other operating expenses, as well as costs associated with maintaining the value of assets. In some insolvency cases, the debtor may already have sufficient liquid assets to fund the ongoing business expenses in the form of cash or other assets that can be converted to cash (such as anticipated proceeds of receivables). Alternatively, those expenses can be funded out of the debtor’s existing cash flow through operation of the stay and cessation of payments

on pre-commencement liabilities. Where the debtor has no available funds to meet its immediate cash flow needs, it will have to seek financing from third parties. This financing may take the form of trade credit extended to the debtor by vendors of goods and services, or loans or other forms of finance extended by lenders.”

6. A full discussion of post-commencement finance is contained in paragraphs 94-107 and recommendations 63-68 of the Legislative Guide (part two, chapter II, section D). Augmenting the direct treatment of the subject are: (a) the discussion and recommendations concerning “protection of value” at paragraphs 63-69 and recommendation 50; and (b) the discussion and recommendations concerning “provisional measures” (between the time of application and the time of commencement of insolvency proceedings) at paragraphs 47-53 and recommendations 39-45 (part two, chapter II, section B). These references are extracted in A/CN.9/582/Add.5.

7. What the Legislative Guide implicitly recognizes is that many insolvency regimes do not currently contain effective mechanisms for post-application or post-commencement financing at the domestic law level. In addition, some States have laws that discourage or penalize lending to businesses that are the subject of insolvency proceedings. Neither the Legislative Guide nor the Model Law address the additional complications to post-petition and post-commencement finance in a cross-border case.

8. As the world economy continues its integration, the number of insolvency cases that involve debtors with establishments and operations in multiple States increases. The need for financing in those cases is as acute as in the domestic cases addressed by the Guide. The III believes that further work by UNCITRAL could enhance both the improvement and harmonization of domestic laws affecting finance in insolvency cases and the effectiveness of those laws in cross-border cases.

9. For example, in addition to considering how to promote enhanced domestic laws on finance, UNCITRAL could consider the following questions raised by cross-border cases: Should the court in which a “main” proceeding is filed, located in the State where the debtor has its centre of main interests, be able to authorize finance for the operations of the debtor in other States? How will the issues of priority and security be addressed in light of likely variations in treatment of these issues by existing domestic laws among States? Will a lender in a main case be protected against exposure in those States which create liability to creditors for lending to an insolvent? How can cash management systems employed to consolidate cash of large businesses across state borders continue to function effectively after the commencement of insolvency proceedings? How will finance be effected when there is an affiliated group of debtors (or even debtors with non-debtor affiliates) with different, but related entities in different States as opposed to a single debtor with branches in different States? What rights will a lender have in each affected State when a reorganization case is dismissed or converted to a liquidation case? Do the coordination and cooperation provisions of the Model Law suffice to address these issues or must there be additional model provisions?

10. UNCITRAL’s excellent prior work in the insolvency area and its ongoing work in the area of secured transactions provides a solid platform on which to build this necessary additional structure. The III believes that further work on financing of insolvency proceedings would be enhanced by involvement of States, representatives of international financial organizations, development banks and non-governmental organizations, including representatives of commercial banks and other financial organizations.

11. Finance for insolvency cases is essential to realization of the goals and objectives of the Model Law and Legislative Guide. Currently, finance is often unavailable or uncertain due to shortcomings in applicable law. UNCITRAL is ideally and uniquely suited to

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develop recommendations for enhancements in this critical area of insolvency law by applying the type of skilled collaborative effort that its Secretariat, members and observers brought to the Model Law and Legislative Guide. Work on post-application and post-commencement finance would be complementary to any work that UNCITRAL might undertake on the development of cross-border protocols and corporate groups and could be combined with such work.



**A/CN.9/582/Add.5****Possible future work in the area of insolvency law:  
Post-commencement financing in  
international reorganizations****ADDENDUM**

The following extracts from the UNCITRAL Legislative Guide on Insolvency Law are provided, for ease of reference, in support of the proposal contained in document A/CN.9/582/Add.4.

**UNCITRAL Legislative Guide on Insolvency Law****Part two, chapter II, section D****D. Post-commencement finance****1. Need for post-commencement finance**

94. *(Paragraph 94 is set forth in paragraph 5 of A/CN.9/583/Add.4)*

95. To ensure the continuity of the business where this is the object of the proceedings, it is highly desirable that a determination on the need for new finance be made at an early stage, in some cases even in the period between the time the application is made and commencement of proceedings. The availability of new finance will also be important in reorganization proceedings between commencement of the proceedings and approval of the plan; obtaining finance in the period after approval of the plan should generally be addressed in the plan, especially in those jurisdictions which prohibit new borrowing unless the need for it is identified in the plan.

96. Notwithstanding that it might be beneficial to the outcome of the proceedings for the debtor to be able to obtain new money, a number of jurisdictions restrict the provision of new money in insolvency or do not specifically address the issue of new finance or the priority for its repayment in insolvency, which creates uncertainty. Under some laws, for example, new money can only be provided on the basis of a security interest, as provision of a preference for new lending is prohibited. In those cases where there are no unencumbered assets, or no excess value in already encumbered assets, that the debtor can offer as security or with which the debtor can satisfy an administrative expense priority claim, the debtor has limited options. No new money will be available unless the lender is prepared to take the risk of lending without security or unless it can be obtained from sources such as the debtor's family or group companies. In the absence of enabling or clarifying treatment in the insolvency law, the provision of finance in the period before commencement of the insolvency proceedings may also raise difficult questions relating to the application of avoidance powers and the liability of both the lender and the debtor. Some insolvency laws provide, for example, that where a lender advances funds to an insolvent debtor in that period, it may be responsible for any increase in the liabilities of other creditors or the advance will be subject to avoidance in any ensuing insolvency proceedings. In other examples, the insolvency representative is required to borrow the money, potentially involving questions of personal liability for repayment.

97. Where an insolvency law promotes the use of insolvency proceedings that permit the insolvent business to continue trading, whether reorganization or sale of the business in liquidation as a going concern, it is essential that the issue of new funding is addressed and limitations such as those discussed above are considered. An insolvency law can recognize the need for such post-commencement finance, provide authorization for it and create priority or security for repayment of the lender. The central issue is the scope of the power and, in particular, the inducements that can be offered to a potential creditor to encourage it to lend. To the extent that the solution adopted has an impact on the rights of existing secured creditors or those holding an interest in assets that was established prior in time, it is desirable that provisions addressing post-commencement finance be balanced against a number of factors. These include the general need to uphold commercial bargains; protect the pre-existing rights and priorities of creditors; and minimize any negative impact on the availability of credit, in particular secured finance, that may result from interfering with those pre-existing security rights and priorities. It is also important to consider the impact on unsecured creditors who may see the remaining unencumbered assets disappear to secure new lending, leaving nothing available for distribution, especially if the reorganization were to fail. This risk must be balanced against the prospect that preservation of going concern value by continued operation of the business will benefit those creditors.

98. In addition to issues of availability and priority or security for new lending, an insolvency law will need to consider the authorization required to obtain that new money (see below, paras. 105 and 106) and, where a reorganization fails and the proceedings are converted to liquidation, the treatment of funds that may have been advanced before the conversion (see below, para. 107).

## **2. Sources of post-commencement finance**

99. Post-commencement lending is likely to come from a limited number of sources. The first is pre-insolvency lenders or vendors of goods who have an ongoing relationship with the debtor and its business and may advance new funds or provide trade credit in order to enhance the likelihood of recovering their existing claims and perhaps gaining additional value through the higher rates charged for the new lending. A second type of lender has no pre-insolvency connection with the business of the debtor and is likely to be motivated only by the possibility of high returns. The inducement for both types of lender is the certainty that special treatment will be accorded to the post-commencement finance. For existing lenders there are the additional inducements of the ongoing relationship with the debtor and its business, the assurance that the terms of their pre-commencement lending will not be altered and, under some laws, the possibility that, if they do not provide post-commencement finance, their priority may be displaced by the lender who does provide that finance.

## **3. Attracting post-commencement finance: providing priority or security**

100. A number of different approaches can be taken to attracting post-commencement finance and providing for repayment. Trade credit or indebtedness incurred in the ordinary course of business by an insolvency representative (or a debtor in possession) may be treated automatically as an administrative expense. When obtaining credit or incurring indebtedness is essential to maximizing the value of assets, and the credit or finance is not otherwise available as an administrative expense or is to be incurred outside the ordinary course of business, the court may authorize that credit or debt to be incurred as an administrative expense, to be afforded super-priority ahead of other administrative expenses or to be supported by the provision of security on unencumbered or partially encumbered assets.

(a) *Establishing priority*

101. Where the business of the debtor continues to operate after commencement of insolvency proceedings, either incidental to an attempted reorganization or to preserve value by sale as a going concern, the expenses incurred in the operation of the business are typically entitled, under a number of insolvency laws, to be paid as administrative expenses. Administrative priority creditors do not rank ahead of a secured creditor with respect to its security interest, but generally are afforded a first priority (see chap. V, paras. 45-47 and 66) that ranks ahead of ordinary unsecured creditors and any statutory priorities, for example, taxes or social security claims. Suppliers of goods and services would only continue to supply those goods and services to the insolvency representative on credit if they had a reasonable expectation of payment ahead of pre-commencement unsecured creditors. In some cases, such a priority is afforded on the basis that the new credit or lending is extended to the insolvency representative, rather than to the debtor, and thus becomes an expense of the insolvency estate. Some insolvency laws require such borrowing or credit to be approved by the court or by creditors, while other laws provide that the insolvency representative may obtain the necessary credit or finance without approval. This may involve an element of personal liability for the insolvency representative and, where it does, is likely to result in reluctance to seek new finance.

102. Other insolvency laws provide for a “super” administrative priority if credit or finance is not available where it is ranked as an administrative claim that is *pari passu* with other administrative claims such as fees of the insolvency representative or professional employed in the case. The “super” priority ranks ahead of administrative creditors.

(b) *Granting security*

103. Where the lender requires security, it can be provided on unencumbered assets or as a junior or lower security interest on already encumbered assets where the value of the encumbered asset is sufficiently in excess of the amount of the pre-existing secured obligation. In that case, no special protections will generally be required for the pre-existing secured creditors, as their rights will not be adversely affected unless circumstances change at a later time (such as that the value of the encumbered assets begins to diminish) and they will retain their pre-commencement priority in the encumbered asset, unless they agree otherwise. Frequently, the only unencumbered assets that may be available for securing post-commencement finance will be assets recovered through avoidance proceedings. However, providing security on such assets is controversial under some insolvency laws and is not permitted.

104. Some insolvency laws provide that new lending may be afforded some level of priority over existing secured creditors, (sometimes referred to as a “priming lien”). In States where this latter type of priority is permitted, insolvency courts recognize the risk to the existing secured creditors and authorize these types of priority reluctantly and as a last resort. The granting of such a priority may be subject to certain conditions, such as the provision of notice to affected secured creditors and the opportunity for them to be heard by the court; proof by the debtor that it is unable to obtain the necessary finance without the priority; and the provision of protection for any diminution of the economic value of encumbered assets, including by a sufficient excess in the value of the encumbered asset. In some legal systems, all of the priority, super-priority, security and priming lien options for attracting post-commencement finance are available to cover the new lending. As a general rule, the economic value of the rights of pre-existing secured creditors should be protected so that they will not be harmed. If necessary, this can be achieved, as noted above (see paras. 63-69), by making periodic payments or providing security rights in

additional assets in substitution for any assets that may be used by the debtor or encumbered in favour of new lending.

#### 4. Authorization for post-commencement finance

105. It may be desirable to link the issue of authorization for new lending to the damage that may occur or the benefit that is likely to be provided as a result of the provision of new finance. A number of insolvency laws permit the insolvency representative (or a debtor-in-possession where that approach is followed) to determine that new money is required for the continued operation or survival of the business or the preservation or enhancement of the value of the estate and obtain unsecured credit without approval by the court or by creditors. Other laws require approval by the court or creditors in certain circumstances. Given that new finance may be required on a fairly urgent basis to ensure the continuity of the business, it is desirable that the number of authorizations required be kept to a minimum. An insolvency law may take a hierarchical approach to the authorization required, depending upon the security or priority to be provided and the level of credit or finance to be obtained. Although requiring court involvement may generally assist in promoting transparency and provide additional assurance to lenders, in many instances the insolvency representative may be in a better position to assess the need for new finance. Similarly, where secured creditors consent to revised treatment of their security interests, approval of the court may not be required. In any event, the court will generally not have access to expertise or information additional to that provided by the insolvency representative on which to base its decision.

106. The question of providing security over unencumbered assets or assets that are not fully encumbered is not one that generally should require approval of the court. Where the insolvency law establishes the level of priority that generally can be given, for example, an administrative priority, court approval may not be required. Should court approval be considered desirable, an intermediate approach may be to establish a monetary threshold above which approval of the court is required. However, where the security or priority to be given affects the interests, for example, of existing secured creditors and those secured creditors do not support what is proposed, approval of the court should be required.

#### 5. Effects of conversion

107. Some insolvency laws provide that any security or priority provided in respect of new lending can be set aside in a subsequent liquidation, and may give rise to liability for delaying the commencement of liquidation and potentially damaging the interests of creditors. Such an approach has the potential to act as a disincentive to commencing reorganization. A more desirable approach may be to provide that creditors obtaining priority for new funding will retain that priority in any subsequent liquidation. A further approach provides that the priority will be recognized in a subsequent liquidation, but will not necessarily be accorded the same level of and may rank, for example, after administrative claims relating to the costs of the liquidation or *pari passu* with administrative expenses.

#### Recommendations 63-68

*Attracting and authorizing post-commencement finance (paras. 94-100, 105 and 106)*

63. The insolvency law should facilitate and provide incentives for post-commencement finance to be obtained by the insolvency representative where the insolvency representative determines it to be necessary for the continued operation or survival of the business of the debtor or the preservation or enhancement of the

value of the estate. The insolvency law may require the court to authorize or creditors to consent to the provision of post-commencement finance.

*Priority for post-commencement finance (paras. 101 and 102)*

64. The insolvency law should establish the priority that may be accorded to post-commencement finance, ensuring at least the payment of the post-commencement finance provider ahead of ordinary unsecured creditors, including those unsecured creditors with administrative priority.

*Security for post-commencement finance (paras. 103 and 104)*

65. The insolvency law should enable a security interest to be granted for repayment of post-commencement finance, including a security interest on an unencumbered asset, including an after-acquired asset, or a junior or lower-priority security interest on an already encumbered asset of the estate.

66. The law should specify that a security interest over the assets of the estate to secure post-commencement finance does not have priority ahead of any existing security interest over the same assets unless the insolvency representative obtains the agreement of the existing secured creditor(s) or follows the procedure in recommendation 67.

67. The insolvency law should specify that, where the existing secured creditor does not agree, the court may authorize the creation of a security interest having priority over pre-existing security interests provided specified conditions are satisfied, including:

- (a) The existing secured creditor was given the opportunity to be heard by the court;
- (b) The debtor can prove that it cannot obtain the finance in any other way; and
- (c) The interests of the existing secured creditor will be protected.

*Effect of conversion on post-commencement finance (para. 107)*

68. The insolvency law should specify that where reorganization proceedings are converted to liquidation, any priority accorded to post-commencement finance in the reorganization should continue to be recognized in the liquidation.

## **Part two, chapter II, section B**

### **Protection and preservation of the insolvency estate**

#### **5. Time of application of the stay**

##### *(i) Provisional measures*

47. In some insolvency laws that do not provide for the proceedings to commence automatically when an application is made, the application of the stay on commencement is complemented by provisional measures that may be ordered between application and commencement to protect both the assets of the debtor that potentially will constitute the insolvency estate and the collective interests of creditors. Even where the commencement decision is made quickly, there is the potential in that period for the debtor's business

situation to change and for dissipation of the debtor's assets—the debtor may be tempted to transfer assets out of the business and creditors, on learning of the application, may take remedial action against the debtor to pre-empt the effect of any stay that may be imposed upon commencement of the proceedings. The unavailability of provisional measures in such circumstances could frustrate the objectives of the insolvency proceedings. As with most provisional measures, the need for relief generally must be urgent and must outweigh any potential harm resulting from such measures.

48. Where an insolvency law permits provisional measures to be granted, it is important that it also include provision for periodic review and, if necessary, renewal of those measures by the court and that it address what happens to those measures on commencement of the insolvency proceedings. In many instances there will be no need for provisional measures to continue to apply after the commencement of proceedings, as they will be superseded by the measures applicable on commencement. If, however, provisional relief of a particular kind is not provided by the measures applicable on commencement and that type of relief is still required after commencement, the court may extend the application of that provisional measure in appropriate circumstances. Provisional measures would also terminate when an application for commencement is denied or the order for provisional measures is successfully challenged.

(ii) *Types of provisional measure*

49. Provisional measures may be available on the application of the debtor, creditors or third parties or be ordered by the court on its own motion. They may include appointing an interim insolvency representative or other person (not including the debtor) to administer or supervise the debtor's business and to protect assets and the interests of creditors; prohibiting the debtor from disposing of assets; taking control of some or all of the debtor's assets; suspending enforcement by creditors of security rights against the debtor; staying any action by creditors against the debtor's assets, such as by a secured creditor or retention of title holder; and preventing the commencement or continuation of individual actions by creditors to enforce their claims.

50. Where an insolvency representative is appointed as a provisional measure, it may not have powers as broad as those of an insolvency representative appointed on commencement of proceedings and its functions may be limited to protecting assets and the interests of creditors. It may be given, for example, the power to use and dispose of the debtor's assets in the ordinary course of business and to realize assets in whole or in part in order to protect and preserve the value of those assets which, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy. In any event, it may be necessary to determine the balance of responsibilities between the interim insolvency representative and the debtor with respect to the operation of the debtor's business, bearing in mind that no determination as to commencement of insolvency proceedings has been made. Since significant harm to the debtor's business or to the rights of creditors may result in situations where the court ultimately decides to deny the application for commencement, it is desirable that the court only exercise the power to grant provisional measures if it is satisfied that the assets of the debtor are at risk. In general, the debtor would continue to operate its business and to use and dispose of assets in the ordinary course of business, except to the extent restricted by the court.

(iii) *Evidentiary requirements*

51. Since these measures are provisional in nature and are granted before the court's determination that the commencement criteria have been met, the law may require the court to be satisfied that there is some likelihood that the debtor will satisfy the commencement requirements. Where a party other than the debtor applies for the measure, the applicant may be required by the court to provide evidence that the measure is necessary to preserve the value or avoid dissipation of the debtor's assets. In that case, some form of security for costs, fees or damages, such as the posting of a bond, may also be required in case insolvency proceedings are not subsequently commenced or the measure sought results in some harm to the debtor's business. Where provisional measures are improperly obtained, it may be appropriate to permit the court to assess costs, fees and damages against the applicant for the measure.

(iv) *Notice of application and orders for provisional measures*

52. The insolvency law may also need to consider the question of provision of notice, both in respect of an application for provisional measures and of an order for provisional measures (including the time at which those measures become effective) and the parties to be notified. As a general principle, the debtor should be given notice of an application for provisional measures and an opportunity to challenge the application. Only in exceptional circumstances is it desirable that notice to the debtor be dispensed with and the application proceeds on an ex parte basis. While many laws allow ex parte applications for provisional measures, they generally do so on the basis that the applicant provides security for costs and damages and can demonstrate requisite urgency, that is, that irreparable harm will result if the applicant is required to seek the requested measure under customary procedures requiring many days' notice. Nevertheless, once an order for provisional measures has been made on an ex parte basis, the debtor would generally be entitled to notice of the order and an opportunity to be heard. Bearing in mind the need to avoid unnecessary damage to a debtor against whom insolvency proceedings are not subsequently commenced, notice of an order for provisional measures may need to be restricted to parties directly affected by the order. Notice should also be provided to other parties where their interests will be affected by the provisional measures being sought.

(v) *Relief from provisional measures*

53. Relief from the application of provisional measures, such as modification or termination, may be appropriate in cases where the interests of the persons to whom the measures are directed are being harmed by their application. Examples might include cases involving perishable goods; actions relating to preservation or quantification of a claim against the debtor; and, in some situations, secured creditors. The granting of such relief may need to be balanced against potential detriment to the interests of creditors generally or to the debtor's assets. Such relief might be available on the application of the affected party, the insolvency representative or on the motion of the court itself and would generally require that notice and an opportunity to be heard be given to the person or persons to be affected by the modification or termination. Where an order for provisional measures is successfully challenged, the measures would generally terminate or be modified by the court.

## 8. Protection of secured creditors

### (b) *Protection of value*

63. Some insolvency laws adopt provisions specifically designed to address the negative impact of the stay on secured creditors by maintaining the economic value of secured claims during the period of the stay (in some jurisdictions referred to as “adequate protection”). Where the estate is able to maintain the value of encumbered assets, it can be approached in several ways.

### (i) *Protecting the value of the encumbered asset*

64. One approach is to protect the value of the encumbered asset itself on the understanding that, upon liquidation, the proceeds of sale of the asset will be distributed directly to the creditor to the extent of the secured portion of their claim. This approach may require a number of steps to be taken.

65. During the period of the stay it is possible that the value of the encumbered asset will diminish. Since, at the time of eventual distribution, the extent to which the secured creditor will receive priority will be limited by the value of the encumbered asset, that depreciation can prejudice the secured creditor. Some insolvency laws provide that the insolvency representative should protect secured creditors against any diminution either by providing additional or substitute assets or making periodic cash payments corresponding to the amount of the diminution in value. This approach is only necessary where the value of the encumbered asset is less than the amount of the secured claim. If the value exceeds the claim, the secured creditor will not be harmed by the diminution of value until that value becomes insufficient to pay the secured claim. Some States that preserve the value of the encumbered asset as outlined also allow for payment of interest during the period of the stay to compensate for delay imposed by the proceedings. Payment of interest may be limited, however, to the extent that the value of the encumbered asset exceeds the value of the secured claim. Otherwise, compensation for delay may deplete the assets available to unsecured creditors. Such an approach may encourage lenders to seek a security interest that will adequately protect the value of their claims.

### *Valuation of encumbered assets*

66. Central to the notion of protecting the value of encumbered assets is the mechanism for determining the value of those assets to enable the court to consider whether and how much to provide to secured creditors as relief against the diminution of the value of encumbered assets during the proceedings. This is a potentially complex issue and involves questions of the basis on which the valuation should be made (e.g. going concern value or liquidation value); the party to undertake the valuation; and the relevant date for determining value, having regard to the purpose for which the valuation is required. In some cases, the parties may have valued assets before commencement of the proceedings and that valuation may still be valid at commencement. There may be a need for an overall valuation shortly after commencement for the purpose of registering all assets and liabilities and preparing a net balance of the debtor’s position, so that the insolvency representative will have some idea of the value of the estate. Assets, in particular encumbered assets, may need to be valued in the course of proceedings to determine the value of the secured claim (and any related unsecured claim) and issues of protection related to any diminution in that value. Assets may also need to be valued in support of the disposal of segments of the business or of specific assets other than in the ordinary course of business and at confirmation of an approved reorganization plan to satisfy applicable



requirements. A related issue is the cost of valuation and the party that should bear that cost.

67. One approach is for the valuation, at least in the first instance, to be determined through agreement by the parties (being the debtor, or insolvency representative, and the secured creditor). Other laws provide different court-based approaches. For example, rather than undertaking the valuation itself, the court may specify a mode of determining the value, which might be carried out by appropriate experts. This could be supported by stating clear principles in the insolvency law as a basis for the valuation. An alternative approach is for the court, possibly following an initial estimate or appraisal of value by the insolvency representative, to determine the value on the basis of evidence, which might include a consideration of markets, market conditions and expert testimony. Some laws require a market valuation of an asset through sale, whereby the highest price available in the market for the asset is obtained via tender or auction. This valuation technique is less applicable to protection of either the value of the encumbered asset or the secured claim than it is to disposal of assets of the estate by the insolvency representative.

68. In some liquidation cases, the insolvency representative may find it necessary to use or sell encumbered assets (see below, paras. 83-86) in order to maximize the value of the estate. For example, to the extent that the insolvency representative is of the view that the value of the estate can be maximized if the business continues to operate for a temporary period in liquidation, it may wish to sell inventory that is partially encumbered. In reorganization proceedings also, it may be in the best interests of the estate to sell encumbered assets of a similar nature to provide needed working capital. Thus, in cases where secured creditors are protected by preserving the value of the encumbered asset, it may be desirable for an insolvency law to allow the insolvency representative the choice of providing the creditor with substitute equivalent security interest, such as a replacement lien over another asset or the proceeds of the sale of the encumbered asset or paying out the full amount of the value of the assets that secure the secured claim either immediately or through an agreed payment plan. Other approaches focus on the use of the proceeds of the sale of the encumbered assets (see below, paras. 92 and 93). One method is for the court to prevent current or future use of those proceeds by the insolvency representative. Other laws grant secured creditors relief from the stay to pursue individual remedies regarding such proceeds or, where use of the proceeds is not authorized by either the secured creditor or the court, hold the debtor, its management or the insolvency representative personally liable for the amount of the proceeds or make such debt non-dischargeable.

(ii) *Protecting the value of the secured portion of the claim*

69. A second approach to protecting the interests of secured creditors is to protect the value of the secured portion of the claim. Immediately upon commencement, the encumbered asset is valued and, based on that valuation, the amount of the secured portion of the creditor's claim is determined. This amount remains fixed throughout the proceedings and, upon distribution following liquidation, the secured creditor receives a first-priority claim to the extent of that amount. During the proceedings, the secured creditor could also receive the contractual rate of interest on the secured portion of the claim to compensate for delay imposed by the proceedings. This approach avoids some of the complexities associated with ongoing valuation of the encumbered assets that may be required under the first approach noted above.

**Recommendations 39-45 and 50***Provisional measures (paras. 47-53)*

39. The insolvency law should specify that the court may grant relief of a provisional nature, at the request of the debtor, creditors or third parties, where relief is needed to protect and preserve the value of the assets of the debtor or the interests of creditors, between the time an application to commence insolvency proceedings is made and commencement of the proceedings, including:
- (a) Staying execution against the assets of the debtor, including actions to make security interests effective against third parties and enforcement of security interests;
  - (b) Entrusting the administration or supervision of the debtor's business, which may include the power to use and dispose of assets in the ordinary course of business, to an insolvency representative or other person designated by the court;
  - (c) Entrusting the realization of all or part of the assets of the debtor to an insolvency representative or other person designated by the court, in order to protect and preserve the value of assets of the debtor that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and
  - (d) Any other relief of the type applicable or available on commencement of proceedings under recommendations 46 and 48.

*Indemnification in connection with provisional measures (para. 51)*

40. The insolvency law may provide the court with the power to:
- (a) Require the applicant for provisional measures to provide indemnification and, where appropriate, to pay costs or fees; or
  - (b) Impose sanctions in connection with an application for provisional measures.

*Balance of rights between the debtor and insolvency representative (paras. 50 and 70-73)*

41. The insolvency law should clearly specify the balance of the rights and obligations between the debtor and any insolvency representative appointed as a provisional measure. Between the time an application for commencement of insolvency proceedings is made and commencement of those proceedings, the debtor is entitled to continue to operate its business and to use and dispose of assets in the ordinary course of business, except to the extent restricted by the court.

*Notice (para. 52)*

42. The insolvency law should specify that, unless the court limits or dispenses with the need to provide notice, appropriate notice is to be given to those parties in interest affected by:
- (a) An application or court order for provisional measures (including an application for review and modification or termination); and
  - (b) A court order for additional measures applicable on commencement, unless the court limits or dispenses with the need to provide notice.

*Ex parte provisional measures (para. 52)*

43. The insolvency law should specify that, where the debtor or other party in interest affected by a provisional measure is not given notice of the application for that provisional measure, the debtor or other party in interest affected by the provisional measures has the right, upon urgent application, to be heard promptly on whether the relief should be continued.

*Modification or termination of provisional measures (para. 53)*

44. The insolvency law should specify that the court, at its own motion or at the request of the insolvency representative, the debtor, a creditor or any other person affected by the provisional measures, may review and modify or terminate those measures.

*Termination of provisional measures (para. 53 and chap. I, para. 63)*

45. The insolvency law should specify that provisional measures terminate when:
- (a) An application for commencement is denied;
  - (b) An order for provisional measures is successfully challenged under recommendation 43; and
  - (c) The measures applicable on commencement take effect, unless the court continues the effect of the provisional measures.

*Protection from diminution of the value of encumbered assets (paras. 63-69)*

50. The insolvency law should specify that, upon application to the court, a secured creditor should be entitled to protection of the value of the asset in which it has a security interest. The court may grant appropriate measures of protection that may include:

- (a) Cash payments by the estate;
- (b) Provision of additional security interests; or
- (c) Such other means as the court determines.

**A/CN.9/582/Add.6****Possible future work in the area of insolvency law:  
Proposal by the International Insolvency Institute (III),  
Committee on Corporate and Professional Responsibilities****ADDENDUM****Directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases****Background**

1. The benefits of effective insolvency laws are widely recognized and accepted by most nations, as evidenced by the efforts of many nations in recent years to update their insolvency laws to take into account modern finance and business. In addition to providing the primary means for maintaining financial discipline and ensuring efficient resource allocation in an economy, providing a predictable legal process for addressing the financial difficulties of troubled firms before their accumulated financial difficulties and the necessary framework for the efficient restructuring or orderly liquidation of troubled firms, effective insolvency laws also permit an examination to be made of the circumstances giving rise to insolvency and the conduct of officers of a company in its failure, perhaps revealing culpable behaviour on the part of those responsible for that failure and unfair dispositions of assets or property that are potentially recoverable.
2. Recently there has been an increased focus on director and officer responsibilities and liabilities in insolvency and pre-insolvency proceedings, fuelled in part by the widely publicized cases of WorldCom, Parmalat and Enron, highlighting alleged corporate fraud and self-dealing. The substantial increase in actions being brought against officers and directors for alleged breaches of various obligations points to an urgent need to create guidelines setting forth the responsibilities of officers and directors when a company approaches insolvency or becomes insolvent. Such guidelines would provide a means of crisis prevention as well as crisis management. The need for such guidelines is not limited to large insolvency cases. It is equally present in much smaller cases—any time a company has assets in more than one country there is a risk that managers will face competing laws or regulations as to how to use those assets to repay creditors, or which creditors are senior, or on many other issues.
3. The soundness and credibility of insolvency laws and director and officer practices are central to the efforts of governments and regulators to enhance the operation of the global financial system. Inefficient, antiquated and inconsistent existing guidelines on director and officer obligations as a company approaches insolvency have the potential to undermine the benefits that the UNCITRAL Legislative Guide on Insolvency Law is intended to produce. Furthermore, poorly designed or developed laws on director and officer responsibilities and liabilities, with outcomes that are uncertain, capricious, unfair or parochial, threaten the benefits of globalization. They have the potential to seriously impede trade liberalization and deter the international flow of capital.

4. The harmonization of officer and director responsibilities is problematic for several reasons. Officer and director responsibilities and liabilities are generally imbedded in corporate and insolvency laws, which often interact with other national laws and policies. The application of laws addressing officer and director responsibilities and liabilities are closely related to a country's other legal rules and statutory provisions on corporate governance. In some jurisdictions they form a key part of other policy frameworks, such as protecting depositors in financial institutions, revenue collection, favouring certain categories of creditors over others (such as employees), and so on. They must be in harmony with the relevant legal, business and cultural frameworks in the local context.

5. Nevertheless, it should be possible to crystallize, from effective insolvency regimes, basic principles that should be reflected in officer and director duties in insolvency. The III believes it is possible to go further and outline the particular features that best give effect to the public and international policy objectives that countries seek to achieve through such laws. The development of a set of guidelines on director and officer responsibilities and liabilities which is flexible in its application could be a valuable supplement to other forces driving nations to progress reforms in this area.

#### **Features of proposed guidelines**

6. A set of guidelines would not seek to harmonize officers and director laws across countries or establish uniform approaches or a "firm" set of provisions. Rather, it would contain a menu of suggested guidelines on various matters (such as to whom duties are owed prior to and after insolvency, what actions might create personal liabilities, etc.) which countries could select from and modify to suit their individual circumstances. A starting point for the development of a model framework could be the key principles and features identified in the survey of legal counsel from over fifty countries conducted by III in 2004 of officer and director responsibilities and liabilities, as well as the work of other organizations in this field, such as the OECD and INSOL International. UNCITRAL could assist in further developing those principles and features. Ultimately, the III would propose having specific options for legislative and other measures, which, if adopted, would be likely to contribute to effective guidelines for director and officer obligations when a company is approaching insolvency.

#### **Role of UNCITRAL in developing guidelines**

7. III considers UNCITRAL well suited to becoming involved in a project of this complexity and wide-ranging significance, given UNCITRAL's proven record with respect to the UNCITRAL Model Law on Cross-Border Insolvency and the subsequent UNCITRAL Legislative Guide on Insolvency Law. The timing of a project to develop such guidelines is ripe given the recent completion of the Legislative Guide. A set of guidelines by which officers and directors should conduct themselves are essential for the meaningful use and application of the principles contained in the Legislative Guide.

8. In the course of developing these texts, UNCITRAL formed links with other key participants in the insolvency community, consulting widely with practitioners and holding joint colloquia with judges and State officials. Participants represented a broad cross-section of nations with different cultures and legal systems. The UNCITRAL Secretariat and members are therefore already familiar with many of the national policy issues connected with director and officer responsibilities and liabilities. These factors would tend to support UNCITRAL in developing a framework of standards for directors and officers when a company approaches insolvency.

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9. UNCITRAL involvement in this area would also give useful international prominence to director and officer responsibilities and liabilities in conjunction with the implementation of insolvency laws based upon the Legislative Guide on Insolvency Law. These items together could become the benchmark for multilateral transparency reporting and surveillance and thus assist the international progress toward better insolvency practice.
  10. The III urges UNCITRAL to develop model guidelines on director and officer responsibilities and liabilities in insolvency and pre-insolvency cases.

**A/CN.9/582/Add.7****Possible future work in the area of insolvency law:  
Proposal by the International Insolvency Institute (III),  
Committee on Commercial Fraud****ADDENDUM****Proposal for Study and Recommendations in the Area of Commercial Fraud****Background**

1. The scale of damage done by commercial fraud is incalculable but, conservatively, losses to commercial fraud and its consequences are certainly in the trillions of Euros and dollars every year.
2. It will never be possible to eliminate commercial fraud. But it is possible to contemplate developing structures and systems that will reduce the opportunities for commercial fraud, reduce the potential rewards from fraudulent transactions and mitigate the negative consequences of fraudulent activities.
3. Commercial fraud often culminates in insolvencies or major restructurings, and one of the productive areas in which anti-fraud systems and procedures could be developed is in the area of insolvency and reorganizations. There are many advantages to focussing attention on remedies against commercial fraud in the insolvency area. Some of them would include:
  - Many countries have procedures and systems in place to deal with insolvencies and several countries are now either developing such procedures or are significantly updating such procedures;
  - Insolvency is a focused and coherent discipline where support for reforms to reduce the effects of commercial fraud would be universally supported;
  - The framework of insolvency legislation is ideal for dealing with the consequences of commercial fraud. In fact, most insolvency systems already contain measures intended to limit the consequences of commercial fraud;
  - Recommendations dealing with changes to discourage commercial fraud and to diminish the availability of advantages from fraudulent activity in an insolvency context could easily be built upon, incorporated into or developed as an adjunct to the *UNCITRAL Legislative Guide on Insolvency Law*;
  - UNCITRAL has already had considerable success in the insolvency area with two major projects successfully completed in a very short period of time; and
  - The UNCITRAL Working Group on Insolvency is a welcome example of a forum in which dozens of countries have worked together successfully for several years on important projects and share a common vision on the need for improvement in international systems and procedures. The fact that a group of this kind with this kind of background and participation is already in place would shorten the learning curve on any new project that UNCITRAL might consider in this area.

4. The III's proposal focuses on work in the insolvency area and the area of creditors' remedies with a view to creating systems and procedures that will serve as deterrents to fraudulent activity in commercial transactions. This work would not duplicate or overlap with any of the valuable work that the United Nations Office on Drugs and Crime (UNODC) is doing in this area, which focuses on activities that are more in the field of criminal and quasi-criminal activity and on activities that are contrary to public order. However, criminal proceedings associated with punishment of fraudulent activities often significantly impact the insolvency process. For example, it is not uncommon for insolvency proceedings to be partially or completely suspended pending criminal investigations. Obviously, protection of the criminal process and the needs of public authorities are extremely important, however, the effect of such actions on creditors and the insolvency process can be substantial. UNCITRAL analysis of this issue could result in facilitating changes to accommodate the needs of the prosecutorial authorities while maximizing the value of the insolvent entity for the benefit of employees, creditors and other parties in interest.

5. The III suggests that UNCITRAL study the means by which insolvency legislation can be amended to create disincentives to fraudulent activity and the use of fraudulent schemes, and to reduce the impact of fraudulent activity on creditors and other parties in interest. The III believes that this can be done through a combination of approaches to the problem. First, in the insolvency context, UNCITRAL should study how best to put in place measures that would treat creditors who participate in or facilitate fraudulent transactions on a basis that would be either subordinate to that of ordinary creditors or otherwise sufficiently unattractive that it would create a disincentive to pursue activities that are commercially fraudulent. On the other hand, responsible commercial activities and parties should be protected from unwarranted negative consequences of engaging in transactions with fraudsters.

6. Second, UNCITRAL should study and make recommendations as to remedies in insolvency procedures and practice that would be available to either an insolvency administrator or to creditors who are willing to pursue recoveries against parties who have participated in transactions that are avoidable under domestic insolvency legislation. Activities such as insider transactions, improper payments while insolvent and transfers at under-valuations or over-valuations would be discouraged if insolvency systems provided for sanctions against those who seek to profit from them. The obligations of parties who participate in normal commercial activities with fraudsters to discover and prevent fraud should be studied and clarified. While active participation in fraud should be discouraged, engaging in normal commercial transactions should not be condemned simply because other parties to the transactions engaged in fraudulent activities. A balance should be achieved and little analysis has been made of this issue, which is becoming common in connection with international fraudulent insolvencies. This is consistent with the *UNCITRAL Legislative Guide on Insolvency Law* which mandates that insolvency systems should discourage conduct that is preferential to one creditor over others: see Part 2, II at paragraphs 148 ff., especially paragraph 151. The *UNCITRAL Legislative Guide* did not recommend specific measures of this kind but they would make an ideal and highly constructive topic for future work in the insolvency area and would be a valuable adjunct to the *Legislative Guide*.

7. Third, to aid in discouraging activities that are commercially fraudulent, UNCITRAL should consider and study means by which insolvency administrators could be given enhanced recovery procedures and expedited remedies that would be effective against parties who participate in fraudulent activities. Again, virtually all insolvency systems already have provisions in place to enhance recoveries by insolvency administrators from



parties who have engaged in improper transactions with the debtor prior to its insolvency, but many of these provisions are difficult to enforce in the event of a multinational insolvency. Also, these and other powers of enforcement must be consistent with the objectives of the insolvency process and must not impede the commercial realities that maximize value and enhance recoveries. Undue administrative cost and burden must be carefully considered.

8. A related area of interest would be the appropriate ranking of the claims and rights of the regulatory and criminal enforcement authorities in insolvency proceedings involving fraud and the proper use of the criminal process when the rights of creditors and others are involved.

9. A distinct advantage of work in the insolvency area is that the insolvency area covers and applies to fraudulent activity of all kinds. By way of contrast, it would be possible to deal with fraudulent use of bills of exchange or documentary credits by building procedures into the systems that apply to those items. This could be done in literally dozens of areas of commercial endeavour, thus providing several dozen individually and specifically designed solutions to several dozen independent and distinct areas with different procedures, different rules and different remedies. While these procedures may be appropriate on a stand-alone basis involving solvent entities, they may conflict with other competing procedures in the event of an insolvency. Anticipation of the insolvency of one or more of the parties involved in a commercial fraud is required in order to appropriately resolve the rights of all of the affected parties. The advantage of focusing on systems in the insolvency area is that the insolvency area ultimately applies to *all* activities whenever an insolvency or reorganization occurs. Although commercial fraud is not restricted to situations in which there is an insolvency, it makes sense to focus the relatively scarce resources available on an area that is best situated to bring about the largest amount of improvement in the shortest time, i.e. the insolvency area.

10. The III submits this proposal to UNCITRAL in the view that UNCITRAL is in an ideal and unique position to be able to give detailed consideration to the very important issues in this area and to produce a set of principles or guidelines that would draw the attention of the worldwide commercial community to the need to reform and improve insolvency systems as they relate to the prevention and avoidance of commercial and fraudulent activities and provide an internationally accepted basis for doing so.

## C. Note by the Secretariat on current work by other international organizations in the area of electronic commerce

(A/CN.9/579) [Original: English]

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### I. Introduction

1. The following paper sets out a summary of work of international organizations relating to electronic commerce undertaken or planned to be undertaken in the past year or planned to be taken in the near future. The paper is not intended to be exhaustive but rather focuses on the work of organizations that might have implications for the work of the Working Group on Electronic Commerce. It is intended to provide information to the Commission in order to consider possible future areas of work for the Working Group as well as to consider the scope for cooperation with other international organizations. The paper complements the current activities report contained in A/CN.9/584.

2. The work of the following organizations is described in this report on the basis of publicly available material:

*(a) United Nations bodies and specialized agencies*

UNCTAD	United Nations Conference on Trade and Development
UNECE	United Nations Economic Commission for Europe
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
ITU	International Telecommunications Union
WIPO	World Intellectual Property Organization

*(b) Other intergovernmental organizations*

APEC	Asia Pacific Economic Cooperation
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Commonwealth Secretariat  
Council of Europe

EC

European Commission

Hague Conference

Hague Conference on Private International Law

OAS

Organization of American States

OECD

Organization for Economic Cooperation and Development

WCO

World Customs Organization

(c) *International non-governmental organizations*

ICC

International Chamber of Commerce

## II. Current work by other international organizations in the area of electronic commerce

### (a) United Nations bodies and specialized agencies

#### UNCTAD<sup>1</sup>

3. At its ninth session (Geneva, 22-25 February 2005), the Trade and Development Board approved recommendations in respect of electronic commerce strategies for development. It recommended that UNCTAD should carry out research and policy-oriented analytical work on the implications for trade and development of the different aspects of information and communications technologies (ICT) and e-business that falls within the mandate of UNCTAD, with particular focus on those sectors of main interest to developing countries. It also recommended that UNCTAD continue to work, inter alia, in the field of measurement of ICT, including the development of statistical capacity, to enable developing countries to measure the access, use and impact of ICT and monitor progress in this field and to contribute to capacity building in the area of ICT for development, particularly in trade sectors of special interest to developing countries or those that can be profoundly enhanced through the use of ICT, such as tourism, small and medium-sized enterprise (SMEs) development and poverty alleviation.<sup>2</sup>

4. UNCTAD is involved in interregional and country specific projects aimed at improving the efficiency of the trade sector of developing countries and countries in transition, through a reduction in the transaction costs linked to problems in customs and in transit transport. Improvements in the effectiveness of customs in these countries is being sought through the upgrading of Automated Systems for Customs Data (ASYCUDA) which involves the development of information technology (IT) tools to be used in monitoring transit transport agreements and technical assistance projects, providing experts, training and project coordination.<sup>3</sup>

<sup>1</sup> [www.unctad.org](http://www.unctad.org).

<sup>2</sup> TD/B/COM.3/L.31, 1 March 2005.

<sup>3</sup> A full list of ASYCUDA related projects may be found at:  
<http://www.unctad.org/Templates/Projects.asp?mode=showprojects&status=subject&intItemID=1451&intSubjectID=23&value=ASYCUDA>.

5. UNCTAD also publishes annually its Ecommerce and Development Report which focuses on trends in information and communications technologies (ICT), such as e-commerce and e-business, and on national and international policy and strategy options for improving the development impact of these technologies in developing countries.<sup>4</sup>

#### UNECE<sup>5</sup>

6. Through its Centre for Trade Facilitation and Electronic Business (UN/CEFACT), UNECE supports activities dedicated to improving the ability of business, trade and administrative organizations, from developed, developing and transitional economies, to exchange products and relevant services effectively. Its principal focus is on facilitating national and international transactions, through the simplification and harmonisation of processes, procedures and information flows, and thereby to contribute to the growth of global commerce.

7. UN/CEFACT has set up a new Trade Facilitation project to revise its existing Recommendation 6 on the Invoice for International Trade, adapting it to the business and regulatory requirements of electronic invoicing (e-invoicing).<sup>6</sup> The revised Recommendation seeks to resolve the obstacles to e-invoicing, and to provide a solution that can easily be implemented by both SMEs and large companies. The draft will be presented during a UN/CEFACT international forum on paperless trade to be held on 20 – 21 June 2005 in Geneva, at which regulatory and business entities will present their proposals towards paperless trade and seek to agree on their implementation (the forum is discussed in para. 11 below and for related work undertaken by the EC see para. 38 below).

8. The Trade Facilitation project will seek to define the data elements necessary to enable automatic invoice reconciliation and the information required to enable financial institutions effectively to process invoices. Requirements as to the authenticity of origin and integrity of the content of invoices will be addressed from a legal standpoint and the forum will analyze the data content requirements from a value added tax (or sales tax) perspective. A number of bodies have expressed an interest in this work and the potential for efficiency gains through e-invoicing (including the International Air Transport Association). UN/CEFACT is seeking both industry and government agencies resources and support for the project, and is working with relevant departments and programmes of the EC in this regard.

9. The UNECE, with UNCTAD, jointly sponsored the Working Party on the Facilitation of International Trade Procedures which developed rules on Electronic Data Interchange For Administration, Commerce and Transport (UN/EDIFACT) comprising internationally agreed standards, directories and guidelines for the electronic interchange of structured data, and in particular that relate to trade in goods and services between independent, computerized information systems.<sup>7</sup>

10. UNECE has also established a task force on developing a uniform approach to electronic documents for trade, including the United Nations Electronic Trade Documents

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<sup>4</sup> A copy of the Ecommerce and Development Report 2004 is available online at:  
[http://www.unctad.org/en/docs/ecdr2004\\_en.pdf](http://www.unctad.org/en/docs/ecdr2004_en.pdf).

<sup>5</sup> <http://www.unece.org/Welcome.html>.

<sup>6</sup> See further, [http://www.unece.org/cefact/forum\\_grps/tbg/projects.htm](http://www.unece.org/cefact/forum_grps/tbg/projects.htm).

<sup>7</sup> [http://www.unece.org/trade/untdid/texts/d100\\_d.htm](http://www.unece.org/trade/untdid/texts/d100_d.htm).

project (UNeDocs)<sup>8</sup> with the support of Technical Committee 154 of the International Organization for Standardization (ISO).<sup>9</sup> UNeDocs is a UNECE initiative aiming at facilitating the shift to paperless trade by providing electronic alternatives to key paper documents in the international supply chain. UN/CEFACT has established a new working group (the UNeDocs TBG2 Working Group)<sup>10</sup> to identify core documents used in international trade and to develop the paper and electronic specifications for those documents as well as customized document specifications to support national, regional and international projects for Single Window implementation<sup>11</sup> and paperless trade.<sup>12</sup>

11. UNECE will sponsor an executive forum from 20 to 21 June 2005 on paperless trade in international supply chains with the aim being for all countries, enterprises and non-governmental organizations (NGOs) to make a commitment to a roadmap of making paperless trade happen, including identification of the main obstacles that have so far prevented the large-scale implementation of paperless trade in the global supply chain and identifying a framework and plan of action on information exchange for security and efficiency of supply chains.<sup>13</sup>

#### UNESCAP<sup>14</sup>

12. UNESCAP has recently undertaken the first phase of a project commissioned by the World Bank<sup>15</sup> on the harmonization of electronic commerce legal systems in the Asia and the Pacific. To that end UNESCAP held a Regional Expert Conference on that subject in Thailand from 7-9 July 2004<sup>16</sup> which, through a collection of papers, focussed on the electronic commerce laws and regulations in some of the subregions of Asia and the Pacific islands as well as the e-ASEAN (Association of Southeast Asian Nations) legal framework.<sup>17</sup> The papers examined the status and challenges for the development of an electronic commerce legal system in Asia and the Pacific and also focussed on capacity-building needs for harmonized development of electronic commerce legal systems in that region. At a meeting on capacity building needs held at the end of the Regional Expert Conference,<sup>18</sup> a recommendation was made that UNESCAP, as the regional arm of the United Nations, coordinate with other relevant capacity-building organizations, particularly UNCITRAL, ITC, UNCTAD/WTO, UNCTAD, ITU, WIPO and the World

<sup>8</sup> Detailed information on UNeDocs can be found at <http://www.unece.org/etrades/unedocs/>.

<sup>9</sup> <http://www.iso.org/iso/en/ISOOnline.frontpage>.

<sup>10</sup> International Trade and Business Processes Group 2. More information regarding the TBG2 may be found at: [http://www.unece.org/cefact/forum\\_grps/tbg/tbg2\\_edocs/tbg2\\_edocs.htm](http://www.unece.org/cefact/forum_grps/tbg/tbg2_edocs/tbg2_edocs.htm).

<sup>11</sup> Whereby documents need only be submitted at one single entry point.

<sup>12</sup> More information may be found at: [http://www.unece.org/cefact/prs/pr05\\_trd\\_04e.pdf](http://www.unece.org/cefact/prs/pr05_trd_04e.pdf).

<sup>13</sup> Further information concerning the forum is available at <http://www.unece.org/forums/forum05/welcome.htm>

<sup>14</sup> <http://www.unescap.org/>.

<sup>15</sup> <http://www.worldbank.org/>.

<sup>16</sup> The full text of the papers presented at the regional conference and related papers are available on the UNESCAP Trade and Investment Division website ([www.unescap.org/tid/](http://www.unescap.org/tid/)).

<sup>17</sup> ASEAN leaders endorsed the eASEAN initiative during their Annual Summit meeting in Manila on 28 November 1999. The aim of the initiative is to establish a region-wide approach to making comprehensive use of information and communication technology in business, society and government.

<sup>18</sup> The meeting was held on 9 July 2004 and the list of participants (which included over 50 experts and senior government officials) and the regional capacity building plan which formed part of the conclusions and recommendations of the Regional Expert Conference are available at [www.unescap.org/tid/projects/ecom04\\_conf.asp](http://www.unescap.org/tid/projects/ecom04_conf.asp).

Bank, to implement regional capacity-building activities on a regional or subregional basis. In the following phases of the project it is envisaged that, in 2005, a subregional training workshop for lawmakers and regulators on developing a regional approach for harmonized electronic commerce legal systems be held as well as “training the trainer” programmes for both judges and lawyers. In a later phase scheduled for 2006 it is proposed that technical assistance be provided to individual countries and regions as well as national training for judges and lawyers with the aim being to ensure the harmonized development and application of electronic commerce laws by lawyers, judges and governments across participating countries.

#### ITU<sup>19</sup>

13. The ITU, a specialized agency of the United Nations, has the lead role in organizing the World Summit on Information Society (WSIS)<sup>20</sup> which has as its primary aim the development of an inclusive and equitable information society. Envisaged in two phases, the first Summit was held in Geneva on 10-12 December 2003, where agreement was reached on the Declaration of Principles<sup>21</sup> (which sets out the principles upon which to develop the global information society) and a Plan of Action<sup>22</sup> (which sets out concrete action lines to advance the achievement of internationally-agreed development goals, including those in, inter alia, the Millennium Declaration,<sup>23</sup> by promoting the use of information and communications technologies (ICT) based products, networks, services and applications and helping countries overcome the digital divide). The second phase of WSIS will be held in Tunis on 16-18 November 2005 focussing on implementing the agenda for development of achievable targets by 2015, and seeking consensus on unfinished business, inter alia, on the question of Internet governance.<sup>24</sup>

14. ITU is implementing a series of activities on countering spam, in the shorter and longer term, to foster international cooperation, develop harmonized policy frameworks, and promote the exchange of information and best practices, as well as to provide support to developing countries in the field of spam.<sup>25</sup> The opening day of an ITU WSIS Thematic

<sup>19</sup> <http://www.itu.int/home/>.

<sup>20</sup> Following a proposal by the Government of Tunisia, the International Telecommunication Union adopted a resolution at its Plenipotentiary Conference in Minneapolis in 1998 to hold a World Summit on the Information Society (WSIS) and to place it on the agenda of the United Nations. In 2001, the ITU Council decided to hold the Summit in two phases, the first from 10 to 12 December 2003, in Geneva, Switzerland, and the second from 16 to 18 November 2005 in Tunis, Tunisia. This was endorsed by the UN General Assembly (Resolution 56/183 ) which accorded the lead role for the preparatory work to ITU in cooperation with other interested organizations and partners.

<sup>21</sup> <http://www.itu.int/wsis/docs/geneva/official/dop.html>.

<sup>22</sup> <http://www.itu.int/wsis/docs/geneva/official/poa.html>.

<sup>23</sup> Resolution 55/2, adopted 8 September 2000. The declaration may be found at: <http://www.un.org/millennium/declaration/ares552e.htm>.

<sup>24</sup> The paragraphs relating to internet governance in the Declaration of Principles may be found at: [http://www.wgig.org/docs/Paragraphs\\_Internet\\_Governance.doc](http://www.wgig.org/docs/Paragraphs_Internet_Governance.doc). A Working Group on Internet Governance (WGIG) has been established to deal with the following issues: develop a working definition of Internet Governance; identify the public policy issues that are relevant to Internet Governance; and develop a common understanding of the respective roles and responsibilities of governments, existing international organizations and other forums as well as the private sector and civil society from both developing and developed countries. For more information about the WGIG, see <http://www.wgig.org/>.

<sup>25</sup> Information about ITU initiatives to counter spam may be found at: <http://www.itu.int/osg/spu/spam/intcoop.html>.

Meeting on Cybersecurity to be held on 28 June 2005 will be devoted to the issue of countering spam.<sup>26</sup>

15. In November 2004, an ITU E-Government and IP Symposium for the Arab Region, was held in Dubai, UAE to consider the practical issues involved in implementing e-Government initiatives as well as to discuss policy aspects of the management of the Domain Name System (DNS) and IP addresses. This is part of an ITU global e-government project aimed at increasing government efficiency in developing countries by providing Internet-based services and applications to citizens.<sup>27</sup> Also, in 2004, the ITU published a report on its activities related to internet protocol networks.<sup>28</sup>

#### WIPO<sup>29</sup>

16. In 1999<sup>30</sup> and 2001,<sup>31</sup> WIPO prepared two comprehensive studies focussing on questions arising out of the interface between domain names and intellectual property (IP) rights. The 1999 report recommended the establishment of a uniform dispute resolution procedure to deal with disputes concerning alleged bad faith registration and deliberate misuse of trademarks as domain names or "cybersquatting". The 2001 report was concerned with a range of identifiers other than trademarks<sup>32</sup> and found considerable evidence of the misleading registration and use of such identifiers as domain names. In respect of names and acronyms of IGOs, the 2001 report recommended that States should seek to develop an administrative dispute resolution procedure similar to the Uniform Domain Name Dispute Resolution Policy which is, in part, administered by the WIPO Arbitration and Mediation Center. The activities of the WIPO Arbitration and Mediation Center in the area of domain name disputes have partly contributed to the wider acceptance of the use of online procedures for resolving disputes arising in the networked environment.

17. In the area of intellectual property law, with the global reach of the Internet and the rapid growth in electronic commerce, a number of questions relating to jurisdiction, enforcement of judgments and applicable law have arisen. For example, the question of applicable law is a priority issue in copyright in cyberspace given the ease and speed with which it is possible to digitally transmit perfect copies of copyrighted materials to and from anywhere in the world with or without the authorization of the copyright holder. In the context of a global marketplace, choice of law issues have increased for industrial property rights. To address these questions in relation to the different aspects of IP, WIPO held a forum in January 2001.<sup>33</sup> The forum discussed IP aspects of the Preliminary Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters

<sup>26</sup> <http://www.itu.int/osg/spu/spam/>.

<sup>27</sup> For more information about this and related projects see: <http://www.itu.int/ITU-D/e-strategy/e-applications/E-government/index.html>.

<sup>28</sup> [http://www.itu.int/osg/spu/ip/chapter\\_five.html](http://www.itu.int/osg/spu/ip/chapter_five.html).

<sup>29</sup> <http://www.wipo.int/>.

<sup>30</sup> "The Management of Internet Names and Addresses: Intellectual Property Issues" Report of the WIPO Internet Domain Name Process (<http://wipo2.wipo.int>).

<sup>31</sup> "The Recognition of Rights and the Use of Names in the Internet Domain Name System", Report of the Second WIPO Internet Domain Name Process (<http://wipo2.wipo.int>).

<sup>32</sup> Such as: international non-proprietary names (INNS) for pharmaceutical substances; names and acronyms of international intergovernmental organizations (IGOs); personal names and geographical identifiers, such as indications of geographical source used on goods, geographical indications and other geographical terms; and trade names which are used by enterprises to identify themselves.

<sup>33</sup> <http://www.wipo.int/pil-forum/en/>.

prepared under the auspices of the Hague Conference. In particular, experts considered those provisions which impacted on the resolution of IP disputes. The forum also considered electronic commerce disputes and the role of alternative dispute resolution procedures.

18. WIPO continued to address points of the WIPO Digital Agenda, a program aimed at formulating appropriate responses to the influence of the Internet and digital technologies on IP systems and in particular ensuring the protection of IP on the Internet.<sup>34</sup> Issues covered by the program include: the application of IP law in transactions via the Internet and the impact of the Internet and digital technologies on the areas of copyright and related rights, trademarks and domain names and patents as well as dispute resolution. The WIPO Digital Agenda also includes: broadening the participation of developing countries through the use of WIPONET and other means to access IP information and improve their opportunities to use their IP assets in eCommerce; the adjustment of the international legislative framework to facilitate e-commerce through the extension of the principles of the WCT<sup>35</sup> and the WPPT<sup>36</sup> to audiovisual works; the adaptation of broadcasters' rights to the digital era; and the development of a possible international instrument on the protection of databases.

19. Other points of the WIPO Digital Agenda include: establishing international rules for determining the circumstances of IP liability of Online Service Providers (OSPs); promoting an institutional framework to facilitate the exploitation of IP through, for example, the online administration of IP disputes; and the introduction of online procedures for the filing and administration of international applications for the PCT,<sup>37</sup> the Madrid<sup>38</sup> and the Hague Systems.<sup>39</sup>

20. The Economic Development Sector (EDS) of WIPO focuses on the development dimension of IP with programs to provide technical assistance to developing countries and promote IP as an aid to social and cultural development, economic growth and wealth creation.<sup>40</sup> Technical assistance programs are initiated in response to specific requests

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<sup>34</sup> The WIPO Digital Agenda was launched in September 1999 by the Director General of WIPO at the WIPO International Conference on Electronic Commerce and Intellectual Property. It was approved later that month by WIPO's Member States at their General Assembly. To keep the public fully informed about its activities under the Digital Agenda, WIPO has created a website dedicated to electronic commerce issues. This web site, maintained in English, French and Spanish, provides extensive information regarding WIPO programs in the areas concerned, background papers on substantive issues, and a comprehensive calendar for meetings. The web site can be found at <http://ecommerce.wipo.int>.

<sup>35</sup> WIPO Copyright Treaty (adopted in Geneva on December 20, 1996). Entry into force: March 6, 2002; Source: International Bureau of WIPO, <http://www.wipo.int/>.

<sup>36</sup> WIPO Performances and Phonograms Treaty (WPPT) (adopted in Geneva on December 20, 1996); Entry into force: May 20, 2002. Source: International Bureau of WIPO, <http://www.wipo.int/>.

<sup>37</sup> The Patent Cooperation Treaty, concluded in 1970, amended in 1979, and modified in 1984 and 2001. Source: International Bureau of WIPO, <http://www.wipo.int/>.

<sup>38</sup> Madrid Agreement Concerning the International Registration of Marks April 14, 1891, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Nice on June 15, 1957 and at Stockholm on July 14, 1967 and amended on September 28, 1979.

<sup>39</sup> Comprising the Hague Agreement Concerning the International Registration of Industrial Designs (the 1999 Act, the Common Regulations under the 1999 Act, the 1960 Act and the 1934 Act of the Hague Agreement).

<sup>40</sup> WIPO's approach towards economic development is rooted in the United Nations Millennium Declaration and its eight millennium development goals, aimed at reducing poverty across the world



from individual countries. EDS' technical assistance programs to developing countries have concentrated on building up the legal and administrative infrastructure required to protect IP rights. This includes assistance with training, modernising IP institutions and systems, awareness-raising, and expert advice on IP legislation. Increasing numbers of developing countries are now also requesting WIPO's assistance in the next stage of optimizing the economic and cultural value from IP assets and technology transfer.

21. WIPO is also committed to studying and responding in a timely and effective manner to: the need for practical measures to improve the management of cultural and other digital assets at the international level by investigating inter alia, the notarization of electronic documents and the introduction of a procedure for the certification of websites for compliance with appropriate IP standards and procedures; studying other emerging IP issues relating to electronic commerce; and, where appropriate, developing norms in relation thereto and coordinating with other international organizations in formulating international positions on issues affecting IP and in particular, the validity of electronic contracts and jurisdiction.

**(b) Other intergovernmental organizations**

**APEC<sup>41</sup>**

22. APEC e-commerce activities are coordinated by the Electronic Commerce Steering Group (ECSG). Based on the principles set out in the 1998 APEC Blueprint for Action on Electronic Commerce,<sup>42</sup> the ECSG promotes the development and use of electronic commerce by creating legal, regulatory and policy environments in the APEC region that are predictable, transparent and consistent.<sup>43</sup>

23. In 2004, the ECSG continued its work on data privacy, consumer protection, cybersecurity, paperless trading, trade facilitation and initiatives to counter spam. APEC Member Economies endorsed the APEC Privacy Framework<sup>44</sup> which encourages the development of appropriate information privacy protection and ensures the free flow of information in the Asia-Pacific region. Sixteen economies have prepared Paperless Trading Individual Action Plans (IAPs) which set out the steps members should take to meet APEC's target to reduce or eliminate customs, cross-border trade administration and other documents relevant to international sea, air and land transport.<sup>45</sup> A comprehensive paperless trading environment that enables the electronic transmission of trade-related information across the APEC region is to be established by 2020. The ECSG also agreed to continue its activities to counter spam. In that respect, it undertook a survey on individual economies' approaches to spam, and considered possible cooperation with the APEC Telecommunication and Information Working Group in 2005.

24. As part of its intention to build trust in e-commerce, the ECSG is considering ways to better protect consumers from fraudulent and deceptive practices when buying goods

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and creating an environment conducive to development.

<sup>41</sup> [www.apec.org](http://www.apec.org).

<sup>42</sup> A copy of the Blueprint may be found at: <http://www.export.gov/apeccommerce/blueprint.html>.

<sup>43</sup> More information is available on the Electronic Commerce Steering Group Website at:

[http://www.apec.org/apec/apec\\_groups/som\\_special\\_task\\_groups/electronic\\_commerce.html](http://www.apec.org/apec/apec_groups/som_special_task_groups/electronic_commerce.html).

<sup>44</sup> The APEC Privacy Framework promotes a consistent approach to information privacy protection across APEC member economies and also avoids the creation of unnecessary barriers to information flows.

<sup>45</sup> A copy of these IAPs is available at <http://www.apec-iap.org/>.

and services online. Work is underway to help economies implement APEC's Voluntary Consumer Protection Guidelines for the On-line Environment.<sup>46</sup> These cover international cooperation, education and awareness, private sector leadership, on-line advertising and marketing and the resolution of consumer disputes.

25. In 2005, the ECSG has stated that it will continue its work on information privacy, spam, paperless trading, digital economy initiatives and review the format of the Stocktake of Electronic Commerce Activities, a business-friendly inventory of the electronic commerce activities currently being undertaken by APEC forums.<sup>47</sup>

26. For work relating to the issue of e-procurement being undertaken by APEC, see, A/CN.9/WG.I/WP.31, para. 37.

#### **Commonwealth Secretariat<sup>48</sup>**

27. In 1999 Commonwealth Law Ministers mandated the Commonwealth Secretariat to look at the legal implications arising from the use of technology in order to assist Member Countries to take full advantage of the opportunities presented by technological developments. The Secretariat convened several expert groups and prepared drafting instructions from their deliberations. Model laws dealing with technology were specifically drafted on the following: Electronic Transactions;<sup>49</sup> Electronic Evidence;<sup>50</sup> Freedom of Information;<sup>51</sup> Privacy;<sup>52</sup> and Computer and Computer Related Crimes.<sup>53</sup> These model laws were submitted to Law Ministers for consideration at their meeting in 2002. The Commonwealth Secretariat was asked to continue its work with senior officials in these

<sup>46</sup> A copy of the guidelines is available at <http://www.export.gov/apeccommerce/cp/guidelines.htm>.

<sup>47</sup> A copy of the Stocktake is available online at:

[http://www.apec.org/apec/apec\\_groups/som\\_special\\_task\\_groups/electronic\\_commerce.html](http://www.apec.org/apec/apec_groups/som_special_task_groups/electronic_commerce.html).

<sup>48</sup> <http://www.thecommonwealth.org/HomePage.asp?NodeID=20593>.

<sup>49</sup> The draft Model Law on E-Commerce is presented as providing a sound basis for the passage of laws by those Commonwealth member countries which seek to adopt legislation that addresses all major issues covered by the UNCITRAL Model Law on Electronic Commerce and is adapted for the specific use of common law jurisdictions. It may be found at:  
[http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/{1072058F-7B90-4A11-A5DF-E33AACEF4000}\\_E-commerce.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/{1072058F-7B90-4A11-A5DF-E33AACEF4000}_E-commerce.pdf).

<sup>50</sup> The Model Law contains provisions on general admissibility, the scope of the Model Law, authentication, application of best evidence rule, presumption of integrity, standards, proof by affidavit, cross examination, agreement on admissibility of electronic records, and admissibility of electronic signature. A copy may be found at:  
[http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/{E9B3DEBD-1E36-4551-BE75-B941D6931D0F}\\_E-evidence.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/{E9B3DEBD-1E36-4551-BE75-B941D6931D0F}_E-evidence.pdf).

<sup>51</sup> The Model Freedom of Information Bill may be found at:  
[http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/{AC090445-A8AB-490B-8D4B-F110BD2F3AB1}\\_Freedom%20of%20Information.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/{AC090445-A8AB-490B-8D4B-F110BD2F3AB1}_Freedom%20of%20Information.pdf), and contains provisions regarding the right of access to information.

<sup>52</sup> The Model Privacy Bill may be found at:  
[http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/{82BDA409-2C88-4AB5-9E32-797FE623DFB8}\\_protection%20of%20privacy.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/{82BDA409-2C88-4AB5-9E32-797FE623DFB8}_protection%20of%20privacy.pdf), and deals with the collection, use, disclosure and retention of personal information as well as establishing a Privacy Commissioner and a system of investigation of complaints of breaches of privacy.

<sup>53</sup> The Model Bill on Computer and Computer Related Crime may be found at:  
[http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/{DA109CD2-5204-4FAB-AA77-86970A639B05}\\_Computer%20Crime.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/{DA109CD2-5204-4FAB-AA77-86970A639B05}_Computer%20Crime.pdf), and establishes offences in relation to certain computer crimes including illegal access, interfering with data or with a computer system, the illegal interception of data, illegal devices and child pornography.

areas to ensure that the laws remain current and reflective of the interests of Member Countries, particularly small and developing States. The Law Development Section of the Commonwealth Secretariat continued its work on the promotion of the Commonwealth's Model Laws.

#### **The Council of Europe<sup>54</sup>**

28. In September 2004, the Council sponsored a conference entitled "The Challenge of Cybercrime" which was aimed at encouraging broad and rapid ratification of and accession to the CyberCrime Convention<sup>55</sup> and its Protocol.<sup>56</sup>

29. In April 2005, the Council of Europe's Multidisciplinary Ad-hoc Committee of Experts on the Information Society (CAHSI) adopted the "draft political statement on the principles and guidelines for ensuring respect for human rights and the rule of law in the information society".<sup>57</sup>

30. Following on from the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, the Project Group on Data Protection (CJPD)<sup>58</sup> prepared a report for the European Committee on Legal Cooperation (CDJC) on the impact of data protection principles on the use of biometric data (fingerprints, iris recognition, face recognition etc) and noted that, where a biometric system is applied then a procedure of certification and monitoring and control, if appropriate by an independent body, should be promoted, particularly in the case of mass applications, with regard to the quality standards for the software, the hardware and the training of the staff in charge of enrolment and matching. As well, it was suggested that a periodic audit of the system's performance was recommendable.<sup>59</sup>

31. The Council is also undertaking a number of projects relating to e-governance which refers to the use of information technology to raise the quality of the services governments provide to its citizens and to business. To that end, the Committee of Ministers adopted a recommendation in September 2004 on e-voting which is the first international legal instrument on this subject and a recommendation on e-governance was also adopted at the end of 2004. From 2005 a follow up project on "Good Governance in the Information Society" will consider how new information and communication technologies (ICT) impact upon the democratic practices, human rights and the rule of law in Council of Europe member States.

<sup>54</sup> <http://www.coe.int/DefaultEN.asp>.

<sup>55</sup> The CyberCrime Convention, ETS 185, entered into force on 1 July 2004. It is intended to develop a common criminal policy aimed at the protection of society against cybercrime, inter alia by adopting appropriate criminal legislation and fostering international co-operation. Source: Council of Europe Treaty Office, <http://conventions.coe.int/>.

<sup>56</sup> The Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature supplements, as between the Parties to the Protocol, the provisions of the Convention on Cybercrime as regards the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS 189). It was opened for signature in Strasbourg on 28 January 2003. Source: Council of Europe Treaty Office, <http://conventions.coe.int/>.

<sup>57</sup> [http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_co-operation/Steering\\_Committees/CDCJ/Documents/2005/cahsi%20\\_2005\\_7%20en%20final-2.pdf](http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Steering_Committees/CDCJ/Documents/2005/cahsi%20_2005_7%20en%20final-2.pdf).

<sup>58</sup> CETS No. 108, entered into force, 1 October 1985. Source: Council of Europe Treaty Office, <http://conventions.coe.int/>.

<sup>59</sup> [http://www.coe.int/T/E/Legal\\_affairs/Legal\\_co-operation/Data\\_protection/Documents/Reports/O-report%20BIOM%202005.asp#P42\\_6028](http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Data_protection/Documents/Reports/O-report%20BIOM%202005.asp#P42_6028).

EC<sup>60</sup>

32. As part of its target for a dynamic electronic business (“e-Business”) environment by 2005, the EC has undertaken a number of projects including: the creation of the future .eu domain in 2003; reviewing relevant European legislation preventing e-Business uptake; convening a major e-business summit in February 2004 involving high-level business representatives; establishing an online dispute resolution mechanism to improve trust and confidence in e-Business; supporting the development of interoperable business solutions for transactions, security, signatures, procurements and mobile payments; establishing an e-Business support network to strengthen and coordinate SME e-Business support actions and the funding of the e-Business Watch Function to provide greater information on the impact of e-Business at sectoral levels across the EU.

33. The EC has already prepared a number of legislative instruments regulating electronic commerce. The European Union Directive on Electronic Commerce<sup>61</sup> is aimed at providing a legal framework to facilitate the free movement of information society services between Member States. The Directive provides a flexible legal framework for e-commerce and addresses only those elements which are strictly necessary in order to ensure the proper functioning of the Internal Market in e-commerce. It is drafted in a technologically neutral way to avoid the need to adapt the legal framework constantly to new developments. Measures required by the Directive include a general ban of prior authorisation requirements to act as an information society service provider, the requirement that the service provider make available general information accessible to recipients and public authorities, and the obligation of Member States to ensure that their legal system allows contracts to be concluded by electronic means.<sup>62</sup> The First Report on the Application of the Directive (published in November 2003) indicates that 12 Member States have brought into force implementing legislation and found that, in the remaining 3 Member States, work on transposition of the Directive was well advanced.<sup>63</sup> The report concludes that analysis to date has not shown a need to adapt the Directive as yet and, given the lack of practical experience, revision of the Directive would be premature. The EC has launched an open consultation on legal problems in e-business with a view to collecting feedback and practical experience from the market and identifying remaining practical barriers or new legal problems encountered by enterprises when doing e-business. The results of that consultation will form the basis for a second report on the application of the Directive due in 2005, which will also address possible needs for adaptation of the Directive.

34. The EU Directive on Electronic Signatures<sup>64</sup> facilitates the use of electronic signatures and contributes to their legal recognition. It does not cover aspects related to the

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<sup>60</sup> [http://europa.eu.int/comm/index\\_en.htm](http://europa.eu.int/comm/index_en.htm).

<sup>61</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Official Journal L 178 , 17/07/2000 P. 0001 - 0016.

<sup>62</sup> For more information about Directive 2000/31/EC see: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/00/442&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>63</sup> The report may be found at: [http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2003/com2003\\_0702en01.doc](http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2003/com2003_0702en01.doc) which contains an annex setting out the list of national measures transposing the Directive.

<sup>64</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, Official Journal L 013 , 19/01/2000 P. 0012 – 0020.

conclusion and validity of contracts or other legal obligations where there are requirements in that respect prescribed by national or Community law nor does it affect rules and limits, contained in national or Community law, governing the use of documents. The principal aim of the Directive is to ensure that electronic signature products that comply with the Directive are permitted to circulate freely in the internal market. Member States are required to ensure that advanced electronic signatures which are based on a qualified certificate and which are created by a secure-signature-creation device satisfy the legal requirements of a signature and are admissible as evidence in legal proceedings. A study on the legal and practical issues concerning the implementation of the EU Directive on Electronic Signatures was undertaken by the Interdisciplinary Centre for Law and Information Technology, at the request of the EC and was presented to the Commission in October 2003.<sup>65</sup> The report found that most of the EU Member States have more or less consistently transposed the Directive into national legislation and concluded that the Directive should not be amended as it was adequate to serve its purpose but that divergences in its practical implementation could be addressed by the development of a non-binding Community-based interpretation of the Directive accompanied by short term support measures.

35. As well, the EU Directive on the protection of consumers in respect of distance contracts<sup>66</sup> provides for the same level of consumer protection throughout the territory of the European Union in respect of distance contracts. In accordance with Article 17 of the Directive a study was undertaken by the EC to consider the feasibility of establishing effective means to deal with consumers' complaints in respect of distance selling.<sup>67</sup> In that report the Commission expressed its intention to monitor closely the situation of consumer complaints as part of the work which is being done on the issue of consumer access and give special attention to consumer complaints in future reports and proposals for new legislation, in the regulatory framework of electronic commerce.

36. Also, in relation to the question of anti-spam measures, the European Directive on Privacy and Electronic Communications (2002/58/EC)<sup>68</sup> which came into force in October 2003, regulates the sending of unsolicited communications via e-mail, SMS or phone across all European Union (EU) Member States.

37. The importance of e-Government for the efficiency of the public sector was highlighted in the Commission's 2004 Competitiveness Report. A priority for the e-Europe 2005 action plan was that basic public services should be available on-line by 2005, a priority which is largely being achieved. A study executed under the Commission's e-Europe 2005 programme focussed on the online availability and sophistication of 20 public services and found that significant progress had been made. The Commission will now try to monitor the take-up of services to identify and exchange good practices and will also examine how the 'back office' has been integrated to maximise efficiency gains and hence boost productivity in the public sector.

38. The European Commission has addressed the question of standardization of electronic invoicing (e-invoicing) in the European Union in two aspects. First, in order to implement

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<sup>65</sup> [http://europa.eu.int/information\\_society/eeurope/2005/all\\_about/security/electronic\\_sig\\_report.pdf](http://europa.eu.int/information_society/eeurope/2005/all_about/security/electronic_sig_report.pdf).

<sup>66</sup> Directive 97/7/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 1997 on the protection of consumers in respect of distance contracts. The text of this Directive is published in Official Journal No 144 of 4 June 1997.

<sup>67</sup> <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:52000DC0127:EN:HTML>.

<sup>68</sup> [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_201/l\\_20120020731en00370047.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_201/l_20120020731en00370047.pdf).

the goals of Council Directive 2001/115/EC of 20 December 2001, which recognizes the legal validity of e-invoices for value added tax purposes and specifies the related technical conditions required, the EC requested the European Committee for Standardisation (CEN)<sup>69</sup> in accordance with the Information Society Standardization System (CEN/ISSS),<sup>70</sup> to address standardization by means of formal CEN Workshop Agreements (CWA) in e-invoicing, notably as regards electronic signatures, electronic archiving/storage and the format of transmissions of electronic invoices, e.g. Electronic Data Interchange (EDI).<sup>71</sup> This project is expected to be completed by January 2006 (for work on e-invoicing undertaken by UNECE, see paras. 7-8 above).

39. Secondly, the IDA programme (Interchange of Data between Administrations) of the EC, working in cooperation with other Commission services, has set up a project to facilitate the efficient introduction of interoperable electronic procurement solutions in compliance with the new European public procurement regulatory framework. The programme includes modelling of electronic procurement phases such as electronic tendering, electronic awarding of contracts, electronic ordering, electronic invoicing and electronic catalogues. In order to contribute to the definition of standards and take into account European requirements, the IDA models have been discussed with and submitted to standardization bodies such as CEN/ISSS, UN/CEFACT and OASIS (a non-profit, international consortium that creates interoperable industry specifications based on public standards such as XML (Extensible Markup Language (a language that enables the definition, transmission, validation, and interpretation of data) and the earlier, related, Standard Generalized Markup Language (SGML)).<sup>72</sup> For information regarding the work of the European Union in relation to e-procurement, see A/CN.9/WG.I/WP.31, para. 35).

### **The Hague Conference<sup>73</sup>**

40. One instrument prepared by the Hague Conference is the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (the Apostille Convention).<sup>74</sup> The main purpose of this multilateral treaty is to facilitate the circulation of public documents issued by a State Party to the Convention and to be produced in another State Party to the Convention by simplifying the series of formalities which complicated the utilisation of public documents outside of the countries from which they emanated. Recommendation Number 24 of the Special Commission of the Hague Conference on the Practical Application of, inter alia, the Apostille Convention requires that States Parties and the Permanent Bureau “work towards the development of

<sup>69</sup> CEN was founded in 1961 by the national standards bodies in the European Economic Community and EFTA countries and contributes to the objectives of the European Union and European Economic Area with voluntary technical standards which promote free trade, the safety of workers and consumers, interoperability of networks, environmental protection, exploitation of research and development programmes, and public procurement. For more information see: <http://www.cenorm.be/cenorm/aboutus/index.asp>.

<sup>70</sup> CEN/ISSS is the “European Entry Point” to the United Nations e-business standardization activities and provides a comprehensive and integrated list of standardization services and products to facilitate e-Business.

<sup>71</sup> The objectives, the work programme and the progress of the work are documented at: <http://comelec.afnor.fr/cen/wsei>.

<sup>72</sup> See further, <http://europa.eu.int/idabc/eprocurement>.

<sup>73</sup> [http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php).

<sup>74</sup> [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=41&zoek=apostille](http://www.hcch.net/index_en.php?act=conventions.text&cid=41&zoek=apostille). The Apostille Convention entered into force on 24 January 1965.

techniques for the generation of electronic Apostilles". To that end, the Hague Conference and the International Union of Latin Notaries (IULN) are jointly organising an International Forum on e-Notarization and e-Apostilles on 30 and 31 May 2005 in Las Vegas, Nevada, USA.

41. The forum will undertake a representative international survey of technologies for e-Notarization currently available or in the process of being developed from a technology-neutral perspective. As well, the forum will provide an opportunity for a legal analysis of the main issues raised by the use of these technologies in the context of notarization and the Hague Apostille Convention. In particular, this analysis is intended to focus on the possible legal requirements and regulatory standards for electronic notarisation, the question whether electronic public documents (in particular notarial acts and official certificates) fall within the scope of the Apostille Convention and whether the current framework of that Convention allows for the issuance and circulation of e-Apostilles.

#### **OAS<sup>75</sup>**

42. The OAS General Assembly is scheduled to mandate work in the area of electronic commerce and consumer protection to be considered in the Seventh Inter-American Specialized Conference on Private International Law. This work includes the possible drafting of the following instruments: a convention on specific aspects of e-commerce that relate directly to jurisdictional consumer issues<sup>76</sup> and a convention on the law applicable to consumer transactions.<sup>77</sup>

#### **OECD<sup>78</sup>**

##### *Authentication*

43. In recent years OECD Member countries have undertaken to develop and implement policies and laws related to authentication and electronic signatures. The OECD provides a forum for exchange of views and developing consensus about specific policy and regulatory issues related to information and communications networks and technologies, including electronic authentication.

44. The OECD Working Party on Information Security and Privacy,<sup>79</sup> comprised of government and private sector representatives from OECD Member countries, has conducted work related to authentication for a number of years. Both the 1992 OECD Guidelines for the Security of Information Systems<sup>80</sup> and the 1997 OECD Guidelines on Cryptography Policy<sup>81</sup> noted the importance of data integrity and security in information and communications networks and systems. The OECD Inventory of Approaches to

<sup>75</sup> <http://www.oas.org>.

<sup>76</sup> As proposed by Canada. For a copy of the proposal see: [http://www.oas.org/dil/CIDIP-VII\\_topics\\_cidip\\_vii\\_proposal\\_canada\\_10dec2004.htm](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_proposal_canada_10dec2004.htm).

<sup>77</sup> As proposed by Brazil. For a copy of the proposal, see: [http://www.oas.org/dil/CIDIP-VII\\_topics\\_cidip\\_vii\\_proposal\\_consumerprotection\\_applicablelaw\\_brazil\\_17dec2004.htm](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_proposal_consumerprotection_applicablelaw_brazil_17dec2004.htm).

<sup>78</sup> <http://www.oecd.org/home/>.

<sup>79</sup> More information about this Working Party is available at:

[http://www.oecd.org/departement/0,2688,en\\_2649\\_34255\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/departement/0,2688,en_2649_34255_1_1_1_1_1,00.html).

<sup>80</sup> On 26 November 1992, the Council of the OECD adopted a recommendation in respect of these guidelines. The Guidelines have since been replaced by the 2002 "OECD Guidelines for the Security of Information Systems and Networks: Towards a Culture of Security".

<sup>81</sup> On 27 March 1997, the Council of the OECD adopted these guidelines relating to cryptography.

Authentication and Certification in a Global Networked Society surveys activities in OECD Member countries related to authentication and certification on global networks, including laws, policies and initiatives in the public and private sectors, and at both the national and international level. A Declaration on Authentication for Electronic Commerce adopted by Ministers at the Ottawa Ministerial Conference in October 1998<sup>82</sup> recognised the importance of authentication for electronic commerce and outlined a number of actions to promote the development and use of authentication technologies and mechanisms, including continuing work at the international level, together with business, industry and user representatives. Ministers declared their determination not to discriminate against the authentication approaches taken by other countries and to amend, where appropriate, the technology or media specific requirements in current laws or policies that might impede electronic commerce.

45. An inventory of approaches to authentication and certifications was prepared in 2000. In August 2004 the OECD published a report summarizing responses to a survey of legal and policy frameworks for electronic authentication services and e-signatures in OECD Member Countries.<sup>83</sup> The survey, which was designed taking account of a similar survey undertaken within the APEC in order to allow for wider comparison, provided information on OECD member countries' legal and policy frameworks for electronic authentication and applicable regulations to entities providing authentication services. It was intended to identify the legal and regulatory barriers to electronic authentication services that might prevent the cross-jurisdictional acceptance of authentication services as well as that might prevent the recognition of electronic signatures across jurisdictions in a non-discriminatory way. The report noted that any subsequent work on authentication by the OECD should draw on UNCITRAL expertise developed during the course of developing the UNCITRAL Model Law on Electronic Signatures as well as taking account of discussions and work underway in other international forums regarding authentication issues (for example, APEC) so as to avoid overlap and duplication of efforts and ensure that the OECD benefits from the experience of other forums. Other subsequent phases envisaged in the report are the identification and assessment of the gaps in technical and operations approaches, for example, guidelines, practices, security standards etc.

46. In November 2004, the OECD launched a new questionnaire intended to gather relevant information on the current usage of authentication across borders in OECD Member Countries. It is planned that a synthesis report will be discussed at the next meeting of the Working Party on Information Security and Privacy scheduled for May 2005 with the central aims being: identifying examples of current offerings and actual implementation of authentication across borders; identification of actual or potential barriers to current cross border use of digital signatures from the supplier/user perspective; and exploring the extent to which cross border offerings of authentication meet or do not meet transaction needs. The report will also consider whether the legal and institutional framework in OECD Member Countries are implementing an existing international or transnational framework (for example, the European Directive 1999/93/EC on a Community Framework for Electronic Signatures and the UNCITRAL Model Law on Electronic Signatures).

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<sup>82</sup> The declaration was adopted by the OECD ministers at the conference on "A Borderless World: Realising the Potential of Global Electronic Commerce", of 7-9 October 1998, Ottawa, Canada.

<sup>83</sup> A copy of the report is available at [http://www.oilis.oecd.org/olis/2003doc.nsf/LinkTo/dsti-iccp-reg\(2003\)9-final](http://www.oilis.oecd.org/olis/2003doc.nsf/LinkTo/dsti-iccp-reg(2003)9-final)



### *Spam*

47. Although a number of measures and initiatives have been undertaken to address spam by OECD countries, there is general acknowledgement that no single approach will likely succeed without close international co-ordination. In March 2005, a special half-day session of the OECD Committee for Information, Computer and Communications Policy was held on emerging spam issues. This session followed on from the launch of the Anti-Spam “Toolkit” seen as the first step in a broader initiative to help policy makers, regulators and industry restore trust in the Internet and e-mail.<sup>84</sup> As well, the OECD in 2004 launched a survey to gather information and data about anti-spam legislation and enforcement authorities in member countries and encouraged non-OECD countries to provide data. As a result, a list containing information and contact details of enforcement bodies has been compiled and is now available on line.<sup>85</sup>

### *Impact of electronic commerce on development*

48. The OECD’s main focus on electronic commerce is considering the impact on the development prospects of emerging economies of the possibilities opened up by electronic commerce. The OECD has published a number of reports relating to electronic commerce including a paper entitled “Policies and Institutions For E-Commerce Readiness: What Can Developing Countries Learn From OECD Experience?”<sup>86</sup> which examines the key elements of the policy and institutional framework for e-commerce existing in OECD countries, and reflects on their applicability and adaptability to a developing country context.<sup>87</sup> Other published OECD reports include a summary of the OECD’s June 2004 expert panel on digital broadband content,<sup>88</sup> and another entitled “ICT, E-Business and Small and Medium Enterprises” which provides guidance on policy directions to foster appropriate business environments for e-business and ICT uptake, and target programmes to overcome market failures to the extent that they are needed in particular areas.<sup>89</sup>

### *Taxation and determining location of the parties*

49. The OECD is also examining the relationship of electronic commerce to questions of taxation. The 1998 Ottawa Taxation Framework Conditions provide that rules for the consumption taxation of cross-border electronic commerce should result in taxation in the jurisdiction where the consumption takes place.<sup>90</sup> In January 2004, the OECD released a

<sup>84</sup> The OECD’s work on spam may be found online at:

[http://www.oecd.org/departement/0,2688,en\\_2649\\_22555297\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/departement/0,2688,en_2649_22555297_1_1_1_1,00.html).

<sup>85</sup> [http://www.oecd.org/document/3/0,2340,en\\_2649\\_22555297\\_34409283\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/3/0,2340,en_2649_22555297_34409283_1_1_1_1,00.html).

<sup>86</sup> <http://www.oecd.org/dataoecd/17/38/2081349.pdf>.

<sup>87</sup> The key elements include, inter alia: improving access to telecommunications and internet services; building trust for users and consumers of electronic commerce; establishing ground rules for the digital market place.

<sup>88</sup> <http://www.oecd.org/dataoecd/53/39/34579763.pdf>.

<sup>89</sup> <http://www.oecd.org/dataoecd/17/38/2081349.pdf>.

<sup>90</sup> The application of this principle often raises difficulties in practice. For example, the tax administration in the country where the customer is located may encounter difficulties in ensuring that the right amount of tax is collected and remitted given that there may be no jurisdictional relationship between the administration and the supplier. Similarly, the supplier may have difficulty in complying with the tax rules of the country where the customer is located. For more information, see report of OECD “Electronic Commerce: Facilitating Collection of Consumption Taxes on Business to Consumer Cross-Border Electronic Commerce Transactions”.

discussion draft on whether the current tax treaty rules for taxing business profits are appropriate for e-commerce.<sup>91</sup>

50. In its work on international aspects of taxation the OECD Committee on Fiscal Affairs adopted changes to the commentary on article 5 of the Model Tax Convention on Income and on Capital (the OECD Model Tax Convention) to deal with the issue of the application of the definition of permanent establishment, as understood in the context of the Model Tax Convention, in connection with electronic commerce. The recommendation distinguished between a website and servers through which websites are stored and used and found that in certain circumstances, a server might constitute a permanent establishment for tax purposes. This information is discussed more fully in paras. 13 to 17 of A/CN.9/WG.IV/WP.104.

51. The future work program of the OECD's WP9 Sub-Group on Electronic Commerce (WP9)<sup>92</sup> includes: verification of the declared jurisdiction of residence of the customer in B2C (business-to-consumer) online transactions; verification of the status of the customer; registration thresholds; technology-based and technology-facilitated collection mechanisms and international administrative co-operation as well as longer term strategies for exploiting the potential of technology-based mechanisms. In respect of verification of business establishments, the WP9 is committed to the development of a set of practical rules defining business presence of the recipient that should be considered in B2B (business-to-business) transactions where the business customer has multiple locations (e.g. headquarters in one jurisdiction and branches in others) as well as to research and evaluate options that facilitate and promote the use of electronic material, including invoicing, reporting, and record keeping. Determining a place of business of a party to an electronic transaction has been addressed in article 6 of the draft convention on the use of electronic communications (see A/CN.9/ 577).

## WCO

52. The WCO promotes and administers the harmonization of customs laws and procedures within its membership.<sup>93</sup> With the growth in areas such as international cargo, information technology and e-commerce, the practices and systems already adopted pursuant to the Kyoto Convention<sup>94</sup> were seen as having created a conflict with modern trade practices. The revised Kyoto Convention,<sup>95</sup> provided a new structure through which modern trade practices, including electronic commerce can operate and be regulated<sup>96</sup> as it takes into account and adopts flexible methods and systems to allow for the changing

<sup>91</sup> <http://www.oecd.org/dataoecd/2/38/20655083.pdf>.

<sup>92</sup> The report is published at:

[http://www.oecd.org/document/46/0,2340,en\\_2649\\_37441\\_1834414\\_1\\_1\\_1\\_37441,00.html](http://www.oecd.org/document/46/0,2340,en_2649_37441_1834414_1_1_1_37441,00.html).

<sup>93</sup> <http://www.wcoomd.org/ie/En/AboutUs/aboutus.html>.

<sup>94</sup> The International Convention on the Simplification and Harmonization of Customs Procedures ("Kyoto Convention") which entered in to force on 25 September, 1974 was the principal instrument through which the WCO operated and through which members regulated and implemented customs policies.

<sup>95</sup> The International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention) as revised in June 1999 was adopted by the WCO Council as the updated "blueprint" for modern and efficient Customs procedures in the modern era:  
<http://www.wcoomd.org/ie/En/AboutUs/aboutus.html>: "The Kyoto Convention: Customs contributing to the development of international trade."

<sup>96</sup> The revised Kyoto Convention is to come into force upon the ratification or accession of the Protocol of Amendment by 40 Contracting Parties.

nature of international trade. Further, the WCO Council adopted a declaration on electronic commerce known as the “Baku Declaration”, in 2001 to recognize the potential social and economic impact of electronic commerce on nations, in particular that of developing nations. The Declaration invited Members of the WCO to take certain steps in response to the declaration and also requested the WCO to develop a coherent strategic WCO policy and action plan on electronic commerce.<sup>97</sup> At the WCO Policy Commission in December 2004, the draft “WCO Framework of Standards to Secure and Facilitate Global Trade” was accepted. One of the main elements of the draft framework is to harmonize advance electronic manifest information in order to allow risk assessment. At the WCO conference to be held in May 2005<sup>98</sup> the WCO is to follow up on discussions from its previous conference in 2003<sup>99</sup> to discuss, *inter alia*, the role of customs within the global trading system and how customs practices can enhance trade. The WCO IT Conference in April 2005<sup>100</sup> provided a forum for industry and customs experts to discuss information technology best practices.

**(c) International non-governmental organizations**

**The International Chamber of Commerce**

53. The ICC Commission on E-Business, IT and Telecoms (EBITT) serves as the overarching body for issue-specific Task Forces which include: the Task Force on Privacy and the Protection of Personal Data;<sup>101</sup> the Task Force on the Internet and IT Services;<sup>102</sup> the Task Force on Jurisdiction and Applicable Law (jointly with ICC’s Commission on Commercial Law and Practice (CLP));<sup>103</sup> the Task Force on Consumer Policy for E-Business; the Task Force on Security and Authentication<sup>104</sup> and the Task Force on

<sup>97</sup> [http://www.wcoomd.org/ie/En/Topics\\_Issues/topics\\_issues.html](http://www.wcoomd.org/ie/En/Topics_Issues/topics_issues.html): “WCO Strategy Paper: Customs and E-Commerce”, p. 2.

<sup>98</sup> WCO Conference, 19 – 21 May, 2005 at Baku, Azerbaijan.

<sup>99</sup> In Budapest, Hungary.

<sup>100</sup> 27– 29 April 2005 in Istanbul, Turkey.

<sup>101</sup> This Task Force analyzes the impact of regulatory frameworks in the area of privacy and data protection and formulates business positions on these issues. It has provided detailed input to the European Union Review of the 1995 General Data Protection Directive, and is currently developing a policy statement on data protection and human resources. It is also developing practical tools for use by companies worldwide in their implementation of data protection regulation, such as alternative contract clauses for transborder data flows and work on the use of codes of conduct to facilitate data flows between regions with differing privacy regimes.

<sup>102</sup> This Task Force, which includes members of the ICC Commission on Intellectual Property, responds to Internet governance issues stemming from the Internet Corporation for Assigned Names and Numbers (ICANN), and other issues related to the technical management of the Internet. It also works to ensure a trade environment for I.T. services that supports innovation.

<sup>103</sup> This Task Force, with participation from experts from the ICC Commission on Commercial Law and Practice (CLP), responds to key global and regional legal initiatives that affect electronic commerce, particularly in light of the critical jurisdiction and applicable law issues raised by cross-border nature of online trade. The work commented on includes the Draft Hague Convention on Jurisdiction and the Enforcement of Foreign Judgements in Civil and Commercial Matters and attempts by the EC to change the Rome Convention. The business stance in this field is reflected through the ICC policy statement entitled “Jurisdiction and applicable law in electronic commerce” (French version) issued by ICC’s former Electronic Commerce Project (ECP) in June 2001. It has also developed a clear and understandable guide to jurisdiction and applicable law for non-lawyers.

<sup>104</sup> This Task Force aims to address issues relating to security and authentication policy regulation of importance to business users. The Task Force is also finalizing an Information Security Toolkit aimed at improving awareness and raising the priority of information security amongst smaller companies

Electronic Contracting - jointly with ICC's Commission on Commercial Law and Practice (CLP).<sup>105</sup>

54. The ICC's Commission on Commercial Law and Practice (CLP) aims to facilitate international trade and promote a fair and balanced self-regulatory and regulatory legal framework for international business-to-business (B2B) transactions.<sup>106</sup> The CLP prepared a draft of principles on electronic contracting and also assisted with the EC's initiative to harmonize European contract law by the revision of the Rome Convention.

55. In coordination with a broadly based group known as the Alliance for Global Business (AGB)<sup>107</sup> the ICC annually updates the Global Action Plan for electronic business (GAP) which is a global reference document that records base policy positions of many business groups and serves as one single interface on all policy issues relating to, inter alia, electronic business that is being dealt with at national and intergovernmental levels. The 3rd edition of the Global Action Plan for electronic business was distributed and made available on the ICC website at the end of July 2002.<sup>108</sup>

56. EBITT also annually prepares policy and practice documents known as the ICC compendium on ICT and E-Business policy and practice for presentation at the World Summit on the Information Society (WSIS).<sup>109</sup> This compendium sets out ICC policy statements on global issues, such as broadband, privacy and content regulation. The compendium sets out ICC responses to specific ICT and e-business policy initiatives, such as European directives and the impact on ICTs of international trade commitments, and also provides information on ICC ICT and e-business tools by setting out best practices which encourage business, particularly small to medium enterprises, to effectively manage their relationships with online consumers. Finally, the compendium includes the ICC model contract clauses for cross-border transfers of personal data which were submitted in September 2003 to the EC for approval by the European Article 29 Working Party on data protection which are intended to provide an alternative means for companies to make personal data transfers from the European Union to third countries while maintaining a level of data protection acceptable under the European Data Protection Directive (95/46/EC).

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and companies in developing countries. In addition, it has provided practical tools for business users worldwide such as the GUIDEC (General Usage for International Digitally Ensured Commerce) which provides guidelines for ensuring trustworthy digital transactions over the Internet and describes how parties should use digital signatures.

<sup>105</sup> This Task Force participates in the UNCITRAL Working Group IV on Electronic Commerce, particularly in its current work on electronic contracting.

<sup>106</sup> More information on the CLP Commission may be found at: <http://www.iccwbo.org/law/commission/>.

<sup>107</sup> Members of the Alliance for Global Business are: Business and Industry Advisory Committee to the OECD (BIAC), Global Information Infrastructure Commission (GIIC), International Chamber of Commerce (ICC), International Telecommunications Users Group (INTUG), and World Information Technology and Services Alliance (WITSA).

<sup>108</sup> [http://www.iccwbo.org/home/e\\_business/word\\_documents/3rd%20Edition%20Global%20Action%20Plan.pdf](http://www.iccwbo.org/home/e_business/word_documents/3rd%20Edition%20Global%20Action%20Plan.pdf).

<sup>109</sup> The compendium is available from the ICC website at: [http://www.iccwbo.org/home/e\\_business/policy/ICC%20compendium%20on%20ICT%20and%20E-Business%20policy%20and%20practice.pdf](http://www.iccwbo.org/home/e_business/policy/ICC%20compendium%20on%20ICT%20and%20E-Business%20policy%20and%20practice.pdf).



### *Part Three*



**I. UNITED NATIONS CONVENTION ON  
THE USE OF ELECTRONIC  
COMMUNICATIONS IN  
INTERNATIONAL CONTRACTS**

[Issued as a United Nations publication, Sales No. E.07.V.2]





## II. SUMMARY RECORDS OF THE MEETINGS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW DEVOTED TO THE PREPARATION OF THE DRAFT CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

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Summary record of the 794th meeting, held at the Vienna International Centre  
on Monday, 4 July 2005, at 10 a.m.

[A/CN.9/SR.794]

*Temporary Chairman:* Mr. Sekolec (Secretary of the Commission)

*Chairman:* Mr. Chan (Singapore), (Vice-Chairman)

*The meeting was called to order at 10.25 a.m.*

### Opening of the session

1. **The Temporary Chairman** opened the thirty-eighth session of the United Nations Commission on International Trade Law (UNCITRAL, hereinafter referred to as “the Commission”).

### Election of officers

2. **Mr. Hidalgo Castellanos** (Mexico) nominated Mr. Pinzón Sánchez (Colombia) for the office of Chairman.

3. **Mr. Burman** (United States of America) seconded the nomination.

4. *Mr. Pinzón Sánchez (Colombia) was elected Chairman by acclamation.*

5. **The Temporary Chairman**, noting that the Chairman had been elected in absentia, said that the Commission should elect one Vice-Chairman immediately to conduct the discussions on agenda item 4. A further two vice-chairmen and a rapporteur would be elected later in the session.

6. **Mr. Meena** (India) nominated Mr. Chan (Singapore) for the office of Vice-Chairman.

7. **Mr. Esfahaninezhad** (Islamic Republic of Iran) seconded the nomination.

8. *Mr. Chan (Singapore) was elected Vice-Chairman by acclamation and took the Chair.*

### Adoption of the agenda (A/CN.9/567)

9. *The agenda was adopted.*

### Finalization and adoption of a draft convention on the use of electronic communications in international contracts (A/CN.9/571, 573, 577 and Add.1, 578 and Add.1-17)

10. **The Chairman** said that the draft convention annexed to document A/CN.9/577 was the result of deliberations in the Working Group on Electronic Commerce spanning a period of almost three years. The Working Group had recommended the current version of the draft to the Commission for consideration and possible adoption. If the Commission adopted the draft convention, it would have to decide whether to recommend that it be adopted by the General Assembly itself as a United Nations convention or, alternatively, by a diplomatic conference convened by the General Assembly.

11. The Working Group had already addressed the technical aspects of the draft convention. The Commission’s task was to consider the text from a legal

policy perspective. Issues that had been discussed in the Working Group did not need be raised before the Commission unless they had a fundamental bearing on policy positions relating to the text. Similarly, comments that had already been submitted in writing (A/CN.9/578 and addenda) should not be elaborated on at length during the proceedings.

12. **The Chairman** suggested that the Commission should consider the substantive articles of the draft convention (chapters I-III) and the final provisions (chapter IV) before considering the draft preamble.

13. *It was so decided.*

### *General comments*

14. **Mr. Bellenger** (France) said that the draft convention incorporated some of the solutions developed in the UNCITRAL Model Law on Electronic Commerce (New York, 1996). With a view to eliminating legal obstacles to electronic commerce, it recognized the functional equivalence between electronic and paper documents where guarantees for their storage were assured. That was a very welcome development, but another challenge that had emerged more recently was the need to ensure confidence in electronic communications. The normative content of the draft convention, particularly with regard to the concept of place of business which played a vital role in establishing confidence in electronic communications, was unfortunately flawed. Arguments to the effect that operators might have a “virtual domicile” appeared to have influenced the Working Group.

15. The territorial scope of application of the draft convention, while not entirely unprecedented, was far broader than that of most other international trade law conventions. The draft convention in its current form would be applicable to States that had not signed or ratified it and only a small number of ratifications would be required for the text to become universally applicable. That would set a worrying precedent: a golden rule of international law was that conventions should apply only to States that had ratified them. The scope of application of the draft convention should therefore be reviewed to make it more restrictive. Regrettably, his delegation could not guarantee that it would be in a position to endorse the draft convention in its present form.

16. **Mr. Burman** (United States of America) said that, overall, his delegation supported the text as it stood. It

represented an effective distillation of sound normative law that would facilitate economic development in all regions and in countries at different stages of development. The text was also flexible enough to accommodate changes in practices, technologies and economic applications of new commercial methodologies in electronic commerce.

17. His delegation supported the broad scope of application of the draft convention, which would allow sound normative standards for electronic commerce to be applied in many areas of activity. At the same time, it supported draft articles 18 and 19, which allowed States to restrict the application of the draft convention as they saw fit. No State would find that the draft convention was applicable to it unless it had ratified the instrument or otherwise implemented its provisions.

### *Chapter I. Sphere of application*

#### *Article 1. Scope of application*

18. **Mr. Estrella Faria** (Secretariat) said that the Commission should bear in mind the logical relationship between draft articles 1, 18 and 19.

19. Article 1 of the draft convention in its current form reflected the final agreement reached by the Working Group at its forty-fourth session. The original version of the article had mirrored article 1 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (“the United Nations Sales Convention”) in that, for the draft convention to apply, the place of business of both parties had to be located in a Contracting State. It had also stipulated, like the United Nations Sales Convention, that the draft convention would apply if the rules of private international law led to the application of the law of a Contracting State, even if one of the parties was not located in a Contracting State. A third possibility not contemplated in the United Nations Sales Convention was that the draft convention would apply if both parties agreed that it should apply.

20. After extensive discussions, the Working Group had decided at its last session that there was no need for the scope of application of the draft convention to mirror that of the United Nations Sales Convention. Its scope would be unnecessarily limited if both parties were required to have their places of business in Contracting States. Moreover, the purpose of the provision in the United Nations Sales Convention was to make it possible for the parties to a contract to determine in

advance whether or not the Convention applied. It provided for autonomous application, which meant that a Contracting State of the Sales Convention whose courts were asked to settle a dispute on a sales contract would automatically apply the Convention if both parties to the contract were located in Contracting States, without having to decide first whether the laws of a Contracting State were applicable to the contract in question. The purpose of the provision had been to enhance legal certainty.

21. That was not necessarily desirable in the present context. The draft convention, by its very nature, did not require autonomous application. Several draft articles referred to legal provisions to be applied by the courts of the forum State and the reasoning that had led to the final version of draft article 1 was that the draft convention was applicable provided that the forum State was a Contracting State. Exclusions could now be lodged under draft article 18, which was preferable to narrowing the scope of draft article 1.

22. The draft convention was thus applicable if a contract was international, i.e. if the parties had their places of business in different States. That approach was not entirely without precedent. The Uniform Law on the International Sale of Goods, adopted by a Convention (The Hague, 1964) that had been ratified by a number of European States, contained a similar provision: the Convention applied to international sales contracts without requiring both parties to have their places of business in States that had ratified the Convention.

23. One point that might require further clarification by the Commission, as correctly noted by the Permanent Bureau of the Hague Conference on Private International Law (A/CN.9/578/Add.6), was that article 1 as drafted suggested that the scope of application was autonomous to the extent that, where the forum State was a Contracting State and the parties to a contract concluded by electronic means had their places of business in two different States, the draft convention would automatically apply and the court of the forum State would not be required to determine first that its own law applied. That understanding appeared to be confirmed by the way in which exclusions were currently set out in draft article 18, since the possibility of lodging an exclusion under paragraph 1 (b) of draft article 18 would make no sense if draft article 1 itself required that the law of the forum State be the applicable law. The Commission should clarify whether draft article 1 required an initial determination that the law of the forum State applied, in which case draft article 18

would have to be revised, or whether draft article 1 provided for autonomous scope of application, in which case draft article 18 could remain unchanged.

24. The words “or agreement” had been inserted in square brackets before the word “contract” in draft paragraph 1 because of the inclusion in the list of instruments contained in draft article 19, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (“the New York Convention”), which used the term “agreement” rather than “contract” to refer to arbitration agreements.

25. Paragraphs 2 and 3 of article 19 remained virtually unchanged.

26. **Mr. Bellenger** (France) said that the scope of application of the draft convention was very broad, since it would apply to States regardless of whether they had acceded to it. The rules of private international law were such that, under instruments such as the Convention on the Law Applicable to Contractual Obligations (Rome, 1980), parties had considerable freedom to choose which law should apply. He therefore submitted that a more limited scope of application of the draft convention, such as that provided for in the United Nations Sales Convention, would not, in practice, prove restrictive.

27. Draft article 1, as it stood, would set a negative precedent since it seemed to challenge the basic principle of international law according to which a convention should apply only to States that had adopted it. The proposed scope of application was not in line with that of existing international trade law instruments. The Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods mentioned by the Secretariat had not entered into force. The United Nations Sales Convention applied to contracts between parties whose places of business were in different States when the States were Contracting States or when the rules of private international law led to the application of the law of a Contracting State; the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995) applied to an international undertaking if the place of business of the guarantor/issuer at which the undertaking was issued was in a Contracting State; the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001) applied to assignments of receivables if, at the time of conclusion of the contract of assignment, the assignor was located in a Contracting State; the Convention on the Contract for the International Carriage of Goods by Road

(Geneva, 1956) applied to contracts when the place of taking over of the goods and the place designated for delivery, as specified in the contract, were situated in two different countries, of which at least one was a Contracting country. None of those conventions applied to States without any connecting factor. It was important to return to established norms of international trade law and international law in general on both technical and policy grounds.

28. **Mr. Yamamoto** (Japan) said that his delegation broadly supported the wording of article 1 read in conjunction with articles 18 and 19 of the draft convention. However, it appeared that two interpretations were being presented. The first, contained in paragraph 32 of the Secretariat's background note (A/CN.9/577/Add.1), was that the draft convention was applicable only when the rules of private international law of the forum State led to the application of the law of a Contracting State. The second, suggested by the Permanent Bureau of the Hague Conference on Private International Law (A/CN.9/578/Add.6), was that the draft convention was also applicable in cases where the forum State was a Contracting State, regardless of the applicable law.

29. It was important to establish the Commission's intent with regard to the scope of application and to reflect it in the official commentary, since otherwise each Contracting State could apply its own interpretation, undermining commercial predictability. His delegation considered that both interpretations had advantages. The Secretariat's view that, unlike the United Nations Sales Convention, the draft convention was not autonomously applicable coincided with the view expressed by the Working Group at its forty-fourth session. Such an interpretation would respect to a greater extent the intention of Contracting States that made declarations under draft articles 18 and 19, since the court of the forum State would be obliged to apply the convention only if the rules of private international law of the forum State led to the application of the law of the Contracting State. However, if the Commission opted for the second interpretation, the court of a forum State that was a Contracting State would not need to examine which law was applicable. That approach had the advantage of ensuring legal certainty.

30. It would be inappropriate, on the other hand, to determine in advance how to proceed in cases where the forum State was a non-contracting State, since the draft convention was not binding on those States. The

applicable law could be determined only by the rules of private international law of the non-contracting State.

31. **Mr. Burman** (United States of America) said that the issues raised by draft article 1 had been discussed at length within the Working Group. His delegation supported the Working Group's conclusion that the scope of the draft convention should be as broad as possible in order to upgrade the general application of electronic commerce norms, while addressing concerns such as those expressed by the delegation of France. Draft article 18, paragraph 1 (a), offered States the option to restrict the scope of application in the manner suggested by France. Draft article 18, paragraph 2, and draft article 19, paragraphs 2, 3 and 4, also made broad provision for exclusions. To provide for exclusions *ab initio*, on the other hand, would deprive many States of the benefits of the draft convention in numerous areas of activity.

32. He proposed that the words "or agreement" in square brackets be deleted from draft article 1, since the difference between the term "agreement" in the New York Convention and the term "contract" in the draft convention could be resolved quite easily in the commentary. The words "or agreement" might be misinterpreted to include "international agreement".

33. Finally, his delegation agreed with the Secretariat's recommendation regarding the issue raised by the Permanent Bureau of the Hague Conference on Private International Law.

34. **Mr. Mitrovic** (Serbia and Montenegro) said that the manner in which Contracting States applied the draft convention in practice depended on the different scenarios conceivable under draft article 18. The first scenario was where both parties had their places of business in Contracting States. The second scenario was where the rules of private international law led to the application of the law of a Contracting State. It was assumed that the rules established by the draft convention would constitute the domestic law of the Contracting State and as such would be applicable pursuant to conflict of law rules. The third scenario was where the parties agreed that the draft convention should apply regardless of whether they had ratified it.

35. If a State made no declaration under draft article 18, it was unclear whether all three scenarios could exist. He felt it would be more logical, from a legal point of view, for draft article 1 to require Contracting States to apply the convention where both parties had their places of business in Contracting States,

leaving open the possibility for a State to make declarations covering the circumstances described in paragraphs 1 (b) and 1 (c) of draft article 18.

36. **The Chairman** said that the argument in favour of limiting the scope of the draft convention to parties who had their places of business in Contracting States was based on a rule of international law to the effect that the sovereignty of States should not be restricted in any way without their agreement. He asked the Secretariat whether there was anything in the text that obliged a non-contracting State to take action pursuant to the draft convention.

37. **Mr. Estrella Faria** (Secretariat) said that the terms of the draft convention could not be invoked to require any action by a non-contracting State. The issue of the possible effect of the convention vis-à-vis a State that had not ratified it would arise only where a dispute was brought before the court of a non-contracting State, which, applying its own rules of private international law, concluded that the law applicable to a particular transaction was the law of a Contracting State of the convention. The court might then apply the convention, not because it had an international obligation to do so but because the convention had become a part of the law of the foreign country, as already occurred, for example, under article 1, subparagraph 1 (b), of the United Nations Sales Convention.

38. The argument that draft article 1 had the effect of making the draft convention applicable to States that had not approved it would perhaps be more relevant in the context of conventions dealing with judicial cooperation or rules of public international law. In the field of private international law, however, a court could be bound by its own national law to apply a foreign law, which entailed applying laws that the State in question had not approved or accepted. In that context, the draft convention would have the status of a law that a foreign State had made a sovereign decision to incorporate in its domestic legal regime. As a result, business partners would be aware that similar provisions were applicable in a large number of States, which would enhance legal certainty in line with the object of the draft convention.

39. **The Chairman**, speaking from his experience as Chairman of the Working Group, confirmed that the intention had been for the Convention to apply only in Contracting States.

40. **Ms. Schulz** (Observer for the Hague Conference on Private International Law—HCCH) said she agreed that the only circumstances in which the draft

convention might have to be applied by a non-contracting State were where that State's domestic law required it to do so.

41. **Mr. Meena** (India) proposed either that the words "or agreement" in square brackets in draft article 1, paragraph 1, should be deleted or that an explanatory commentary should be added to explain their purpose.

42. **Mr. Buttimore** (Observer for Ireland) said that he was in favour of the newly revised article 1, paragraph 1, because it provided not only legal certainty but also flexibility for States that wished to restrict the scope of the draft convention. The concerns expressed by the representative of France were taken care of by the interlinking of draft article 1 and draft article 18. The only risk for a non-contracting State was that it might find itself obliged to apply the convention to an individual transaction or dispute. He supported the proposal to delete the words "or agreement".

43. **Mr. Bellenger** (France) said that it was clear from the different views expressed that draft article 1 could be interpreted in a number of ways. If, as seemed to be the most widely accepted interpretation, the scope of application of the draft convention would be the same as that of the Sales Convention, he saw no reason for the insertion of such an unusual clause. He warned of the danger of setting a precedent that might lead to a convention being applicable to a State that had not chosen to adopt it or even being universally applicable although it had only been ratified by a small number of States.

44. **Mr. D'Allaire** (Canada) said that draft article 1 should not be viewed in isolation but in conjunction with draft articles 18 and 19. The question was whether the provisions of the draft convention might be found to apply where a dispute regarding a contract concluded between two parties located in non-contracting States was for some reason governed by the law of a third State that had ratified the draft convention. He submitted that such cases were not unusual in the context of existing contract law. His delegation therefore had no fundamental problem with draft article 1.

45. He supported the deletion of the words "or agreement", which caused confusion.

46. Lastly, he cautioned against drawing analogies with the Sales Convention, since the draft convention was an interpretative instrument and there was nothing to fear from breaking the mould established by previous conventions.

47. **Mr. Yang Lixin** (China) said that his delegation had supported the inclusion of the words “or agreement” in the interests of consistency with draft article 19. However, he now felt that the same aim could be achieved by means of a commentary defining the term “contract”.

48. **Mr. Sandoval** (Chile) noted that States wishing to restrict the scope of application of the draft convention would be free to do so under draft articles 18 and 19. He supported the deletion of the words “or agreement”.

49. **Mr. Chong** (Singapore) endorsed the comments made by the observer for Ireland, the representative of the United States and the Secretariat on the intended scope of draft article 1, read in conjunction with draft articles 18 and 19. The concerns expressed by the delegation of France regarding possible drafting ambiguities could be addressed in the commentary. He supported the proposal to delete the words “or agreement” and to insert an appropriate clarification in the commentary.

50. **Mr. Boulet** (Belgium) emphasized that the draft convention, as an interpretative instrument, was not intended to stand alone but to be applied in conjunction either with a domestic law declared applicable to the subject matter or with an international convention whose scope of application might be adversely affected by an unduly restrictive approach. He therefore supported the wording of draft article 1 as it stood. The draft convention did not establish substantive rules but offered guidance on how to interpret existing rules. Its *sui generis* character warranted a distinctive scope of application.

51. **Mr. Madrid Parra** (Spain) said that he concurred with the explanation given by the Secretariat and supported the proposal to include a clarification in the commentary to allay concerns that the scope of application might undermine the sovereignty of non-contracting States. He agreed with the representative of Belgium that the draft convention would be applied only alongside applicable substantive laws.

52. Although his delegation had earlier supported the proposal to insert the words “or agreement” in draft article 1, he would have no objection to a clarification being included in the commentary instead.

53. **Mr. Laval** (Guatemala) proposed inserting in draft article 1 the following introductory phrase to allay the concerns of the French delegation: “It being understood that this Convention does not aim to impose

on States not parties thereto any obligation whatsoever to act or refrain from acting in any way”.

54. It was clear from the reference to parties to a contract that the words “or agreement” could not refer to an agreement between States. However, to avoid ambiguity “or agreement” could be replaced with “or any other agreement relating thereto”.

55. **Mr. Nordlander** (Sweden) said that he could accept the wording of draft article 1 as it stood. If the words “or agreement” might lead to confusion, they should be deleted and a clarification included in the commentary.

56. **Mr. Martens** (Germany) said that draft article 1 ought to be read in conjunction with draft articles 18 and 19. He agreed with the Secretariat and the observer for the Hague Conference on Private International Law that no material risk would ensue from acceptance of the wording approved by the Working Group.

57. With regard to the addition of “or agreement”, he concurred with the representative of Guatemala that the word agreement, read in conjunction with a reference to the “places of business” of the parties, could not by any stretch of the imagination be interpreted to mean an agreement under public international law.

58. **Mr. Chung Wan-yong** (Republic of Korea) said that it should be made clear whether the draft convention would be applicable to non-contracting States if a State failed to make the declaration under draft article 18.

59. He supported the insertion of the words “or agreement” in order to align the wording with that used in draft article 19.

60. **Mr. Chikanda** (Zimbabwe) said he did not consider that the language of draft article 1, paragraph 1, would give rise to ambiguity.

61. **The Chairman** noted that there was strong support for maintaining the scope of the draft convention as currently formulated in draft article 1.

62. While the overwhelming majority of speakers did not support the inclusion of the words “or agreement”, all agreed that the intent of the word “contract” should be clarified in the commentary to the article.

63. The question arose whether the concern expressed by the observer for the Hague Conference on Private International Law should be addressed in the context of draft article 1 or draft article 18.

64. **Mr. Estrella Faria** (Secretariat) said that the Working Group had reformulated draft article 1 on the assumption that the draft convention would apply in all cases where the law of a Contracting State was applicable to a transaction involving electronic messages. The conditions limiting the scope of the draft convention had been moved from draft article 1 to draft article 18 but the list of qualifications had been maintained. On the assumption that the rules of private international law were implicit in draft article 1, the observer for the Hague Conference on Private International Law had requested clarification of the provision in draft article 18, paragraph 1 (b), to the effect that a State could declare that it would apply the Convention only when the rules of private international law led to the application of the law of a Contracting State. A simple way of ruling out the possibility of an autonomous scope of application might be to delete paragraph 1 (b) of draft article 18. If necessary, the commentary could state that draft article 1 was meant to apply if the forum State was a Contracting State and if the rules of private international law applied by the forum State led to the application of its own law or that of another Contracting State.

65. **The Chairman** suggested that the Commission take time to reflect on the Secretariat's recommendation and defer consideration of the issue until the time came to discuss article 18 of the draft convention.

66. *It was so decided.*

67. **The Chairman** noted that there were no comments on paragraphs 2 and 3 of draft article 1. He therefore took it that the Commission wished to adopt draft article 1 without the words "in agreement" in paragraph 1.

68. *It was so decided.*

69. *The substance of draft article 1, as amended, was approved and the text was referred to the drafting group.*

#### *Article 2. Exclusions*

70. **Mr. Estrella Faria** (Secretariat) said that draft article 2 had given rise to extensive debate in the Working Group. Draft paragraph 1 (a) provided for the exclusion of consumer contracts, using the same wording as the United Nations Sales Convention, and draft paragraph 1 (b) provided for the exclusion of transactions where it was felt that the application of the convention might disrupt the functioning of markets,

especially financial markets, that had established their own rules.

71. Draft paragraph 2 concerned the exclusion of certain negotiable instruments on the ground that the rules contained in the draft convention could not provide the guarantee of singularity required for the legal recognition of electronic equivalents of such instruments. Moreover, at the current stage of technological development, it would be premature to attempt to develop permanent rules for dealing with such instruments in an international convention.

72. **Ms. Schulz** (Observer for the Hague Conference on Private International Law) said that the HCCH had screened all Hague conventions to determine where communications in written form were required and where their replacement by communications in electronic form might be incompatible with the spirit and purpose of the Convention. The issue arose only in connection with the Convention on the Law Applicable to Matrimonial Property Regimes (The Hague, 1978). Nothing in the draft convention explicitly limited its scope of application to transactions related to international trade or commercial transactions. She feared that the exclusion from the scope of the draft convention of electronic communications relating to contracts concluded for personal, family or household purposes in draft article 2, paragraph 1 (a), would be interpreted, as in the United Nations Sales Convention, as relating only to consumer transactions. To avoid ambiguity, she would welcome more explicit language in the commentary to the effect that the draft convention covered only commercial or trade-related concepts.

73. **Mr. Madrid Parra** (Spain) said that a commentary along the lines requested by the observer for the Hague Conference on Private International Law might be more pertinent under draft article 1, paragraph 3.

74. **Ms. Gurbanova** (Observer for Azerbaijan) proposed incorporating a new paragraph in draft article 2 that would read:

"The Convention does not apply to the contracts requiring by law the involvement of activities of courts, public authorities or professionals exercising public authority; notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority; the representation of a client and defence of his interests before the courts."



75. **The Chairman** said that it was for the Commission to decide whether such a far-reaching proposal should be discussed at that stage.

76. **Mr. Boulet** (Belgium) said that negotiable instruments raised a special issue because of the requirement of a guarantee of singularity. His delegation had submitted a comment (A/CN.9/578/Add.12) on draft article 9, paragraphs 4 and 6, since it believed that the notion of an “original” in those paragraphs should be associated with the guarantee of singularity.

77. With regard to the suggestion by the observer for Azerbaijan, he felt that it was preferable to adhere to the approach agreed by the Working Group, namely that there should be a limited number of explicit exclusions that could be supplemented, where necessary, by States in the form of declarations under draft article 18, paragraph 2, until such time as they considered that the declarations could be safely withdrawn. Any exhaustive list would in all likelihood be rendered obsolete within a short time.

78. **Mr. Burman** (United States of America) said that he was concerned at the reopening of the discussion on matters that had been explored in depth by the Working Group. Draft article 18 provided a mechanism whereby countries seeking to restrict the application of the draft convention could do so, but the Working Group’s policy decision against providing for restrictions ab initio had won strong support. His delegation was comfortable with the draft article as it stood.

*The meeting rose at 12.35 p.m.*

**Summary record of the 795th meeting, held at the Vienna International Centre  
on Monday, 4 July 2005, at 2 p.m.**

[A/CN.9/SR.795]

*Chairman:* Mr. Chan (Singapore), (Vice-Chairman)

*In the absence of Mr. Pinzón Sánchez (Colombia), Mr. Chan (Singapore), Vice-Chairman, took the Chair.*

*The meeting was called to order at 2.10 p.m.*

**Finalization and adoption of a draft convention on the use of electronic communications in international contracts** (*continued*) (A/CN.9/571, 573, 577 and Add.1, 578 and Add.1-17)

*Article 2. Exclusions (continued)*

1. **The Chairman** reminded the Commission that the Hague Conference on Private International Law had requested at the 794th meeting (A/CN.9/SR.794) that the commentary to draft article 2 should contain a statement to the effect that the scope of the draft convention did not extend to contracts relating to the division of matrimonial property.

2. **Mr. Burman** (United States of America) said that the Working Group, after extensive deliberations, had decided to eliminate a number of possible areas of exclusion from draft article 2, including matters relating to matrimonial law and the law of succession, so that States wishing to apply the draft convention to such matters were free to do so. States wishing to exclude them could make a declaration to that effect under draft article 18. It would be inappropriate to include a statement in the commentary that conflicted with that decision.

3. **Ms. Schmidt** (Germany) proposed allaying the concerns of the Hague Conference on Private International Law by including a statement in the commentary to the effect that the draft convention dealt essentially with trade-related matters.

4. **The Chairman** said that the Working Group had taken a deliberate decision to keep the scope of the draft convention as broad as possible and to avoid any exclusion that might reduce its flexibility. In the absence of strong support for the proposed clarification, he took it that the Commission agreed not to include it in the commentary and to approve the draft article as it stood.

5. *It was so decided.*

6. *The Commission approved the substance of draft article 2 and referred the text to the drafting group.*

*Article 3. Party autonomy*

7. **Mr. Estrella Faria** (Secretariat) said that an article on party autonomy was a customary provision in UNCITRAL instruments. The two issues that had emerged during the meetings of the Working Group were: whether derogations must be explicit or could also be implicit in parties' agreement on contract terms that were at variance from the provisions of the draft convention; and whether some provisions should be made non-derogable. Some States had taken the view that parties ought not to be able to derogate from the minimum legal requirements set forth in draft articles 8 and 9, while others had concluded that in any case nothing in the draft convention would allow the parties to derogate from mandatory provisions of national law.

8. **Ms. Schmidt** (Germany), drawing attention to Germany's written comment (A/CN.9/578/Add.8), said that her delegation believed that the scope of party autonomy should be restricted to draft articles 10 to 14 and that it should be made clear that the remaining articles of the draft convention did not fall within the scope of draft article 3.

9. **Mr. Bellenger** (France), supporting the proposal by the German delegation, said that the credibility of the draft convention would be undermined if there were not at least some provisions from which parties could not derogate. As the concept of implicit derogation would be open to interpretation by courts, it would create considerable legal uncertainty. Derogation should be explicit so that the intention to derogate was clearly demonstrated.

10. **Mr. Field** (United States of America), drawing attention to the United States comment on draft article 3 (A/CN.9/578/Add.13), said he understood that the

Working Group had concluded that the scope of party autonomy should extend to implicit as well as explicit derogations. However, his delegation had reached the conclusion, following consultations at the national level, that the draft article as it stood did not make that possibility sufficiently clear. While he would be amenable to the insertion of the words “implicitly or explicitly” in the draft article itself, he proposed instead that a statement be included in the commentary to the effect that the intention was to permit implicit derogation.

11. He also thought it unnecessary to specify which articles were non-derogable. In the absence of legislative intent, private law would not override public law with respect to such articles. However, if the Commission wished to place further limitations on party autonomy, he proposed that parties be accorded the right to derogate from any of the articles in chapter III, including draft articles 8 and 9. There might be valid reasons, for instance, to vary some of the rules set out in article 9 for specific applications. Such freedom would also, in his view, serve the interests of electronic commerce.

12. **Mr. D’Allaire** (Canada) said that party autonomy was a key principle in contractual dealings. Consequently, parties should be allowed to derogate from most provisions. His delegation had no objection to keeping draft article 3 as it stood. However, if the scope of party autonomy was to be restricted, the final provisions under chapter IV should be made non-derogable, since it would be anomalous to allow parties to derogate from matters that were effectively public policy.

13. **Mr. Madrid Parra** (Spain) expressed firm support for the text as drafted, which did not limit party autonomy and allowed derogations to be either implicit or explicit. Parties could simply agree not to apply the whole or a part of the draft convention to a particular contract.

14. **Ms. Lahelma** (Observer for Finland) said that her delegation was satisfied with the current wording of draft article 3 and foresaw difficulties if some articles, such as draft article 9 as proposed by the German delegation, were to be exempted. The Secretariat had confirmed that party autonomy did not mean that the draft convention empowered parties to set aside statutory requirements.

15. **Mr. Yamamoto** (Japan) and **Mr. Sandoval** (Chile) expressed support for the principle of implicit derogation.

16. **Mr. Nordlander** (Sweden) said he was content with the wording of draft article 3 as it stood but would appreciate further enlightenment regarding the issue of explicit and implicit derogation.

17. **Mr. Boulet** (Belgium) said he saw no reason for explicit derogation to be required provided that a clear distinction was drawn by the parties between the terms agreed and the provisions of the draft convention. However, as the same clause had been used in other conventions, a statement in the commentary to the effect that the wording of draft article 3 should be interpreted as permitting implicit derogations might be read as implying that other conventions, including substantive instruments, containing a similar clause should be interpreted in the same way. As the draft convention was an interpretative instrument he wondered whether there was any need to include draft article 3.

18. **Mr. Estrella Faria** (Secretariat) said that if the Commission intended implicit derogation to be permissible, the commentary could make that understanding clear but add that similar clauses in other instruments should not necessarily be interpreted in the same way.

19. Although many of the provisions of the draft convention, such as part of draft article 8 and most of draft article 9, were interpretative, some articles, notably draft article 10 on time and place of dispatch and receipt of electronic communications, and draft article 14 on error in electronic communications, had practical consequences in terms of specifying a default provision in the absence of any contractual provision. As he saw it, the Working Group had intended that parties should not have the right to lower the standards for electronic signatures set out under draft article 9, since they were statutory standards and amounted to minimum requirements, but that parties should have the right to require higher standards of reliability than those provided for under draft article 9. Draft article 3 had been worded to reflect that intention. Thus, where provisions were intended to establish functional equivalence for electronic means in order to meet a statutory requirement such as providing a written signature, parties could agree on a higher standard than that set out in the draft convention but did not have the power to alter statutory requirements since they had

been created not by the draft convention itself but by the applicable statutory law.

20. **Mr. Bellenger** (France) said that he was not familiar with the concept of an “interpretative” convention and he wished to know what text the draft convention was supposed to be interpreting. If it was a purely interpretative instrument, he wondered what purpose it would serve.

21. In his view, all international conventions must contain a minimum number of provisions from which parties could not derogate. The proposal made by the representative of Germany therefore seemed entirely appropriate. Draft article 9 on form requirements, for instance, laid down a number of essential conditions for functional equivalence between electronic communications and paper documents.

22. **The Chairman** said he took it that the Commission agreed that derogation could be either explicit or implicit and that that agreement should be reflected in the commentary.

23. *It was so decided.*

24. **The Chairman** invited further comments on possible limitations on the scope of party autonomy.

25. **Mr. Chung Wan-yong** (Republic of Korea) said that he did not see any need to limit party autonomy under draft article 3, given that paragraph 2 of draft article 18 already allowed States to make exclusions by means of declarations. He supported retaining the text of draft article 3 without amendment. In particular, the addition of the word “implicitly” in draft article 3 would create legal uncertainty.

26. **Mr. Burman** (United States of America) said that there seemed to be a consensus in favour of keeping the draft article unchanged. It was implicit in treaty practice that the provisions of a private law convention did not derogate from mandatory public law. That principle need not be spelled out in the text of the draft article but simply mentioned in the commentary.

27. **Mr. Minihan** (Australia) expressed support for the text as drafted, which he interpreted to imply that parties could not derogate from the final provisions under chapter IV, since they were addressed to States rather than to parties. He supported the right to derogate from all the draft articles under chapter III. If parties chose to derogate from the draft convention’s provisions on form requirements, they should be free to do so, since

the underlying legal requirements would be set forth in domestic law. He also supported the right to derogate from draft article 6, since he anticipated that parties might wish to reach a separate agreement in respect of the location of the parties.

28. **Mr. Chikanda** (Zimbabwe) said he wished to add his voice to the consensus on keeping draft article 3 as it stood.

29. **The Chairman** asked whether the Commission wished the commentary to state that treaty practice precluded any derogation from elements of the text that dealt with public policy issues determined by Governments, notably the final provisions under chapter IV.

30. *It was so decided.*

31. **Ms. Schmidt** (Germany) proposed that the commentary should also make it clear, as suggested by the representative of the United States, that parties could not derogate from the mandatory provisions of domestic law.

32. *It was so decided.*

33. *The Commission approved the substance of draft article 3 and referred the text to the drafting group.*

## *Chapter II. General provisions*

### *Article 4. Definitions*

34. **Mr. Estrella Faria** (Secretariat) said that where the wording of definitions in draft article 4 was drawn from the definitions contained in the UNCITRAL Model Law on Electronic Commerce, they had been approved by the Working Group with little discussion. The most contentious definitions had been (f), “information system”, and (h), “place of business”. However, the Working Group’s reformulation of draft article 10 had made it easier to reach agreement on the definition of an information system. Some written comments before the Commission sought to align the wording with International Organization for Standardization (ISO) definitions that had probably not existed when the Model Law was drafted. The Commission should decide whether it was necessary to align the definitions with those of the International Organization for Standardization, which in his view were not all that different in terms of substance.

35. **The Chairman** urged the Commission to bear in mind that any change to the definitions under draft article 4 might necessitate corresponding amendments elsewhere in the draft convention.

36. **Mr. Madrid Parra** (Spain), noting the importance of international standardization, asked whether the terms used in the definitions or alternative terms had been employed in other international contexts.

37. **Mr. Estrella Faria** (Secretariat) said that the International Organization for Standardization's preferred definitions of "data" and "information system" were reproduced in the written comment submitted by the Government of Belarus (A/CN.9/578/Add.3). The definitions were used for technical purposes in international commercial practice; to his knowledge, they had not been used in instruments comparable to the draft convention.

38. **Ms. Gurbanova** (Observer for Azerbaijan) drew attention to her Government's proposal to incorporate two new definitions, of a "commercial communication" and of an "intermediary", in draft article 4. The proposal had been submitted in a written comment (A/CN.9/578/Add.17) which had not yet been circulated.

39. **The Chairman** invited the Commission to consider the definitions one by one.

*Definition (a), "Communication"*

40. *The Commission approved the substance of definition (a) and referred the text to the drafting group.*

*Definition (b), "Electronic communication"*

41. *The Commission approved the substance of definition (b) and referred the text to the drafting group.*

*Definition (c), "Data message"*

42. **Mr. Laval** (Guatemala) questioned the need to include the abbreviation "EDI" in brackets after "electronic data interchange", given that the term did not appear elsewhere in the text.

43. **Mr. Estrella Faria** (Secretariat) explained that the abbreviation had been included so that readers would immediately make the connection between the term "electronic data interchange", which might be unfamiliar, and its more commonly used abbreviation, "EDI".

44. **Mr. Boulet** (Belgium) said that the word "information" was very broad, since a telephone call could be deemed to be information sent by electronic means. He was not proposing that the definition be amended but requested that the commentary should emphasize that the use of the word "information" should not be interpreted as broadening the notion of a "data message".

45. **The Chairman** said that the Working Group had discussed the meaning of the term "data message" at length and had concluded that it was intended to be broad. Moreover, the word "information" was qualified by the phrase "generated, sent, received or stored by electronic, magnetic, optical or similar means". He assured the Belgian delegation that when drafting the commentary the Secretariat would be guided by the reports of the Working Group and the comments of the Commission.

46. *The Commission approved the substance of definition (c) and referred the text to the drafting group.*

*Definition (d), "Originator"*

47. *The Commission approved the substance of definition (d) and referred the text to the drafting group.*

*Definition (e), "Addressee"*

48. *The Commission approved the substance of definition (e) and referred the text to the drafting group.*

*Definition (f), "Information system"*

49. *The Commission approved the substance of definition (f) and referred the text to the drafting group.*

*Definition (g), "Automated message system"*

50. *The Commission approved the substance of definition (g) and referred the text to the drafting group.*

*Definition (h), "Place of business"*

51. **Mr. Silverman** (Observer for the International Bar Association) said that, after reading the definition of a place of business under draft article 4 in the context of draft article 1, he remained confused as to what occurred if one of the parties had multiple places of business. The definition did not clearly indicate that the relevant place of business was that of the person entering into the agreement. He tentatively proposed that clarity might be

achieved by inserting the word “respective” before “parties” in the first line of paragraph 2 of draft article 1.

52. **Mr. Estrella Faria** (Secretariat) said that the issue of plurality of places of business might be adequately dealt with by paragraph 2 of draft article 6, which stipulated that if a party had more than one place of business, the place of business for the purposes of the draft convention was that which had the closest relationship to the relevant contract. A similar provision appeared in the United Nations Sales Convention.

53. **Mr. Silverman** (Observer for the International Bar Association) said that the Secretariat’s comment had largely addressed his concern.

54. **Mr. Hidalgo Castellanos** (Mexico) said he feared that the inclusion of a definition of “place of business” in respect of electronic contracts might result in different places of business being recognized for contracts concluded by electronic means from those recognized for paper-based or orally concluded contracts.

55. **The Chairman** pointed out that the definition had been included only for the purpose of determining the applicability of the draft convention, and was not intended to affect substantive rights or the substantive law that applied to the transaction.

56. **Mr. Bellenger** (France) expressed support for the position taken by the Mexican delegation. The notion of “place of business” was well known and yet another definition of the term entailed the risk of fragmentation of the law. As the Working Group had opposed any derogation from general contract law, he proposed that the definition of the term “place of business” be deleted.

57. **The Chairman**, noting that there was no support for the proposal by the representative of France, said he took it that the Commission wished to approve the definition of the term “place of business”.

58. *The Commission approved the substance of definition (h) and referred the text to the drafting group.*

#### *Article 5. Interpretation*

59. **Mr. Estrella Faria** (Secretariat) said that an article on interpretation was a standard provision in all UNCITRAL conventions and had not proved contentious in the Working Group.

60. *The Commission approved the substance of draft article 5 and referred the text to the drafting group.*

#### *Article 6. Location of the parties*

61. **Mr. Estrella Faria** (Secretariat) said that draft article 6 had been debated at length in the Working Group and had been redrafted several times. Draft paragraph 1 created a presumption, albeit a relatively weak and rebuttable one, that a party’s place of business was the location that it indicated. However, it was not intended to allow a party to indicate a fictional place of business. The other party to the contract, or indeed any other party, was authorized to demonstrate that the first party did not have a place of business at the location indicated. A party could also demonstrate that the place of business indicated under draft article 6, paragraph 1, did not meet the requirements of the definition of a “place of business” under draft article 4. That possibility might allay the concern expressed by some delegations that the draft convention appeared to acknowledge or endorse “virtual” entities or companies.

62. The United Nations Sales Convention contained a provision similar to paragraph 2 of draft article 6. The paragraph dealt with cases in which a party had more than one place of business and would apply only when a party had not indicated a place of business under paragraph 1. It had been agreed by the Working Group that, where a party had several places of business, it should have the right to indicate which place of business should be regarded as having the closest relationship to the relevant contract.

63. Draft paragraph 3 was also derived from a similar provision of the United Nations Sales Convention and dealt with natural persons who did not have a place of business within the meaning of the definition in draft article 4.

64. Draft paragraph 4, which drew inspiration from a notion contained in the preamble to Directive 2000/31/EC of the European Union on electronic commerce, stipulated that the location of a server or an information system was not of itself constitutive of a place of business but had to be supplemented by other material and substantive factors.

65. Similarly, draft paragraph 5 stipulated that the use of a domain name or electronic mail address connected to a specific country did not, of itself, create a presumption regarding the location of a place of business. That principle did not preclude a court from attaching some value to the link between a domain name

and a particular country, but only if the link was supported by other evidence.

66. **Mr. Field** (United States of America) commended the Working Group on formulating the draft article in such a way as to avoid endorsing virtual companies, a principle reinforced by the reference to a non-transitory establishment in the definition of a place of business in draft article 4.

67. His delegation recommended deleting the words “subject to paragraph 1 of this article” in square brackets in draft article 6, paragraph 2. In addition, he proposed that the phrase “and has more than one place of business, then” should be deleted, since if the party had not indicated a place of business and had only one place of business, that place of business would automatically have the closest relationship to the relevant contract.

*The meeting was suspended at 3.40 p.m. and resumed at 4.05 p.m.*

68. **Mr. Yamamoto** (Japan) said that draft article 6, paragraph 2, did not seem to be applicable to a case in which a party had more than one place of business but indicated a place of business that was subsequently demonstrated by a third party to be fictional. It might therefore be appropriate to delete the words “has not indicated a place of business and” in the first line of draft paragraph 2. If the Commission considered that the case was covered by the present wording of draft paragraph 2, that understanding should be spelled out in the commentary.

69. **Mr. Bellenger** (France) said that he had reservations about draft article 6 because it did not oblige parties to indicate their place of business but merely gave them the option of doing so. Moreover, there was a presumption that the place of business was the location indicated by a party and it was for the other party, in most cases the purchaser, to prove otherwise. In his view, the opposite should be the case. Legal certainty would be undermined if a purchaser did not know the location of a vendor’s place of business. Commercial fraud would flourish in the absence of effective rules to contain it. The Commission had a role to play in promoting electronic commerce, but in doing so it should give due attention to important issues such as the use of electronic communications for money-laundering and the financing of terrorism. Draft article 6 should therefore be amended to create a positive obligation of disclosure of a party’s place of business.

70. **The Chairman** said that the Working Group had initially pursued the ambitious goal of drafting a convention that included provisions of substantive law, including consumer protection provisions. A requirement for a vendor to disclose its place of business would constitute such a provision. However, the Working Group had ultimately lowered its ambitions, merely seeking functional equivalence for electronic communications in the areas to which the draft convention applied. The Working Group had been aware of the need to bear in mind issues such as commercial fraud, money-laundering and other transnational crimes. However, the prevalent view had been that such matters were best left to domestic legislators. Substantive rules such as that proposed by the representative of France required means of enforcement and the Commission was unlikely to have time to address such major issues at its current session.

71. **Mr. Field** (United States of America) said his delegation believed that the Working Group had reached a wise decision on the matter. A mandatory rule would have to be accompanied by a description of the consequences of non-compliance. That was not the role of the draft convention. In any case, draft articles 7 and 13 made it clear that nothing in the draft convention would affect any domestic rule of law.

72. **Mr. Madrid Parra** (Spain) said that his delegation supported the wording of draft article 6 as it stood, with the deletion of the text in square brackets in paragraph 2.

73. **Mr. Velázquez** (Paraguay) said that he opposed the introduction of a mandatory rule of disclosure.

74. He proposed that draft paragraph 5 should be amended to cover the use of electronic media other than domain names or electronic mail addresses such as short message service (SMS) facilities. The words “domain name or electronic mail address”, for instance, could be replaced with “domain name, electronic mail address or other means of electronic communication”.

75. **Ms. Schmidt** (Germany) said she agreed with the representative of France that there should be an obligation for parties to disclose their place of business. Such a provision would enhance legal certainty regarding the scope of application of the draft convention.

76. **Mr. Lavalle** (Guatemala) said that neither draft paragraph 1 nor draft paragraph 2 appeared to cover

cases in which a party that had only one place of business did not indicate a place of business. He therefore supported the United States proposal to delete the words “and has more than one place of business, then” in draft paragraph 2.

77. **Mr. Silverman** (Observer for the International Bar Association) proposed that the words “domain name or electronic mail address” in draft paragraph 5 be replaced with “domain name, electronic mail address or other implied indicia of location”.

78. **Mr. Bergevin** (Observer for the European Commission) said he agreed with the representatives of France and Germany that the draft article should make it obligatory for a party to disclose its place of business in order to avoid relying on a presumption. As the Secretariat had mentioned, disclosure was a key obligation under the European Union Directive.

79. **Mr. Buttimore** (Observer for Ireland) said that his delegation supported the deletion of the words in square brackets in draft paragraph 2 but was in favour of retaining the remainder of the paragraph as it stood. It also supported the amendment to draft paragraph 5 proposed by the representative of Paraguay.

80. While recognizing the concerns expressed by the representatives of France, Germany and the European Commission, he opposed the proposal to introduce an obligation of disclosure. Draft article 6 read in conjunction with draft article 7 represented an acceptable compromise in that regard.

81. **Mr. Madrid Parra** (Spain) expressed support for the proposal by the representative of Paraguay regarding draft paragraph 5. It would make the provision consistent with the definition of “data message” in draft article 4.

82. He was opposed to the discussion of matters of substantive law. In any case, draft articles 7 and 13 contained ample safeguards against potential abuse.

83. **Mr. Chong** (Singapore) said that his delegation opposed the inclusion of a positive obligation to disclose a party’s place of business because of the need to accompany such a requirement by provisions setting out the consequences of failure to comply. Moreover, he did not believe that such an obligation would help to determine the scope of application of the draft convention, as the representative of Germany had suggested. Scope of application was a matter dealt with

by draft article 1 and including a positive obligation in draft article 6 had no bearing on the question.

84. The reasoning behind paragraphs 1 and 2 of draft paragraph 6 was that if a party indicated a place of business, paragraph 1 would apply, while if a party made no indication, it either had only one place of business and the situation was clear, or it had more than one place of business and paragraph 2 was applicable. It was therefore unnecessary to provide for cases in which a party had not made an indication and had only one place of business.

85. He supported the amendment to draft paragraph 5 proposed by the representative of Paraguay.

86. **Mr. Yamamoto** (Japan) said that his delegation took it that paragraph 2, as currently drafted, dealt only with cases in which a party had more than one place of business. He did not agree with the United States proposal to delete the words “and has more than one place of business, then”, since cases in which a party made no indication and had only one place of business were covered by the definition of a place of business in draft article 4.

87. His delegation supported the proposal made by the representative of Paraguay with regard to draft paragraph 5.

88. **Mr. D’Allaire** (Canada) said that a disclosure obligation would have no effect without provision for the consequences of failure to comply with that obligation. If parties wished to benefit from the presumption provided for in draft paragraph 1, they would take steps to indicate their place of business.

89. He agreed with the proposed deletion of the bracketed text in draft paragraph 2 and with the amendment to draft paragraph 5 proposed by the representative of Paraguay.

90. **Ms. Lahelma** (Observer for Finland) said that her delegation supported the views expressed by the representatives of Ireland, Singapore and Canada with regard to disclosure obligations. The compromise solution reached by the Working Group, whereby draft article 6 was to be read in conjunction with draft article 7, had been accepted by all delegations attending the Working Group’s session.

91. **Mr. Bellenger** (France) said it was illogical to argue that the draft convention should not lay down substantive rules because it contained no penalties for



non-compliance. He pointed out that some articles, such as draft article 9, established substantive rules but made no provision for penalties, which raised the question of how they were to be enforced.

92. **Mr. Boulet** (Belgium) said that his delegation supported the deletion of the bracketed text in paragraph 2 but opposed the United States proposal to delete the preceding phrase, because the rule set out in draft paragraph 2 was meaningful only if a party had more than one place of business.

93. With regard to the question of disclosure obligations, it was important to make clear that draft article 6 did not encroach on any rule in a Contracting State that imposed an obligation to provide information. To remove all possible ambiguity, that fact should be spelled out in the commentary or even included in the article itself.

94. **The Chairman** pointed out that draft article 7 made that very point. However, it could perhaps be reinforced by the commentary to draft article 6.

95. **Mr. Estrella Faria** (Secretariat) said that the opening words of draft article 6, paragraph 2, had been agreed upon by the Working Group for the reasons set out in document A/CN.9/571, paragraph 100. It was implicit in paragraph 2 that the paragraph covered only cases in which a party had more than one place of business and failed to indicate which one was relevant for the purposes of the draft convention. Where a party had only one place of business and did not disclose it, the definition in draft article 4 clarified the situation.

96. The Working Group had been aware that draft article 6 was based on a similar provision in the European Union Directive. The member States of the European Union had indicated that it had been left to them to provide for the consequences of failure to comply with the disclosure obligation. Each country applied a different regime, ranging from invalidity of the contract to administrative sanctions, penalties that would be inappropriate in the draft convention. The Working Group had concluded that, however desirable a disclosure obligation might be from the standpoint of transparency, it was simply not feasible to provide for it in the draft convention.

97. **The Chairman** noted that there appeared to be a consensus on deleting the bracketed text in draft paragraph 2. There was also strong support for the proposal to add a reference in draft paragraph 5 to “other

means of electronic communication”. However, there was little support for the United States proposal to delete the phrase “and has more than one place of business, then” in draft paragraph 2 or for the French proposal to make disclosure of a party’s place of business mandatory. If he heard no objection, he would take it that the Commission wished to adopt draft article 6, with the proposed amendments to draft paragraphs 2 and 5.

98. *The substance of draft article 6, as amended, was approved and the text was referred to the drafting group.*

99. **Mr. Bellenger** (France) said that his delegation’s proposal had not been rejected out of hand. The representative of Belgium, for instance, had suggested that the commentary should make clear that the draft convention did not encroach on domestic law.

100. **The Chairman** assured the representative of France that his views had been recorded and that the commentary would clearly state that the draft convention would not affect any mandatory requirement of domestic law.

101. **Mr. D’Allaire** (Canada) drew attention to the proposal by the representative of Japan to state in the commentary that draft article 6, paragraph 2, applied to cases in which a party indicated a place of business but that indication was rebutted under paragraph 1. His delegation supported that proposal.

102. Although his delegation opposed the inclusion of a disclosure obligation in draft article 6, he shared the view of the French delegation that the issue had not been settled in a satisfactory manner. He would be interested in hearing the views of other delegations on the matter.

*The meeting rose at 5 p.m.*

**Summary record of the 796th meeting, held at the Vienna International Centre  
on Tuesday, 5 July 2005, at 9.30 a.m.**

[A/CN.9/SR.796]

*Chairman:* Mr. Chan (Singapore), (Vice-Chairman)

*In the absence of Mr. Pinzón Sánchez (Colombia), Mr. Chan (Singapore), Vice-Chairman, took the Chair.*

*The meeting was called to order at 9.45 a.m.*

**Finalization and adoption of a draft convention on the use of electronic communications in international contracts** (*continued*) (A/CN.9/571, 573, 577 and Add.1, 578 and Add.1-17)

*Article 6. Location of the parties (continued)*

1. **The Chairman** drew attention to the possible pitfalls of attempting to amend the draft convention from the floor. A case in point was the Commission's decision, at its 795th meeting, to insert the phrase "or another means of electronic communication" after "electronic mail address" in draft article 6, paragraph 5. The drafting group had found that the proposed new element fell into a different category from domain names and electronic mail addresses, and would shortly publish document A/CN.9/XXXVII/CRP.2 containing three variants of draft paragraph 5 in square brackets for consideration by the Commission. The Commission might in any case decide that it would be preferable to omit the reference to "another means of electronic communication" so as not to rule out the possibility that as yet undiscovered forms of electronic communication might appropriately create a presumption that a party's place of business was located in a particular country.

2. He suggested that the Commission should suspend consideration of draft paragraph 5 until the drafting group's suggestions became available.

3. *It was so decided.*

4. **The Chairman** reminded the Commission that no decision had been reached on the proposal by the Japanese delegation that the commentary to draft article 6, paragraph 2, should state that paragraph 2 was applicable where a party indicated its place of business, giving rise to the presumption that it was located where it said, but the presumption was rebutted under paragraph 1.

5. **Ms. Schmidt** (Germany) said that the rebuttal of such a presumption would be based on a demonstration of the actual location of a party's place of business in accordance with the definition in draft article 4. She therefore wondered whether it was necessary to apply the default rule contained in draft article 6, paragraph 2.

6. **Mr. Yamamoto** (Japan) said that the draft convention should make it clear that if a party had more than one place of business and could be shown to have indicated the wrong location, draft article 6, paragraph 2, would apply.

7. **Ms. Schmidt** (Germany) said that the appropriate place of business in that circumstance would, in her view, be the place of business with the closest relationship to the relevant contract.

8. **Mr. Estrella Faria** (Secretariat) suggested that the concern of the Japanese delegation might be addressed by a statement in the commentary to the effect that draft article 6, paragraph 2, would be applicable in the absence of a valid indication of a place of business. There would then be no need to change the text of the draft convention.

9. **Mr. Field** (United States of America), **Mr. Yamamoto** (Japan) and **Mr. Yang Lixin** (China) expressed support for the formulation suggested by the Secretariat.

10. **The Chairman** said he took it that the Commission accepted that an appropriate clarification should be included in the commentary.

11. *It was so decided.*

*Article 7. Information requirements*

12. **Mr. Estrella Faria** (Secretariat) said that the text of draft article 7 was the result of a compromise within the Working Group, which had decided to recommend that requirements for the disclosure of identities, places of business or other information should be those established by the substantive law governing the

contract. The purpose of the draft article was to make it abundantly clear that nothing in the draft convention gave any party the right to indicate a fictitious place of business in order to evade obligations under applicable law.

13. **The Chairman** said that the text reflected the outcome of a lengthy discussion in the Working Group of the extent to which the draft convention should prescribe substantive rules.

14. **Mr. Boulet** (Belgium) said that his delegation supported the thrust of the draft article. As the text stood, however, no reference was made to a situation in which a party failed to make any disclosure at all, as opposed to making a false or inaccurate statement. Since there was, in any case, little difference in meaning between “inaccurate” and “false”, he suggested that the words “inaccurate or false” should be replaced with “inaccurate or incomplete”. Alternatively, the word “incomplete” could be added to the existing provision.

15. **Mr. Madrid Parra** (Spain), supported by **Mr. Bellenger** (France), **Mr. Houmann** (Observer for Denmark), **Mr. Sandoval** (Chile), **Mr. Velázquez** (Paraguay) and **Mr. Yang Lixin** (China), said that the proposed amendment dealt satisfactorily with a situation that was not otherwise covered by the draft convention.

16. **The Chairman** said he took it that the Commission agreed to replace “inaccurate or false” with “inaccurate, incomplete or false”.

17. *It was so decided.*

18. *The substance of draft article 7, as amended, was approved and the text was referred to the drafting group.*

#### *Article 8. Legal recognition of electronic communications*

19. **Mr. Estrella Faria** (Secretariat) said that draft article 8 was not contentious. Draft paragraph 1 reflected a similar provision in the UNCITRAL Model Law on Electronic Commerce. Draft paragraph 2 did not appear in the Model Law but had been incorporated in the domestic legislation of several jurisdictions to balance the general principle enunciated in draft paragraph 1.

20. *The substance of draft article 8 was approved and the text was referred to the drafting group.*

#### *Article 9. Form requirements*

21. **Mr. Estrella Faria** (Secretariat) said that draft article 9 had, by contrast, created some controversy, as evidenced by the number of comments on some of its paragraphs submitted by Governments. Draft paragraphs 1 and 2, however, were relatively uncontroversial. The latter was based on article 7 of the UNCITRAL Model Law on Electronic Commerce.

22. Draft paragraph 3 concerning signatures had given rise to extensive debate on the relative advantages of the short provision used in the UNCITRAL Model Law on Electronic Commerce and the longer one that appeared in the UNCITRAL Model Law on Electronic Signatures. At least two written submissions by Member States opted for the latter formulation. Another area of concern was the reliability test contained in draft paragraph 3 (b). At least two of the comments received were in favour of deleting the provision altogether on the ground that, unlike the UNCITRAL Model Law on Electronic Commerce, the draft convention did not contain a provision on attribution of data messages and the notion of reliability was logically linked to attribution. One argument put forward in the Working Group for retaining the subparagraph was that if the reliability requirement was eliminated, courts might be inclined to apply their own higher domestic standards for signatures, regardless of the purpose for which the message had been generated or communicated. Some delegations had felt that the notion of reliability of the method used for the purpose for which the message was generated or communicated provided some measure of confidence for parties who wished to use a variety of methods of identification but did not wish to be bound by higher standards. The Working Group had therefore decided, on balance, to retain the provision.

23. Draft paragraphs 4 and 5, which were interrelated, had been added relatively late in the proceedings as a consequence of the decision by the Working Group to include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (“the New York Convention”), on the advice of Working Group II (Arbitration), in the list of conventions in draft article 19, paragraph 1. It would be meaningless to accept that an arbitration agreement could be concluded by electronic means without establishing the criteria for functional equivalence between the agreement and the original paper-based document, since the New York Convention itself required a party demanding enforcement of an arbitration award to produce the original of the

arbitration agreement. However, comments had been received from Member States to the effect that the provision was unwarranted because the draft convention did not cover negotiable instruments.

24. Draft paragraph 6 was one of the few provisions that remained in square brackets. It had also been added relatively late in the proceedings of the Working Group at the suggestion of the United States. The intention was to recognize that financial entities and banks should retain the right to require that documentary evidence be submitted in original form and in writing for payment under a letter of credit, even if the letter of credit itself was in electronic form. It was felt that such a provision under draft article 9 was preferable to a general exclusion under draft article 2. Although the proposal had met with opposition, there was reason to hope that the Commission might find a way of reconciling the conflicting views that existed on the issue.

25. **The Chairman** invited the Commission to consider the draft article paragraph by paragraph.

#### *Paragraph 1*

26. *The substance of draft paragraph 1 was approved and the text was referred to the drafting group.*

#### *Paragraph 2*

27. **Mr. Mitrović** (Serbia and Montenegro) said that the meaning of the words “the law” should be clarified both in the text of draft paragraph 2 and in the commentary.

28. **Mr. Bellenger** (France) said he agreed that “the law” was ambiguous and proposed that the text be amended to read: “Where the rules of law require”.

29. **Mr. Mazzoni** (Italy), supported by **Mr. Velázquez** (Paraguay) and **Mr. Boulet** (Belgium), proposed instead the wording “any applicable law”, which was, legally speaking, more precise.

30. **Mr. Bellenger** (France) said that the meaning of the word “loi” in French was narrower than that of the word “law” in English, which was why he had proposed using the term “rules of law”. Alternatively, he proposed the wording: “Where international conventions or the applicable law require”.

31. **Mr. Mitrović** (Serbia and Montenegro) said that the words “the law requires” clearly referred to cases where the law of a particular country required a communication or contract to be in writing. The wording “the applicable law” would therefore be appropriate,

since it was for the court or arbitrator to decide which law was applicable and whether it required the document in question to be in writing.

32. **Mr. Estrella Faria** (Secretariat) suggested that the wording be amended to read: “Where the applicable rules of law require”.

33. **Mr. Gabriel** (United States of America) suggested that the issue be referred to the drafting group, since the Commission was in agreement on the substantive issues. The words “the law” were taken from the UNCITRAL Model Law on Electronic Commerce and had not given rise to difficulties in that context. In his view, “the law” implied, by definition, “the applicable law”.

34. **Mr. Boulet** (Belgium) said that the issue was not merely terminological but substantive. The applicability of the draft convention to international conventions was governed by draft article 19. It would therefore be inappropriate to refer to such conventions separately in draft paragraph 9, which was applicable only to domestic law save under the circumstances set forth in draft article 19.

35. **Mr. Mazzoni** (Italy) said that he supported the position of the delegation of Belgium. Although the language of the Model Law had not given rise to difficulties, it would be helpful to clarify that draft paragraph 2 was intended to refer to conflict of law rules and not to law in general or law merchant. He could accept the Secretariat’s suggested wording “the applicable rules of law”.

36. **Mr. Madrid Parra** (Spain), supported by **Mr. Velázquez** (Paraguay) and **Mr. Sandoval** (Chile), drew attention to a clarification in paragraph 68 of the Guide to Enactment of the Model Law and urged the Commission to exercise caution in introducing changes to the existing wording since it might cause confusion.

37. **The Chairman** read out the relevant passage in the Guide to Enactment:

“the words ‘the law’ in the opening phrase of article 8 are to be understood as encompassing not only statutory or regulatory law but also judicially-created law and other procedural law”.

38. **Ms. Cherif Chefchaoui** (Morocco), supported by **Mr. Bellenger** (France), pointed out that since the Model Law was designed to be incorporated in national law, the words “the law” in that context clearly referred to domestic law. She therefore supported the proposal to refer to “applicable rules of law” in draft paragraph 2.

39. **Mr. Maiyegun** (Nigeria) said that in his view the words “the law” were sufficiently clear and caused no confusion.

40. **Mr. Minihan** (Australia) said he was also in favour of leaving the paragraph as it stood but he could accept the wording “applicable rules of law” since he saw no real difference in meaning between the two options.

41. **Mr. Buttimore** (Observer for Ireland) advocated retaining the paragraph as it stood. Any linguistic problems with the French version could be addressed in the drafting group.

42. **Mr. Chong** (Singapore), **Mr. Yang Lixin** (China) and **Mr. Bouacha** (Algeria) agreed that the draft paragraph should remain unchanged.

43. **Mr. Mitrović** (Serbia and Montenegro) said that if the question arose in practice, it would be for a court or arbitrator to decide which law was applicable; that was why he had proposed the wording “applicable rules of law”.

44. **Mr. Field** (United States) suggested that it might be sufficient for the relevant passage in the Guide to Enactment of the Model Law to be incorporated in the commentary.

45. **The Chairman** said he took it that the Commission wished to retain the wording of the paragraph as it stood but to request the Secretariat to incorporate the clarification contained in paragraph 68 of the Guide to Enactment of the Model Law in the commentary.

46. *It was so decided.*

47. *The substance of draft paragraph 2 was approved and the text was referred to the drafting group.*

### Paragraph 3

48. **Mr. Gregory** (Canada) said that Canada, in its written comment (A/CN.9/578/Add.15), had proposed that the reliability test for electronic signatures contained in draft paragraph 3 (b) should be deleted. The text as it stood required that the method used to identify the party and ensure the party's link to the signed document should be as reliable as possible in the circumstances. His delegation's concerns in that regard were matters of principle and policy and not of mere technology. Its basic objection was that there was no requirement of reliability in the general law of signatures. If a reliability requirement were to be included in the law of electronic

signatures, two sets of law would be created. Such a situation would be incompatible with the principles underlying the draft convention, particularly the principle of non-discrimination between paper and electronic documents, or media neutrality, set forth in draft article 8.

49. The purpose of the draft convention was to indicate how a single set of rules of law should best be interpreted in the field of electronic communications and not to create a legal entity, an electronic signature, with a separate status from a handwritten signature. The basic requirement was to establish what constituted the essence of a signature and to ascertain how that essence could be recreated electronically. According to draft paragraph 3 (a), the essence consisted in providing a means of identifying the signing party and of linking that party with the document signed, as in the case of a handwritten signature, for which no further standard of reliability was imposed.

50. The application of a reliability test to electronic signatures would entail major problems where, for instance, other creditors of the parties to a transaction sought access to the assets involved, alleging that the signature requirement had not been met. If the parties to a transaction could prove who had signed and what had been signed, there was no need for a separate abstract reliability test, which could trap the incautious and serve as a weapon for non-parties seeking to attack the transaction.

51. Draft paragraph 3 (b) placed undue emphasis on the technology used and focused on reliability of method rather than on reliability of essence. Directive 2000/31/EC of the European Union on electronic commerce (“the European Union Directive”), on the other hand, allowed the parties to prove the essence of the signature without abstractly proving the reliability of the technology.

52. Certain signatures in some jurisdictions had to be particularly reliable. In civil law systems, for instance, an *acte authentique* (an officially or notarially recorded instrument) had special legal effect, and specific regulation of the technology used for electronic signatures would be required to justify an *acte authentique*. The wording of draft subparagraph (b) fell short of the standard required. Hence the reliability test in its current form was too demanding for business purposes and fell short of what was needed in other cases for public protection. He therefore proposed that the draft subparagraph should be deleted.

53. **Mr. Lavalle** (Guatemala) queried the appropriateness of the wording “approval of the information contained in the electronic communication” in draft paragraph 3 (a). As the purpose of an electronic communication was to express the party’s intent rather than to provide information, he proposed amending the phrase to read “approval of the contents of the electronic communication”.

54. **Mr. Mitrović** (Serbia and Montenegro), referring to the words “[w]here the law requires” at the beginning of draft paragraph 3, said that a guide to enactment was neither on a par with nor superior to a convention and could not be taken into account in interpreting a convention.

55. **Mr. Khani Jooyabad** (Islamic Republic of Iran) noted that the delegation of Canada had made a similar proposal at the last session of the Working Group. The proposal had met with strong opposition and the current wording of draft paragraph 3 (b) had been accepted as a compromise. His delegation was in favour of retaining the text as it stood.

56. **Mr. Chong** (Singapore) drew attention to Singapore’s written comment on draft paragraph 3 (A/CN.9/578/Add.10).

57. The proposal by the delegation of Canada in the Working Group to delete draft subparagraph (b) had been narrowly rejected by five delegations to four. His delegation felt that more attention needed to be given to the important issues raised in that connection. The general reliability requirement in draft subparagraph (b) was based on article 7, paragraph 1 (b), of the UNCITRAL Model Law on Electronic Commerce. Noting the uncertainty created by that provision, the Commission had subsequently agreed to create more certainty by inserting article 6, paragraph 3, in the UNCITRAL Model Law on Electronic Signatures. Draft paragraph 3 (b) required the determination of sufficient reliability to be made *ex post* by a court or other trier of fact, which meant that when two parties to a contract entered into a transaction, they had no idea whether that transaction would eventually be upheld, a state of affairs that was counterproductive and could constitute an impediment to electronic commerce. Unscrupulous parties could try to invalidate their electronic signatures on grounds of unreliability. His delegation therefore strongly advocated the deletion of draft paragraph 3 (b).

58. The UNCITRAL Model Law on Electronic Commerce needed a reliability test because of the general attribution rule contained in article 13. Article 7

thereof was designed to ensure reliability by requiring the signature to perform the function of identification of the signatory. The draft convention, on the other hand, did not deal with attribution of electronic communications, so that there was no need for a reliability test. It was for the individual parties to check with the signatory whether a signature had been appended, and the signature derived its legal effect from the proven link between the signature and the signatory. Draft paragraph 3 (b) was not intended to confer legal validity on an electronic signature but simply to make it the functional equivalent of a handwritten signature. The validity of the signature was to be settled by domestic law if that law was applicable to the contract.

59. Turning to draft paragraph 3 (a), he said that not every signature was intended to indicate the party’s approval of the content of a document. For instance, a witness or notary might simply be associated with the information contained in a document without approving it. He therefore proposed that draft paragraph 3 (a) be amended to read:

“(a) A method is used to identify the party and to associate that party with the information contained in the electronic communication, and as may be appropriate in relation to that legal requirement, to indicate the party’s approval of the information contained in the electronic communication.”

60. **Mr. Yang Lixin** (China) noted that there had originally been two variants of draft paragraph 3 (b), one based on the UNCITRAL Model Law on Electronic Commerce and the other on the UNCITRAL Model Law on Electronic Signatures. His delegation considered that the second variant was preferable. Indeed many countries were already applying article 6 of the UNCITRAL Model Law on Electronic Signatures.

61. **Mr. Smedinghoff** (United States of America) said that his delegation had been comfortable with the text of draft paragraph 3 (b) at the last session of the Working Group but had since been convinced by consultations with other parties in the United States and by the comments submitted by Canada and Singapore that the draft paragraph should be deleted. Where a party was able to prove the validity of a signature, there was no need for an additional reliability test. The European Union Directive as well as domestic legislation in the United States and other countries operated on that assumption. If draft paragraph 3 (b) was not deleted, his delegation would propose an amendment to draft article 9.

62. **The Chairman** noted that very few delegations had participated in the discussion of draft paragraph 3 (b) at the last session of the Working Group and that the outcome had been determined by a narrow margin. He trusted that a broad consensus reflecting the considered opinion of the Commission could now be reached.

*The meeting was suspended at 11.25 a.m. and resumed at 11.50 a.m.*

63. **Mr. Minihan** (Australia), supporting the view expressed by the representative of the Islamic Republic of Iran, said that draft paragraph 3 (b) should be retained in its current form. Special provisions were needed to establish functional equivalence between electronic communications and other types of documents. They were needed, inter alia, to assist States that were enacting new laws in determining what criteria an electronic signature had to fulfil in order to be equivalent to a handwritten signature and also to encourage the use of new technology.

64. One of the arguments for the deletion of draft paragraph 3 (b) was that it might allow the reliability of a signature to be determined by a court after the fact. He pointed out that the validity of a handwritten signature could also be determined by a court after the fact if it was challenged by one of the parties.

65. Another argument was that third parties might use the reliability element to deny the validity of a signature that had been agreed by the parties. However, any such agreement would be taken into account by the court in determining whether the signature was valid in the light of draft paragraph 3 (b), which referred to "any relevant agreement".

66. It had also been argued that unscrupulous parties might try to repudiate their own signature by invoking the reliability element. But courts were well acquainted with that type of problem and had a range of ways of determining whether or not a party should be bound by a signature.

67. If the draft article contained only the identity criterion in paragraph 3 (a), a court in a jurisdiction with digital signature laws might decide that only a digital signature was appropriate for identifying the parties. The provision in paragraph 3 (b), however, would allow the court to consider the circumstances in which the signature had been affixed, thereby permitting something that fell short of a digital signature.

68. The reliability element would not generate more uncertainty than existed at present in terms of a greater risk of court challenges to the validity of a signature and it would provide additional guidance for States that were trying to facilitate electronic commerce. The UNCITRAL Model Law on Electronic Commerce, which contained a reliability requirement, had been adopted by a number of countries, including Australia, and had not so far given rise to any significant problems. Moreover, the Working Group had agreed to retain the reliability element in the draft convention. His delegation therefore favoured retaining draft paragraph 3 (b).

69. **Mr. Mazzoni** (Italy) said that he agreed with the Canadian delegation that a signature was valid for legal purposes if it was associated with a person's clearly stated intent. A signature was not an objective fact whose validity could be adjudicated in the light of technological criteria. A signature by one person on behalf of another reflected, if authorized by the latter, that person's intent.

70. However, the real problem with electronic signatures was that, without certain safeguards, they could be manipulated more easily than handwritten signatures. If the draft convention provided for safeguards against the danger of manipulation, the reliability test in paragraph 3 (b) could be eliminated. Without such safeguards, his delegation would support its retention, albeit with some hesitation because technology was not a sound basis for determining the link between a signature and a person.

71. **Mr. Bellenger** (France) said that his delegation favoured retaining draft paragraph 3 (b). The current wording represented a compromise between civil law and common law approaches that had been agreed upon by the Working Group. In civil law countries, signatures had greater importance because they served not only as a means of identification but also to denote approval of a document. The Working Group had therefore taken the view that equivalence between handwritten and electronic signatures should be assured by a sufficiently reliable method.

72. **Ms. Schmidt** (Germany), endorsing the comments made by the representative of Australia, said that her delegation also wished to retain paragraph 3 (b), which would not, in her view, generate legal uncertainty.

73. **Mr. Sandoval** (Chile) said that his delegation supported Canada's position. The significant changes that had taken place since the elaboration of the

UNCITRAL Model Law on Electronic Commerce made the reliability test unnecessary and draft paragraph 3 (b) should therefore be deleted.

74. His delegation supported Singapore's proposal with regard to draft paragraph 3 (a).

75. **Mr. Velázquez** (Paraguay) said that draft paragraph 3 (b) would enhance legal certainty and the principle of reliability should, in his view, be applicable to all transactions, not only those concluded with an electronic signature. The Model Law had addressed the issue adequately in 1996 and although there had been subsequent developments in electronic commerce, methods were still needed to ensure the reliability of such transactions.

76. **Mr. Mitrović** (Serbia and Montenegro), noting that draft article 9 referred to "a communication or a contract", drew attention to the continuing importance of written authorization for the conclusion of a commercial contract. He therefore suggested that the word "authorization" should be inserted in draft article 9.

77. **Mr. Meena** (India) said that the text of draft article 9 should be retained as it stood.

78. **Mr. Boulet** (Belgium) said that his delegation also wished to keep the text of the draft article unchanged since it set out a clear legal rule governing the validity of electronic signatures. Merely using a method to identify the party and to indicate that party's approval of information, as set out in draft paragraph 3 (a), was inadequate because it would mean that any method of electronic identification would serve as an acceptable guarantee of the validity of a signature. An additional reliability test, as set out in draft paragraph 3 (b), was required. Like the representative of Australia, he believed that the current wording of the draft article was flexible enough to accommodate the legitimate concerns expressed by the representative of Canada, since it referred to "all the circumstances, including any relevant agreement". That reference to an agreement among the parties should perhaps be highlighted in the commentary.

79. With regard to draft paragraph 3 (a), while his delegation understood the motivation for the amendment proposed by the representative of Singapore, it did not believe that a signature could express no approval at all, although there might be cases where it indicated approval of only part of a document rather than the document as a whole. In his view, the text of draft paragraph 3 (a) covered that possibility adequately. However, he suggested inserting the words "all or part

of" after the words "approval of" in order to allay the concerns of the delegation of Singapore.

80. **Mr. Maiyegun** (Nigeria) said that while his delegation wished to retain the reliability requirement, it also sympathized with the concerns expressed by Canada and Singapore. Those concerns could be addressed in an explanatory note or by amending draft paragraph 3 (b). He would like to hear the proposal for new wording referred to earlier by the representative of the United States.

81. **Mr. Chung Wan-yong** (Republic of Korea), endorsing the remarks made by the delegation of Australia, said that the reliability requirement was important and draft paragraph 3 (b) should therefore be retained as an appropriate adaptation of the reliability principle contained in article 6 of the UNCITRAL Model Law on Electronic Signatures.

82. **Mr. Smedinghoff** (United States of America) said that his delegation's concern with regard to draft paragraph 3 (b) was that a signature might actually be proven but its validity nonetheless denied because of a reliability test. He therefore proposed that a phrase should be added to the draft article, perhaps at the end of paragraph 3 (b), along the following lines: "or the validity of the method can otherwise be established by the evidence". That would allow the reliability requirement to be retained while leaving open the possibility for the parties to establish the validity of the signature by any other evidentiary method. The precise wording of such an amendment could be left to the drafting group.

83. **Ms. Proulx** (Canada) said that the concerns expressed with regard to reliability could, in her delegation's opinion, be resolved by combining Singapore's proposal regarding draft paragraph 3 (a) with the United States proposal regarding draft paragraph 3 (b). The validity of a signature could be established by establishing the validity of each of its constituent elements. A signature was an act whereby a person indicated on a document his or her intent. Any method that was capable of proving the identity of the person and establishing a link between the person and the document was, by definition, reliable. In both common law and civil law systems, the main purpose of a signature was to signify intent, which was a neutral concept that allowed for the expression of approval or of other types of consent or association such as that of a witness. The required reliability could be established without changing the legal concept of a signature, which was valid irrespective of the medium used. She therefore



suggested that the wording proposed by the representative of the United States should be added to draft paragraph 3 (a) and that draft paragraph 3 (b) should be deleted.

*The meeting rose at 12.30 p.m.*

**Summary record of the 797th meeting, held at the Vienna International Centre  
on Tuesday, 5 July 2005, at 2 p.m.**

[A/CN.9/SR.797]

*Chairman:* Mr. Chan (Singapore), (Vice-Chairman)

*In the absence of Mr. Pinzón Sánchez (Colombia), Mr. Chan (Singapore), Vice-Chairman, took the Chair.*

*The meeting was called to order at 2.05 p.m.*

**Finalization and adoption of a draft convention on the use of electronic communications in international contracts** (*continued*) (A/CN.9/571, 573, 577 and Add.1, 578 and Add.1-17)

*Article 9. Form requirements (continued)*

*Paragraph 3 (continued)*

1. **The Chairman** invited the Commission to resume its discussion of draft article 9, paragraph 3. He noted that most members preferred to retain the “reliability test” contained in draft paragraph 3 (b), although a significant minority thought it should be abolished. To address the concerns of that minority, the United States delegation had proposed inserting the phrase “or the validity of the method can otherwise be established by the evidence” at the end of the draft paragraph. The delegations of Singapore and Canada had also proposed new wording for draft paragraph 3 (a).

2. **Mr. Gregory** (Canada) said that the United States proposal supplemented the reliability test in a way that addressed the concerns of his delegation. However, he proposed splitting draft paragraph 3 (b) in two, with clause 3 (b) (i) reproducing the present wording and clause 3 (b) (ii) reading “or that method has been proved to identify the party and indicate that party’s approval”. Thus, if the evidence of the identity of the party, the fact of signing and the signature’s link with the party’s approval or intent, as set out in draft paragraph 3 (a), could be proved to be reliable in fact, it would be unnecessary to address the question of whether the method was reliable in principle. The choice was between a test of reliability in principle and a matter of evidence in fact, both supporting the method referred to in draft paragraph 3 (a), which could, in his view, be retained as drafted, subject to possible minor amendments.

3. **Mr. Smedinghoff** (United States of America) said that his delegation would prefer the language that it had originally proposed but it was also comfortable with the proposal by the delegation of Canada.

4. **Ms. Schmidt** (Germany) said that she had reservations about the United States proposal because it implied that indirect evidence used to validate the method would also be sufficient to prove the identity of the party. She proposed as alternative wording: “or the validity of the method can otherwise be established by the identity of the party”.

5. **Mr. Smedinghoff** (United States of America) said that the wording proposed by the German delegation was acceptable.

6. **The Chairman** suggested that the Commission defer consideration of draft paragraph 3 (b) to allow the Secretariat time to work on the wording.

7. *It was so decided.*

8. **The Chairman** invited the Commission to resume its consideration of draft paragraph 3 (a). Some delegations considered that there were circumstances in which the affixation of a signature to a document did not imply that the signatory approved of its content. Other delegations, citing domestic legislation, disagreed. The Commission had before it proposals from the delegations of Singapore and Canada. The wording proposed by the delegation of Singapore read:

“(a) A method is used to identify the party and to associate that party with the information contained in the electronic communication, and as may be appropriate in relation to that legal requirement, to indicate the party’s approval of the information contained in the electronic communication.”

9. **Mr. Smedinghoff** (United States of America) said he broadly agreed with the comments by the delegation of Singapore regarding the word “approval”. There were many reasons why a person might sign a document or be

legally required to do so, only one of which was to indicate approval. Other reasons included to witness an event, to notarize a document or to evidence receipt of information contained in a document. His delegation would therefore support an amendment stating that the method used should associate the party with the information contained in the communication.

10. **Mr. Minihan** (Australia) said he understood that the word “approval” had originally been intended to cover the range of situations mentioned by the United States delegation. He accepted Singapore’s point, however, that that intention was not entirely clear. His delegation was uncertain as to whether it could accept the compromise proposed by the Canadian delegation, but it was prepared to consider some modification to clarify the matter.

11. **Mr. Chong** (Singapore) pointed out that the amendment proposed by his delegation took account of the situation both in jurisdictions in which a signature necessarily signified approval and in jurisdictions where that was not always the case.

12. **Mr. Bellenger** (France) said he found the wording of the proposed amendment unclear.

13. **Mr. Boulet** (Belgium) said that the discussion, in his view, was not about differences of approach adopted by different legal systems. The approval given in the examples cited by the representative of the United States was admittedly more limited, but the signature nonetheless indicated approval of some limited aspect of the document. It might reflect an acknowledgement, for instance, that the signatory had witnessed a document or received the information it contained. To assist in reaching a consensus, he reiterated the proposal his delegation had made at the previous meeting to insert the words “all or part” after “approval of” in draft paragraph 3 (a).

14. **Mr. Gregory** (Canada) proposed that the words “approval of” be replaced with “intention in respect of”. The word “intention” was flexible enough to cover approval, witnessing, acknowledgement and other concepts. Draft paragraph 3 (a) would then read: “A method is used to identify the party and to indicate that party’s intention in respect of the information contained in the electronic communication.”

15. **Mr. Estrella Faria** (Secretariat), referring to the Belgian delegation’s point that a signature, for instance by a notary, might signify approval of only part of a document, suggested replacing the phrase “approval of the information contained in the electronic

communication” with “approval of the information to which the signature relates”.

16. **The Chairman** said that where a suspect was required to sign a subpoena or court document detailing the charges against him or her, the suspect was clearly not approving the charges but merely confirming receipt of the information.

17. **Mr. Chong** (Singapore) said that his delegation had already considered the wording suggested by the Secretariat. However, there might be situations in which a signature was appended to a document without relevant text. Acknowledgement of receipt of goods by means of a signature was satisfactory only if the document stated explicitly that the goods had been received. Otherwise the delivering party could use a signed document without an explicit statement in a court of law as proof of receipt.

18. His delegation was prepared to accept the wording proposed by the Canadian delegation, which was an eloquent way of neutrally stating that a signature might have different functions, including association with and approval of part or all of a document, but that in all cases it reflected the intent of the signatory.

19. **Mr. Boulet** (Belgium) expressed support for the Secretariat’s suggestion. While he agreed with the delegation of Singapore that in some cases the information approved by a signature might not be explicitly stated but merely implicit, he nonetheless submitted that a signature always signified consent to something. The wording proposed by the Secretariat could be supported by a commentary stating that the information referred to by the signature might be implicit.

20. **Mr. Smedinghoff** (United States of America) pointed out that draft paragraph 3 (a) referred to “the information contained in” the electronic communication. His delegation shared Singapore’s concern that in many cases the signatory’s intention was not expressly set forth in a document but had to be inferred from the circumstances, as in the case mentioned by the Chairman of a suspect signing a subpoena. He therefore supported the proposal by the Canadian delegation to replace the word “approval” with “intention”, which would cover all situations.

21. **Mr. Minihan** (Australia) said that, for the reasons stated by the United States delegation, his delegation also supported the text proposed by Canada as addressing the issue raised by draft paragraph 3 (a) most succinctly.

22. **Mr. Madrid Parra** (Spain) said that in the Spanish legal system the term “intention”, or “*intención*” in Spanish, was not used in civil law but only in criminal law. Contract law used the term “*declaración de voluntad*” (declaration of intent). His delegation therefore requested that an alternative term be used. He noted in that connection that since 1992 Spain had been unsuccessfully seeking an acceptable alternative in Spanish to the word “*aprobar*” which was not a satisfactory translation of “approve”.

23. **Mr. Mazzoni** (Italy) proposed replacing the phrase “that party’s approval of the information contained in the electronic communication” with “that the electronic communication is attributable to the will of such party”.

24. **The Chairman** said that the issue of attribution had been carefully avoided in the text of the draft convention.

25. **Mr. Maiyegun** (Nigeria) proposed that the Commission revert to the text suggested by the Secretariat.

26. **Mr. Madrid Parra** (Spain) expressed support for the proposal by the representative of Italy.

27. **Mr. Gabriel** (United States of America) suggested focusing on the Canadian proposal, which addressed the factual aspects of a party’s intention or purpose rather than the legal aspects.

28. **Mr. Mazzoni** (Italy), noting that the word “attributable” was unacceptable, proposed wording such as “to indicate that the electronic communication reflects/expresses/manifests the will of such party”. It was important to avoid giving legal effect to a signature that did not reflect an act of will.

29. **The Chairman** suggested replacing the word “intention” in the proposal by the Canadian delegation with the word “will”.

30. **Mr. Gregory** (Canada) said that the Chairman’s suggestion was acceptable, although the word “*volonté*” in French was more acceptable than “will” in English.

31. **Mr. Smedinghoff** (United States of America) said that the Chairman’s proposal was also acceptable to his delegation.

32. **Mr. Estrella Faria** (Secretariat) noted that the word “will” differed from the term used in the UNCITRAL Model Law on Electronic Commerce. He wondered whether the Commission might be attaching too much importance to the issue of intention or will

since “electronic communication” in the draft convention was defined as “any statement, declaration, demand, notice or request”. It was normally a piece of information that a person approved or expressed the will to endorse.

33. **Mr. Gabriel** (United States of America) pointed out that the word “will” did not have the same connotation in English, either in philosophical or in legal terms, as the words “*volonté*” in French and “*voluntad*” in Spanish, and did not convey the concept of “intention” in the text. He suggested that the matter be referred to the drafting group.

34. **The Chairman** noted that common law drew a clear distinction between the concepts of “will” and “intention”.

35. **Mr. Mazzoni** (Italy) said that it was a legal issue that should be resolved by the Commission itself. He proposed using the words “intention” in English, “*volonté*” in French and “*voluntad*” in Spanish.

36. **Mr. D’Allaire** (Canada), **Mr. Minihan** (Australia), **Mr. Burman** (United States of America), **Mr. Buttimore** (Observer for Ireland), **Mr. Maiyegun** (Nigeria), **Ms. Mosoti** (Kenya) and **Mr. Chong** (Singapore) expressed a preference for the word “intention”.

37. **Mr. Sandoval** (Chile), **Mr. Velázquez** (Paraguay) and **Mr. Madrid Parra** (Spain) said that the word “*voluntad*” was acceptable in Spanish.

38. **Mr. D’Allaire** (Canada) said that his delegation was in favour of using the word “*volonté*” in French.

39. The substance of draft paragraph 3 (a), as amended, was approved and the text was referred to the drafting group.

*The meeting was suspended at 3.30 p.m. and resumed at 4.05 p.m.*

40. **The Chairman** invited the Commission to resume its consideration of draft paragraph 3 (b).

41. **Mr. Estrella Faria** (Secretariat) said that the Secretariat had experienced some difficulty in producing a draft text. He suggested restructuring the whole of draft paragraph 3 to read:

“3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if a method is used

to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication, provided that:

(a) That method is as reliable as appropriate to the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(b) The identity of the party can otherwise be proved."

42. **Mr. Smedinghoff** (United States of America) expressed support for the Secretariat's suggestion, which appeared to resolve the issues raised.

43. **Mr. Boulet** (Belgium) said that his delegation was somewhat sceptical about the proposed text, which stated that the signature requirement would be met if a method was used to identify the party "provided that" the identity of the party could otherwise be proved. The text was, in his view, illogical.

44. **Mr. D'Allaire** (Canada) said that his delegation shared the concern expressed by the Belgian delegation that there was a missing link in the proposed text between the chapeau and subparagraph (b). The proposal made earlier by the German delegation related solely to the identity of the party but, in his view, both the identity and the intention of the party should be mentioned. He proposed that the words "or the intention" be inserted after the word "identity" in subparagraph (b).

45. **Mr. Chong** (Singapore) suggested the following amendment to draft paragraph 3 (b) as proposed by the Secretariat in order to indicate that if the method used performed the functions set out in draft paragraph 3 (a), the question as to whether that method was sufficiently reliable would not arise:

"(b) That method is proven to have identified the party and to have indicated that party's intention in respect of the information contained in the electronic communication."

46. **Ms. Schmidt** (Germany) said she agreed with the Canadian delegation that subparagraph (b) should refer to both identity and intention. The proposal by Singapore, however, focused on the method. She would prefer wording such as "That the identity and intention of the party can otherwise be proved".

47. **Mr. Madrid Parra** (Spain) said that he agreed with the comment by the representative of Belgium on

the Secretariat's proposal. If identity could be proved by any means whatsoever, such proof might bear no relationship to the electronic environment. Moreover, it was unclear whether the emphasis in the proposal by the delegation of Singapore was placed on the method used or the identity of the party.

48. **The Chairman** said that several members were clearly wondering why there was any need to be concerned about the viability of the method if the identity of the party could be proved in any case. It should be borne in mind, however, that focusing exclusively on the establishment of identity would be tantamount to attribution, which was a vexed issue that the Working Group had carefully avoided. The delegations consulted by Singapore had apparently agreed that the focus should be on the method. Where a signature was required, it was not necessary to prove that the party concerned had signed the document, provided that the method could be proved. That could be done either by proving that the method could identify the party and was reliable or that the method was proven to have identified the party, whether or not it satisfied the reliability test.

49. **Mr. Estrella Faria** (Secretariat) said that the Canadian delegation's original concern had been that draft paragraph 3 (b) might be interpreted as referring to an abstract criterion of reliability, which could lead to situations in which a court would deem a signature to be invalid because a method to which that jurisdiction attached legal consequences had not been used. To address that eventuality and to take account of situations in which the parties were fully aware of each other's identities, Canada had proposed alternative wording. The Secretariat had subsequently suggested language that merely referred to the possibility of otherwise establishing the identity of the party. That version had been opposed on the ground that although establishment of identity was the purpose of a signature, it was important to focus instead on the method used. The proposal by the representative of Singapore had the advantage of recognizing that the parties could either meet the abstract reliability requirement by using a recognized method or use another method that was a valid means of identification inasmuch as it could be proven in fact that the party had been identified by that method. The Singaporean proposal thus appeared to address the concerns of Canada and the United States.

50. The question raised by Germany as to whether surrounding circumstances could be used to establish the party's identity might be addressed by the phrase "in the

light of all the circumstances, including any relevant agreement” in draft paragraph 3 (b) of the original version. For instance, although a jurisdiction might not recognize negotiations by e-mail as meeting the highest standards of reliability, that method might be deemed sufficient to identify the party and meet the requirements of draft paragraph 3 (a) in the light of all the circumstances and the agreement of the parties. Moreover, the wording proposed by Singapore would provide for situations in which it could be demonstrated that a method had identified a party, regardless of how that method was viewed in abstract terms in a given jurisdiction.

51. **Mr. Mazzoni** (Italy) expressed support for the thrust of the Singapore proposal but suggested that the wording should be pared down and clarified.

52. **Mr. Smedinghoff** (United States of America) proposed the following amendment to the text of draft paragraph 3 (b) suggested by the Secretariat in order to address the issue raised by Germany:

“(b) The identity of the party and that party’s intent with respect to the information can otherwise be proven or established.”

The focus would then be on meeting the two basic requirements of establishing the identity of the party and the party’s intention with respect to the information contained in the electronic communication.

53. **The Chairman** suggested setting up a small ad hoc drafting group to propose a compromise text.

54. *It was so decided.*

55. **Mr. Gregory** (Canada) said that his delegation would be pleased to participate in the group.

56. **Mr. Boulet** (Belgium) said that the UNCITRAL Model Law on Electronic Signatures had laid down explicit criteria for determining what constituted a reliable method. Similar wording had been adopted in the draft convention and any departure from that wording might undermine the Model Law.

57. **The Chairman** advised the ad hoc drafting group to bear in mind Belgium’s words of caution and to avoid undermining established concepts.

#### Paragraph 4

58. **Mr. Smedinghoff** (United States of America) proposed replacing the word “presented” in the second line of the chapeau by “made available”. The concept of “presentation” had a specific meaning in United States

law, for instance in relation to letters of credit and negotiable instruments

59. **The Chairman** said he took it that the Commission wished to adopt the proposed amendment.

60. *It was so decided.*

61. **Mr. Boulet** (Belgium) drew attention to Belgium’s written comment on paragraphs 4 to 6 of draft article 9 (A/CN.9/578/Add.12), noting that those paragraphs had not been examined in depth by the Working Group.

62. The exclusion of negotiable instruments and documents of title from the scope of the draft convention by draft article 2 was warranted by the fact that it was not possible in an electronic context to guarantee the singularity of such documents, an attribute that was related to their status as “originals”. Although there could be several “original” documents, each one required the active intervention of the individual parties, who controlled the number of originals to be created. In an electronic environment, the parties would be unable to exercise such control.

63. If there was a real functional equivalent of the notion of an “original” in an electronic environment, the issue of singularity would not arise. Paragraph 4 of draft article 9, however, made no mention of singularity. Hence there was no guarantee that a document deemed to be an original could not be reproduced without a further intervention by the parties. In other words, the parties would be unable to control the number of documents and ensure that each one could be deemed to be an original. Unless the notion of singularity could be included in draft paragraph 4, his delegation would not be in a position to adopt the provision.

64. The question of documents of title and negotiable instruments was being addressed by Working Group III (Transport Law), which was drafting an instrument on maritime transport that would deal, *inter alia*, with electronic bills of lading. The Commission should not pre-empt the work of that Group by approving a text that enshrined a notion of “original” which was, in his delegation’s view, unsatisfactory. He proposed that draft paragraph 4 should either contain a reference to the notion of singularity or be deleted pending the outcome of the deliberations of Working Group III.

65. **The Chairman** reminded the Commission that the references to originals had been included, at the request of the Working Group II (Arbitration and Conciliation),

to extend the applicability of the draft convention to the New York Convention.

*The meeting rose at 5 p.m.*

**Summary record of the 798th meeting, held at the Vienna International Centre  
on Wednesday, 6 July 2005, at 9.30 a.m.**

[A/CN.9/SR.798]

*Chairman:* Mr. Chan (Singapore), (Vice-Chairman)

*In the absence of Mr. Pinzón Sánchez (Colombia), Mr. Chan (Singapore), Vice-Chairman, took the Chair.*

*The meeting was called to order at 9.45 a.m.*

**Finalization and adoption of a draft convention on the use of electronic communications in international contracts** (*continued*) (A/CN.9/571, 573, 577 and Add.1, 578 and Add.1-17)

*Article 9. Form requirements (continued)*

*Paragraph 4 (continued) and paragraph 5*

1. **The Chairman** invited the Commission to resume its discussion of draft paragraph 4 of draft article 9, which should perhaps be considered together with paragraph 5.

2. **Mr. Field** (United States of America) said that his delegation was satisfied with paragraph 4, as amended, and paragraph 5 of draft article 9. When the time came to discuss draft paragraph 6, he would propose that it be deleted in the light of the amendment to paragraph 4. As uniqueness was not easy to achieve in an electronic environment, the draft convention excluded instruments that required uniqueness in draft article 2, paragraph 2. He submitted that draft paragraphs 4 and 5 were easily reconcilable in their current form with the work being undertaken in other international forums, including in the maritime field.

3. **Mr. Mazzoni** (Italy) said he agreed with the representative of the United States that paragraph 2 of draft article 2 resolved the uniqueness issue raised by the Belgian delegation.

4. **Mr. Chong** (Singapore) also concurred with the representative of the United States. A distinction could be drawn between two categories of “original” document: documents such as negotiable instruments with a single original, and other documents such as contracts prepared in duplicate or airway bills prepared in four copies, for which there was more than one “original”. Documents in the latter category would benefit from draft article 9, paragraph 4.

5. **The Chairman** observed that there seemed to be little support for the position taken by the Belgian delegation. He reminded the Commission that it had agreed at its 797th meeting to replace the phrase “should be presented” in draft paragraph 4 with “should be made available”.

6. **Mr. Field** (United States of America) said that the word “presented” occurred three times in draft paragraph 4; he proposed that it be replaced with the words “made available” in each case.

7. *It was so decided.*

8. **Mr. Imai** (Japan) said that he had some reservations regarding draft paragraphs 4 and 5 because the reference in those paragraphs to the concept of originality meant that the draft convention regulated not only the use of electronic communications but also rules of evidence. As rules of evidence formed part of States’ codes of civil procedure and also of their judicial and administrative procedures, draft paragraphs 4 and 5 would have an unacceptable impact on national legal regimes. He therefore proposed that the draft paragraphs should be deleted or else that their scope should be limited to arbitration agreements.

9. **The Chairman** noted that when the issue raised by Japan had been discussed in the Working Group, the consensus view had been that States which had difficulties with draft paragraphs 4 and 5 could make an opt-out declaration under draft article 18.

10. **Mr. Caprioli** (France) said that he supported the United States delegation’s view regarding draft paragraphs 4 and 5 and agreed with the distinction drawn between an environment in which the uniqueness of an original was important, as in the case of negotiable instruments which were not covered by the draft convention, and an environment in which singularity was not required. France had recently adopted amendments to its Civil Code regarding the notion of an original and that of a copy. The approach it had adopted,



particularly as regards integrity and availability, was very close to that reflected in draft paragraph 4.

11. **Mr. Boulet** (Belgium) said that he had difficulty following the argument that the notion of an original could differ between one context and another. The concept originated in a paper-based environment and although the draft convention sought to transpose it into an electronic environment, the characteristic of uniqueness remained. A document was either an original or it was not: there was no middle ground. While draft article 18, paragraph 2, allowed States to exclude some types of contract, it did not allow them to refrain from applying certain provisions of the draft convention such as that pertaining to the notion of an original. To address the misgivings of some delegations, the Working Group had, however, envisaged giving States the possibility of excluding paragraphs 4 and 5 of draft article 9 (A/CN.9/577, footnote 5).

12. **The Chairman** noted that draft article 18 was worded in such a way that it might arguably be seen to provide Contracting States with the option of excluding the provisions in the draft convention pertaining to the validity of electronic originals.

13. **Mr. Mazzoni** (Italy) said that it should be made clear that States were entitled to make exclusions in that regard.

14. **Mr. Estrella Faria** (Secretary) said that the footnote to document A/CN.9/577 was not intended to suggest that there should be a specific option to exclude paragraphs 4 and 5 of draft article 9. The purpose of the broad formulation of draft article 18, paragraph 2, had been to exclude matters that would otherwise have created difficulties. He urged the Commission to resist the temptation to insert provisions that would permit declarations on or reservations to every draft article.

15. **The Chairman** said he took it that the Commission wished to insert a clarification in the commentary to the effect that exclusions under draft article 18 could relate to any matters dealt with in the draft convention that created difficulties for States.

16. *It was so decided.*

17. **Mr. Mitrović** (Serbia and Montenegro) said that if each Contracting State was free to make as many declarations, in other words reservations, as it wished, the aim of enhancing legal certainty would be undermined. Although draft article 21 stated that no reservation might be made, declarations under draft articles 18 or 19 amounted to the same thing. In his

view, exclusions should not be permitted where consensus had been reached on a draft article.

18. **The Chairman** said that the practice of allowing declarations under private international law conventions was to leave scope for party autonomy. The value of the present draft convention was that it set international standards that served as default rules from which States should not deviate without good reason.

19. **Mr. Burman** (United States) said that it had been the practice since the 1970s to provide generous scope for declarations that did not amount to reservations; it was particularly important to continue that practice in the case of the present draft convention because rapidly changing circumstances might require States to make adjustments when they came to implement it.

20. **Mr. Boulet** (Belgium) said that the draft convention dealt with an issue that required particular flexibility, which made the use of declarations entirely appropriate. A similar approach had been adopted in the European Union Directive on electronic commerce.

21. **Mr. D'Allaire** (Canada) said he understood that the Japanese delegation considered that it should be possible to limit the application of draft article 9, paragraphs 4 and 5, to arbitration agreements and that the convention as drafted would not allow such flexibility. His delegation's understanding of draft article 18 was that when States excluded certain matters from the scope of application, the exclusion would be applicable to the convention as a whole even if it related only to specific paragraphs. Japan's proposal was worth considering when the Commission discussed draft article 18 for a number of reasons, some of which related to the Belgian delegation's comment regarding the originality and integrity of documents. Some States might find that the proposed solution would give them the flexibility to implement the draft convention.

22. **Mr. Burman** (United States of America) said that his delegation did not interpret article 18 as being limited in the way described by the Canadian delegation.

23. **The Chairman** said he took it that the Commission wished to approve the substance of draft paragraph 4, as amended, and of draft paragraph 5 and to refer the text to the drafting group.

24. *It was so decided.*

#### *Paragraph 6*

25. **The Chairman** noted that the United States delegation wished to withdraw draft paragraph 6, despite

having introduced it in the Working Group. However, at least one written comment had argued for the retention of the paragraph, which was in square brackets because the Working Group had not had time to examine it in depth at its forty-fourth session.

26. **Ms. Schmidt** (Germany) said that her delegation wished to retain draft paragraph 6 since the alternative—exclusions under draft article 18, paragraph 2—would undermine the aim of the convention to ensure the greatest possible uniformity of law.

27. **Mr. Khani Jooyabad** (Islamic Republic of Iran) expressed support for the proposal by the German delegation. The inclusion of draft paragraph 6 would allay a number of concerns regarding ambiguities in draft paragraphs 4 and 5 and should therefore be retained.

28. **Mr. Madrid Parra** (Spain) said that his delegation did not support the proposal to retain draft paragraph 6, not because it did not agree with exclusions but simply because exclusions were already provided for in draft article 2, paragraph 2, which stated that the convention did not apply to “any transferable document or instrument” that entitled the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money. The list contained in draft article 2 was thus open-ended. If a Contracting State still felt that the provision was not clear enough, it had the option of declaring, under draft article 18, that particular financial instruments such as bank guarantees, letters of credit or any new instrument that emerged in the future was not included in the scope of application of the convention.

29. **Mr. Estrella Faria** (Secretariat) said that the Spanish translation of draft paragraph 6 might have created confusion. The English version referred to a rule of law or agreement between the parties requiring a party “to present certain original documents”, meaning evidentiary documents that accompanied a letter of credit rather than the letter of credit itself. The Spanish version referred to only one original document and thus, by implication, to the letter of credit itself.

30. **Mr. Mazzoni** (Italy), **Mr. Imai** (Japan), **Mr. Yang Lixin** (China) and **Mr. Velázquez** (Paraguay) expressed support for the retention of draft paragraph 6.

31. **Mr. Madrid Parra** (Spain) said that in order to keep the scope of application of the draft convention as broad as possible only minimal exclusions were established under draft article 2, while States could make additional exclusions under draft article 18. They

could not, however, decide to include provisions. Paradoxically, therefore, if the parties agreed that one of the instruments mentioned in draft paragraph 6 of article 9 should be accompanied by a document in electronic form, that document would be unacceptable because of its exclusion by the draft paragraph, which might thus restrict the use of electronic means and was therefore superfluous.

32. **Mr. Minihan** (Australia) expressed support for the comments made by the Spanish delegation. Draft paragraph 6 excluded the instruments that it mentioned from the scope of the convention and appeared to limit the flexibility of States and parties wishing to use electronic versions of those instruments. States that had concerns regarding those matters could make exclusions under draft article 18.

33. **The Chairman** reminded the Commission that draft paragraph 6 would apply only where a rule of law or an agreement between the parties required a party to present original documents. Conversely, draft paragraphs 4 and 5 would not apply in those circumstances alone.

34. **Mr. Chong** (Singapore) expressed support for the thrust of the comments made by the Spanish delegation. Draft paragraph 6 had originally been proposed by the United States delegation to address a very narrow class of documents, since the delegation had felt that banks and financial intermediaries might be unwilling to accept electronic originals. As the United States delegation was now willing to delete the paragraph and the German delegation had not presented any compelling arguments for its retention, the delegation of Singapore supported its deletion.

35. **Mr. Mitrović** (Serbia and Montenegro) said that if draft paragraph 6 were retained, all States would be able to accept draft paragraphs 4, 5 and 6. Those against its inclusion would be free to exclude that paragraph. If draft paragraph 6 were deleted, on the other hand, States might exclude draft paragraphs 4 and 5.

36. **Mr. Boulet** (Belgium) supported the views expressed by the Spanish delegation. In view of the scope of draft article 18, paragraph 2, draft paragraph 6 of article 9 was redundant. It was more logical to deal with the issue it addressed under draft article 18 and he therefore supported the proposal to delete draft paragraph 6.

37. **Mr. Maiyegun** (Nigeria) said that the provisions of draft articles 2 and 18 already covered all

eventualities and draft paragraph 6 should therefore be deleted.

38. **Mr. Sandoval** (Chile) also supported the proposal to delete the draft paragraph, which added superfluous material to a draft article that was already long and complex.

39. **Mr. Mazzoni** (Italy) said that if the principal instruments, namely letters of credit, bank guarantees or similar instruments, were excluded from the scope of the convention, it was logically consistent that the draft convention should not regulate the presentation of ancillary documents pertaining to the use of such instruments.

40. **Mr. Chung** (Republic of Korea) supported the proposal to delete draft paragraph 6. Although the “original documents” referred to in the draft paragraph were not letters of credit or bank guarantees themselves, they might have an equivalent value. Furthermore, original documents of that kind would be used frequently in the future for bank-to-bank transactions.

41. **Mr. Williams** (South Africa) said that his delegation supported the deletion of draft paragraph 6, which was superfluous given that there was nothing to prevent a State from excluding the effects of paragraphs 4 and 5.

42. **Mr. Caprioli** (France) expressed support for the deletion of draft paragraph 6 both for the sake of consistency and to ensure the applicability of draft paragraphs 4 and 5 in the absence of an exclusion under draft article 18.

43. **The Chairman** asked whether it was the common understanding of the Commission that letters of credit were not covered by the draft convention, which appeared to be the basis of the proposal by the Italian delegation to retain draft paragraph 6.

44. **Ms. Schmidt** (Germany) said that although an exclusion covering the subject matter of draft paragraph 6 could be made under draft article 18, paragraph 2, it would be preferable to include an exclusionary provision under draft article 9 because it was unclear which instruments for claiming payment were excluded under draft article 2. In her delegation’s view, draft article 9, paragraph 6, referred not only to ancillary documents but also served to ensure that all instruments under which payment could be claimed were excluded.

45. **Mr. Gabriel** (United States of America) said that draft paragraph 6 had not been intended to deal with letters of credit themselves. It was his delegation’s

understanding, however, that letters of credit would be covered by the draft convention unless a State explicitly excluded them.

46. **Mr. Boulet** (Belgium), endorsing the comment made by the previous speaker, said that draft article 2, paragraph 2, excluded only negotiable instruments and documents of title from the scope of application of the draft convention. Letters of credit were not excluded.

47. **Mr. Velázquez** (Paraguay) said that his delegation supported Germany’s position. Draft article 18, paragraph 2, provided for exclusions from the scope of application of the draft convention, whereas draft article 9, paragraph 6, referred to exclusions agreed between the parties. As the draft convention did not exclude bank guarantees, draft paragraph 6 should be retained. It was his delegation’s understanding that letters of credit were covered by the draft convention.

48. **Mr. Mazzoni** (Italy) said that letters of credit were clearly excluded from the scope of application of the draft convention by the clause in draft article 2, paragraph 2, concerning “any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money”.

49. **Mr. Chung Wan-yong** (Republic of Korea) said that the terms “letter of credit” and “bank guarantee” had been mentioned explicitly in an earlier version of draft article 2, paragraph 2. However, the Working Group had decided at its last session to delete them. The documents referred to in the paragraph were documents of title. Letters of credit and bank guarantees were therefore, in his view, covered by the draft convention.

50. **Mr. Estrella Faria** (Secretariat) said that the emphasis in draft article 2, paragraph 2, was on transferable documents, a term which, according to the Working Group, did not cover letters of credit and bank guarantees.

51. **Mr. Buttimore** (Observer for Ireland) said that his delegation had some sympathy with the point of view expressed by the representative of Italy but endorsed the comment by the representative of the Secretariat. That aspect of draft article 2, paragraph 2, should, in his view, be clarified in the commentary.

52. **Mr. Gabriel** (United States of America), endorsing the comments made by the representative of the Republic of Korea, said that the content of draft article 9, paragraph 6, was an accurate reflection of what the law was and should be and of existing and

foreseeable banking practice. However, the paragraph was superfluous because a letter of credit agreement would normally specify what form the various documents in question should take, creating in the case in point either an express or an implicit opt-out from the draft convention.

53. **Mr. Caprioli** (France) said that there were two categories of letter of credit: those that were used as a means of payment and those that served as guarantees. The latter fell within the scope of application of the draft convention. The former could be excluded in some cases but not as a matter of principle.

54. **Mr. Meena** (India) expressed the view that draft article 9, paragraph 6, was rendered unnecessary by the provision of draft article 3 regarding party autonomy.

55. **The Chairman** said he took it that, in the absence of strong support for the proposal made by the delegation of Germany, the Commission wished to delete paragraph 6 of draft article 9.

56. *It was so decided.*

*The meeting was suspended at 11.05 a.m. and resumed at 11.35 a.m.*

#### *Paragraph 3 (continued)*

57. **The Chairman** noted that the Commission had already agreed in principle that draft paragraph 3 of article 9 should provide for an alternative to the reliability test but it still had to decide on the wording. He invited the ad hoc working group to report on its proceedings.

58. **Mr. Chong** (Singapore) said that a proposed wording had been agreed by the ad hoc drafting group. The objective was to ensure that, if an electronic signature fulfilled the functions described in draft article 9, paragraph 3 (a), a party could not challenge the validity of that signature on the grounds of non-reliability. Draft subparagraphs (a) and (b) would now read:

“(a) A method is used to identify the party and to indicate that party’s intention in respect of the information contained in the electronic communication; and

(b) That method used is either:

(i) As reliable as appropriate to the purpose for which the electronic communication was generated or communicated, in the light of all the

circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.”

59. **Mr. Madrid Parra** (Spain) asked whether the new wording of draft paragraph 3 (b) was intended to exclude the possibility of proving identity and intention by methods other than that provided for in draft paragraph 3 (a).

60. **The Chairman** said that the Commission had decided at a previous meeting that the requirements of draft paragraph 3 should be met through proof of method only and not through proof of identity. As proof of identity was related to the issue of attribution, the Commission had decided that it should not be addressed.

61. **Ms. Schmidt** (Germany) said that her delegation had raised the issue of whether it was possible to provide evidence not only of the method used but also of identity and intention. Its concern had been met by the new wording, which was open enough to allow further evidence to be taken into account alongside proof of the method used.

62. **Mr. Chong** (Singapore) said that the ad hoc drafting group’s understanding had been that fulfilment of the functions set out in draft article 9, paragraph 3 (a), should be proved not only through evidence of the method itself but also, if necessary, through further evidence. The proof should not, on the other hand, be confined to extraneous evidence that disregarded the method used. Thus, if the method used failed to identify the party and to indicate that party’s intention but it could nonetheless be proved through extraneous evidence that the electronic signature had been created by the signing party, such a signature would not meet the requirements of draft article 9, paragraph 3.

63. **Mr. Boulet** (Belgium) noted that article 6 of the UNCITRAL Model Law on Electronic Signatures had been drafted with a view to expanding on the principle of reliability of method contained in article 7 of the UNCITRAL Model Law on Electronic Commerce. The proposed text of draft article 3 seemed to undermine that approach. It was important, in his view, to preserve consistency between the draft convention and the UNCITRAL Model Law on Electronic Signatures.

64. **The Chairman** said he understood that the Belgian delegation wished to preserve the reliability test because it was the only test referred to in previous

UNCITRAL documents. He pointed out, however, that the Model Laws had been enacted by many jurisdictions without the reliability test. It was important for the draft convention to take account of developments since the adoption of those instruments.

65. **Mr. Gregory** (Canada) said that the new draft text did not supersede the reliability test, which, as interpreted by the UNCITRAL Model Law on Electronic Signatures, remained in force and unchanged, but constituted an alternative to it, which might be termed “reliability in fact”. There would be no inconsistency between the draft convention and the Model Law.

66. **Mr. Laval** (Guatemala) said that the use of the words “further evidence” in subparagraph (ii) of the proposed new text implied that the method itself constituted evidence. He therefore suggested a more precise, albeit longer, form of words along the following lines: “evidence that might complement the evidence obtained by application of the method”.

67. **Mr. Gregory** (Canada), supported by **Mr. Chong** (Singapore), said that the ad hoc drafting committee had tried to keep the text as economical and compact as possible without sacrificing any of the meaning. He submitted that there was no ambiguity because the words “further evidence” referred to the word “proven” rather than to the word “method”.

68. **The Chairman** said he took it that the Commission accepted the wording of draft paragraph 3 proposed by the ad hoc drafting group.

69. *The substance of draft article 9 was approved and the text was referred to the drafting group.*

*Article 10. Time and place of dispatch and receipt of electronic communications*

70. **Mr. Estrella Faria** (Secretariat) said that paragraph 1 of draft article 10 was based on article 15 of the UNCITRAL Model Law on Electronic Commerce. However, the Working Group had agreed that the time at which a communication left the originator’s information system rather than the time it entered an information system outside the originator’s control should be the criterion for establishing the time of dispatch. In most situations, the result would be the same as under the Model Law despite the fact that the criterion was different.

71. The same applied to draft paragraph 2, which seemed to differ from the Model Law but in substance

remained the same. A message was deemed to have been received when it became capable of being retrieved and the operation of that rule was supported by a presumption that retrievability occurred once an electronic communication reached the addressee’s electronic address. The term “electronic address” replaced the term “information system”.

72. One new element in the draft article was the second sentence of paragraph 2, which had given rise to extensive debate. The aim had been to use alternative wording to capture the underlying meaning of the terms “designated” and “non-designated” information systems in the Model Law without using those words.

73. Draft paragraphs 3 and 4 were very similar to the corresponding provisions of the Model Law.

74. With regard to the written comment concerning the possible need for an explanatory note on the use of security devices that might prevent the receipt of a data message, if the Commission wished to endorse that proposal, it should give a clear indication of what the explanatory note should say regarding whether or not, and to what extent, security devices or measures would effectively, for legal purposes, prevent the receipt of electronic communication.

*Paragraph 1*

75. *The substance of draft paragraph 1 was approved and the text was referred to the drafting group.*

76. **Mr. Smedinghoff** (United States of America) proposed that the commentary should emphasize that the presumption in draft paragraph 2 that an electronic communication was capable of being retrieved by the addressee when it reached the addressee’s electronic address was rebuttable, given current concerns about security technologies, spam filters and other attempts to restrict problematic electronic communications.

77. Another issue relating to draft paragraph 2 was the increasingly common practice of delivering information not by sending it to a party but by posting it on the Internet and informing the intended recipient by electronic mail that a document was available for retrieval at a given website address. The commentary to the draft paragraph should make it clear that the mere fact that information was not sent to an address designated by the addressee did not preclude the possibility that it had been received by the addressee.

78. **The Chairman** said that the issue raised by the representative of the United States had not been

discussed by the Working Group. The Commission must be particularly clear in its instructions to the Secretary as to what should be included in the commentary in such cases since the Secretary was unable to seek guidance in the record.

79. **Mr. Madrid Parra** (Spain) said that his delegation shared the concern expressed by the United States. He wondered whether provision should have been made for such practices in the text of the draft convention. Notification of the addressee was important but it was equally important to establish whether the information had effectively been “made available” to the addressee, who now often had to take the initiative to obtain access to the information.

80. **Mr. Estrella Faria** (Secretariat) said that similar procedures had long been in place in the paper-based environment and, to his knowledge, no legal provisions specifically addressed such situations. It was just one way of receiving a communication and, as such, was covered by draft article 10.

*The meeting rose at 12.30 p.m.*

**Summary record of the 799th meeting, held at the Vienna International Centre  
on Wednesday, 6 July 2005, at 2 p.m.**

[A/CN.9/SR.799]

*Chairman:* Mr. Chan (Singapore), (Vice-Chairman)

*In the absence of Mr. Pinzón Sánchez (Colombia), Mr. Chan (Singapore), Vice-Chairman, took the Chair.*

*The meeting was called to order at 2.10 p.m.*

**Finalization and adoption of a draft convention on the use of electronic communications in international contracts** (*continued*) (A/CN.9/571, 573, 577 and Add.1 and 578 and Add.1-17)

*Article 10. Time and place of dispatch and receipt of electronic communications (continued)*

*Paragraph 2*

1. **The Chairman** invited the Commission to continue its discussion of the United States proposal that the commentary to draft article 10, paragraph 2, should state that the rule laid down in the draft paragraph did not preclude information being communicated by one party to another through, for instance, the posting of information on the originator's website.

2. **Mr. Maiyegun** (Nigeria) said that, in his delegation's view, such an explanatory note would be inappropriate. The Commission should not prejudge legal developments in that regard.

3. **Mr. Hidalgo Castellanos** (Mexico) said that he had no objection to the United States proposal, which would, in his view, have a beneficial impact on international trade.

4. **Mr. Chong** (Singapore) said that the United States proposal raised the issue of whether a notice posted on a website, which became retrievable by the addressee at an address that had presumably been determined by contract, was effective notification in legal terms. A matter of substantive law was involved and the Commission, by appearing to sanction the practice in its commentary to the draft article, might unwittingly change the legal status of such a posting. In his view, if the originator sought to provide notice to the recipient by way of a posting and that arrangement was agreed by contract, it would constitute a derogation from the draft

convention or a rule agreed by the parties in exercise of party autonomy.

5. **The Chairman** said that, in informal consultations, the United States delegation had confirmed that its proposal was not intended to apply solely to a situation in which the parties had agreed that posting on the originator's website was a valid means of notification but was also intended to apply to situations in which no such agreement had been reached. Draft paragraph 2 did not address such a situation and if it was intended to be exclusive or exhaustive, such a mode of service of notice would not be permitted.

6. **Mr. Smedinghoff** (United States of America) said that his delegation's concern related in part to the internal consistency of draft article 10. Paragraph 1 contemplated both the sending of a message and the delivery of a message that was not sent, in the sense that it did not leave the sender's information system but was posted on a website. Paragraph 2, however, made no reference to posting but only to sending. It should therefore be made clear that draft paragraph 2 did not preclude the possibility of posting information. With regard to the concerns expressed by the representatives of Nigeria and Singapore, his delegation was not proposing the introduction of a rule or suggesting that the Commission should sanction any particular practice. Its only concern was to ensure that the draft paragraph was not considered exclusive: in other words, it should be possible for a party to be deemed to have received a message even if it had not been sent directly to the party concerned. That kind of flexibility would not interfere with the development of the law.

7. **Mr. Boulet** (Belgium) said he shared the concerns expressed by the representatives of Nigeria and Singapore. He further considered that there would always be a preliminary agreement or at least some form of understanding between parties regarding the posting of information on a website. Otherwise such information would have no legal status whatsoever. Moreover, where such an agreement or understanding existed, the

principle of party autonomy came into play and the parties could derogate from draft article 10, paragraph 2.

8. **Mr. Chung Wan-yong** (Republic of Korea) expressed qualified support for the United States proposal. Care must be taken to differentiate between two situations. On the one hand, where the originator, in a message to the addressee, referred to and included a link to its own website containing further information, the posting could be deemed to form part of the electronic communication on the principle of incorporation by reference (enunciated, for example, in article 5 bis of the UNCITRAL Model Law on Electronic Commerce). That situation was covered by draft paragraph 2 and the commentary could refer to it. On the other hand, where the message by electronic mail merely indicated the location of the originator's website, the notion of "reaching" the addressee's electronic address would be overstretched and there should be no suggestion in the commentary that such a situation was covered by the draft paragraph.

9. **Mr. Yamamoto** (Japan) said that his delegation could support the United States proposal if the commentary explained that draft paragraph 2 was not considered exclusive but, at the same time, created no new rules.

10. **Mr. Sandoval** (Chile), noting that a website could contain a very large amount of information, said that the proposal could have the effect of extending the scope of the provision to cover situations with no legal status.

11. **Mr. Buttimore** (Observer for Ireland) said that, although he acknowledged the concern expressed by the representative of Singapore, he shared the view that the commentary should include an explanatory note to the effect that the rule contained in the draft paragraph was not exclusive, though without referring to the website posting issue.

12. **The Chairman** said that, in the absence of a strong consensus, he took it that the Commission did not wish to include an explanatory note on draft paragraph 2.

13. *It was so decided.*

14. **Mr. Hidalgo Castellanos** (Mexico) said that his delegation was concerned that, according to draft paragraph 2, there was a presumption that a communication had been received even if it had not been delivered at the addressee's designated address. It would be preferable, in his view, if the presumption were to be that, in the absence of evidence to the

contrary, the communication was deemed not to have been received if it had been sent to a non-designated address.

15. **The Chairman** said that the provision had been extensively debated at every meeting of the Working Group and the text was a finely crafted compromise taking account of all the views expressed.

16. **Ms. Schmidt** (Germany) said that her delegation had a similar concern. Draft paragraph 2 distinguished between the receipt of a message sent to a designated address and the receipt of a message sent to a non-designated address. The addressee was required to become aware that a communication had been sent to a non-designated address; but that was a subjective factor and was incapable of proof. Her delegation therefore proposed deleting the phrase "at an electronic address designated by the addressee" in the first sentence and the whole of the second sentence. That was the approach adopted in the European Union Directive on electronic commerce and it had worked well to date.

17. **The Chairman** said that the Working Group had been aware of the European Union approach when it formulated the draft paragraph. It had, however, been concerned to establish whether an addressee was bound in a case where an electronic communication had been sent to a non-designated address and was retrievable from that address, but the addressee was unaware of the fact that it had been sent.

18. **Ms. Struncova** (Observer for the European Union) said that she supported the amendment proposed by the German delegation.

19. **Mr. Smedinghoff** (United States of America) said he opposed any change to the text as it stood. The issues involved had been extensively debated in the Working Group and the existing text was the result of a compromise. Fairness demanded that parties should not be deemed to have received messages until they became aware of their existence.

20. **Mr. Minihan** (Australia), expressing support for the United States position, drew attention to paragraphs 55 and 56 of the note by the Secretariat providing background information on the draft convention (A/CN.9/577/Add.1), which provided a clear context for the discussion.

21. Support for the retention of the existing text was expressed by **Mr. Maiyegun** (Nigeria), **Mr. Madrid Parra** (Spain), **Mr. Chong** (Singapore), **Mr. Sandoval** (Chile), **Ms. Cherif Chefchaoui** (Morocco),



**Mr. Boulet** (Belgium), **Mr. Yang Lixin** (China), **Mr. Chung Wan-yong** (Republic of Korea), **Mr. Velázquez** (Paraguay) and **Ms. Lahelma** (Observer for Finland).

22. **Mr. Yamamoto** (Japan) and **Mr. Nop** (Czech Republic) said that they supported the amendment to draft paragraph 2 proposed by the German delegation.

23. **Mr. Gregory** (Canada), concurring with the view that the compromise text should be retained, said that it would be extremely unfair, under both common-law and civil-law regimes, to have a rule stating that a message had been received although the addressee had no reason to believe it had been sent. The objection raised by the representative of Germany seemed to be merely evidentiary; but there were many conventional ways of making a person aware that a message had been sent. The point of the awareness requirement was, in any case, largely to prevent parties from ignoring messages when they actually knew that they had arrived.

24. **Mr. Williams** (South Africa) said that, although he was in favour of retaining the existing text, he sought confirmation that the words “electronic address” in the last sentence of draft paragraph 2 referred to the designated electronic address.

25. **Mr. Hidalgo Castellanos** (Mexico) reiterated his proposal that, in the case of communications sent to non-designated addresses, the presumption should be that they had not been received in the absence of evidence to the contrary.

26. **Mr. Estrella Faria** (Secretariat) said that the intent of the last sentence of draft paragraph 2 was to interpret the phrase “capable of being received” in the first two sentences. The Working Group had decided not to deal with the issue raised by the representative of Mexico in the draft article. Originally, provision had been made for a situation in which an originator had sent a message to a non-designated system although a system had been designated. The current version of the draft article covered all situations, i.e. where a message was sent to a non-designated system either because there had been no designation from the outset or because the originator had disregarded a designation. The provision actually refined the standard of retrieval laid down in the UNCITRAL Model Law on Electronic Commerce, under which, if there was no designation at all, the addressee was presumed to have received a message as soon as it entered any information system of the addressee. The Model Law went on to state that a message was deemed to be received only when the

addressee retrieved it. The second sentence of draft article 10, paragraph 2, applied that retrieval standard to all situations.

27. **The Chairman** drew attention to document A/CN.9/578/Add.17, paragraph 3, which contained a proposal by Azerbaijan to amend paragraph 2 of draft article 10. As he saw no support for that proposal, he took it that, in the absence of specific proposals by the delegations of Mexico or South Africa, the Commission wished to approve draft paragraph 2.

28. *The substance of draft paragraph 2 was approved and the text was referred to the drafting group.*

### Paragraph 3

29. **Ms. Proulx** (Canada) proposed that the word “deemed”, which created an irrebuttable presumption regarding the place of dispatch, should be replaced by the word “presumed”. It would be preferable, in the interests of flexibility, to establish a rebuttable presumption, which would also be more consistent with the wording of draft paragraph 2 and with the party autonomy provided for in draft article 3.

30. The Canadian proposal was supported by **Mr. Bellenger** (France) and **Mr. Correia** (Observer for Portugal).

31. **Mr. Yamamoto** (Japan) said that his delegation would prefer to retain the existing text. Paragraph 163 of the Working Group’s report (A/CN.9/571) set out a convincing argument to the effect that “the scope of the provision was to avoid duality of places of business in case the communication was retrieved in a place other than the place of business for the purpose of determining the application of the draft convention”.

32. **Mr. Boulet** (Belgium) said that, attractive though the argument in favour of increased flexibility was, the proposed amendment would raise the question of who was eligible to rebut such a presumption. It would be easy, for instance, for the originator to do so, perhaps deliberately misleading the addressee. That would raise questions of legal certainty. His delegation was therefore in favour of retaining the text as it stood.

33. **Mr. Chong** (Singapore) drew attention to paragraph 105 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce which, commenting on article 15, paragraph 4, of the Model Law, which was a similar provision, stated that “the rationale behind the provision is to ensure that the location of an information system is not the determinant

element, and that there is some reasonable connection between the addressee and what is deemed to be the place of receipt, and that that place can be readily ascertained by the originator". Thus, even if a company operating in France had its e-mail message server in London, a communication from that company, say to a transacting party in Germany, was deemed to have originated in its place of business in France. To replace the word "deem" by the word "presume" would be to create an evidentiary presumption, which was not the intention of draft paragraph 3.

34. **Mr. Estrella Faria** (Secretariat) said that it had been the Working Group's concern from the outset to avoid duality of regimes for paper and electronic transactions. Under a substantive instrument of law such as the United Nations Sales Convention, for instance, which applied to sales contracts between parties whose places of business were in contracting States of that Convention, it was immaterial whether an agent of the seller went to a contracting State and placed an order there. What was relevant was the location of the place of business of that person, not the current location. The same applied to the UNCITRAL Model Law on Electronic Commerce, as the representative of Singapore had indicated.

35. **The Chairman** noted that there was insufficient support for the Canadian proposal.

36. *The substance of draft paragraph 3 was approved and the text was referred to the drafting group.*

#### *Paragraph 4*

37. *The substance of draft paragraph 4 was approved and the text was referred to the drafting group.*

*The meeting was suspended at 3.20 p.m. and resumed at 3.50 p.m.*

#### *Article 11. Invitations to make offers*

38. **Mr. Estrella Faria** (Secretariat) said that although draft article 11 did not correspond to a provision in the UNCITRAL Model Law on Electronic Commerce, it was inspired by article 14 of the United Nations Sales Convention pertaining to the conditions governing the effectiveness of an offer. Draft article 11 contained one of the few substantive provisions of the draft convention, the aim of which was to clarify whether an offer by a party that used an Internet platform or website to offer goods and services that could be ordered at the touch of a button should be considered binding on that party. An earlier version of the text had suggested that a

presumption of an intention to be bound in the case of acceptance might be attached to the use of automated message processing systems, termed "interactive applications" in the current text. After extensive discussion by the Working Group, it had been decided that it would be unwise to include such a presumption, if for no other reason than that a party might have a limited stock of goods. He added that it had been suggested that the phrase "interactive applications" should be explained in a footnote or in the commentary.

39. **Mr. Yang Lixin** (China) endorsed the view that the phrase "interactive applications" should be clarified in the commentary. Acceptable wording for such an explanation could be found in the Working Group's report on the work of its forty-second session (A/C.9/546, para. 114).

40. **Mr. Madrid Parra** (Spain) wondered whether "interactive applications" corresponded to definition (g), "automated message system", in draft article 4. If it did, it would be preferable to use the same terminology rather than introducing a new phrase that required a definition or an explanation.

41. **Mr. Estrella Faria** (Secretariat) said that the Working Group had not defined the term "interactive applications" because, while it was reasonably easy to describe what it meant, it was not easy to establish a concise definition using treaty language. One possible version had been "a system for the automatic placement of orders". The question arose, however, what exactly the word "automatic" meant in that context and how automatic the process needed to be. While an automated message system involved the exchange of messages between parties, interactive applications required parties to input information by using a system that appeared to generate a contract and could be used to purchase goods and services.

42. **The Chairman** read out paragraph 4 of document A/CN.9/578/Add.17, which contained a proposal by the Government of Azerbaijan to add a new paragraph to draft article 11. He invited comments on the provision, which was calculated to restrict the flow of unsolicited commercial communications ("spam").

43. **Mr. Burman** (United States of America) said that his delegation was second to none in its concern about the problem of unsolicited electronic mail, but it was not appropriate in the present context to seek to formulate international treaty rules on what was an extremely complex topic. However, there was no reason why the question should not be taken up in the future, although

he noted that other international bodies were currently examining related issues. The Commission would need to coordinate its work with those bodies.

44. *The substance of draft article 11 was approved and the text was referred to the drafting group.*

*Article 12. Use of automated message systems for contract formation*

45. **Mr. Estrella Faria** (Secretariat) said that, although there was no provision corresponding to draft article 12 in the UNCITRAL Model Law on Electronic Commerce, it appeared in some domestic enactments of the Model Law, typically using the expression “electronic agent”. In some legal systems, in which the exercise of human judgement was deemed to be a prerequisite for the formation of a contract, it had been decided to include a provision expressly recognizing that contracts might be validly concluded through an automated message system, even though no human being reviewed every action generated by that system. The Model Law contained an indirect reference to the matter in article 13 on the attribution of data messages, but the Working Group had decided from the outset that draft article 12 should not deal with attribution. All that was needed was a non-discrimination rule that would recognize the validity of using automated message systems for the formation of contracts.

46. **Mr. Lavalle** (Guatemala) noted that, whereas definition (g), “automated message system”, in draft article 4 referred to a “person”, draft article 12 referred to a “natural person”. The discrepancy should be resolved. Secondly, consistency with the wording of the definition demanded that the words “or intervened in” should be inserted after the word “reviewed” in draft article 12.

47. **Mr. Field** (United States of America) noted that when the definition of the word “person” had been removed from the list of definitions, “person” had been replaced by “natural person” throughout the text. The omission of the word “natural” in definition (g) was presumably an oversight.

48. **Mr. Yamamoto** (Japan) proposed inserting the word “natural” before “person” in definition (g).

49. *It was so decided.*

50. **The Chairman** said he took it that the Commission wished to insert the words “or intervened in” after “reviewed” in draft article 12.

51. *It was so decided.*

52. *The substance of draft article 12, as amended, was approved and the text was referred to the drafting group.*

*Article 13. Availability of contract terms*

53. **Mr. Lavalle** (Guatemala) noted that, whereas draft articles 7 and 13, and draft article 9, paragraph 6, referred to a “rule of law”, other paragraphs of draft article 9 referred simply to “the law”. The same wording should be used in all cases.

54. **Mr. Field** (United States of America) said that the difference in wording reflected differences in the issues involved. Draft article 13 mirrored draft article 7, while the meaning elsewhere was slightly different. The text of draft article 13 should, in his view, remain unchanged.

55. **Mr. Estrella Faria** (Secretariat) said that the words “rule of law” had been used in the phrase “the application of any rule of law” in draft articles 7 and 13 because they referred to specific hypothetical rules of law. The expression “the law” was a general term that denoted statutory law, judicial precedent or any other source of a rule of law.

56. **Mr. Madrid Parra** (Spain) suggested that the commentary should contain an explanation of the difference between the two terms for the benefit of non-English speakers.

57. **Mr. Bellenger** (France) said that, in the French text, the use of the terms *loi* and *règle de droit* should be reversed in the articles in which they appeared, since in French usage the latter term had the more general meaning.

58. **Mr. Estrella Faria** (Secretariat) said that if draft article 13 referred to the law rather than to a rule of law, it would be understood as meaning statute law and not law in the broader sense of *derecho* in Spanish or *droit* in French. A rule of law, on the other hand, could result, for example, from case law.

59. **Mr. Mazzoni** (Italy) said that the term “rule of law” was a broad concept that included not only rules of statutory origin but also rules of public policy and of judicial origin. It did not, however, refer to the notion of “conflict of law”. When the word “law” was used on its own, on the other hand, it implied the law governing a contract in the “conflict of law” sense. His delegation feared that it could be taken to mean *lex mercatoria* or law merchant rather than State law. The Commission should use the term “applicable law” to make it clear that State law rather than *lex mercatoria* was meant.

60. **Mr. Sekolec** (Secretary of the Commission) said that “the law” was a system of rules originating from State organs having legislative authority, namely parliament and in some cases cabinets or ministers with power to issue binding rules. Rules of law, on the other hand, included rules originating from bodies without nationally endowed legislative power. The International Chamber of Commerce’s “Uniform Customs and Practice for Documentary Credits” were frequently referred to as a system of rules of law. The same was true of the “Principles of International Commercial Contracts” of the International Institute for the Unification of Private Law (Unidroit) and indeed of *lex mercatoria* itself. In that sense, rules of law were broader in scope. The Commission must therefore decide whether, in draft article 13, it had in mind “the law” in the narrow sense or a system of rules, regardless of origin, in which case the phrase “rules of law” should be used.

61. **Mr. Burman** (United States of America) drew attention to the explanatory material contained in paragraph 68 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce. That paragraph, adopted by the Commission itself, interpreted the words “the law” as encompassing not only statutory or regulatory law but also judicially created law and other procedural law. He doubted whether the Commission really wished to reverse that interpretation, but if it did a number of provisions would need to be redrafted.

62. **Mr. Chikanda** (Zimbabwe) said that the term “rule of law” was ambiguous in the draft article: it was unclear whether it related only to national laws or to other laws as well.

63. **The Chairman** said that, whatever the differing interpretations of the expressions “the law” and “rule of law”, draft article 13 simply stated that the draft convention did not affect any obligation imposed on a person by any legal prescription. A change in the text might be unnecessary, since the draft article was simply a “safe harbour”. If necessary, a clarification might be given in the commentary.

64. **Mr. Madrid Para** (Spain) concurred. The practical effect was the same either way. The Commission should, however, adopt one of the two terms and use it consistently.

65. **Mr. Bellenger** (France) said that since draft articles 7 and 13 contrasted the rules of the draft convention with those of domestic law, the appropriate term would be “the law”, which signified all provisions of national law. The term “rule of law” should be used in draft article 9 because it related to international rather than national law.

66. **Mr. Estrella Faria** (Secretariat) said that the meaning of the words “the law” in draft articles 8 and 9 was exactly the same as the meaning in the Model Law to which the representative of the United States had referred. The Guide to Enactment also stated that the term was not intended to encompass areas of law that had not become part of the law of a State and were sometimes “somewhat imprecisely” referred to by expressions such as “*lex mercatoria*” or “law merchant”. A reason for avoiding the term “rule of law” in draft articles 8 and 9 was that in some languages an adjective such as “applicable” or “governing” would have to be inserted. In draft articles 7 and 13, on the other hand, the reference was to an individual segment of the law referred to in draft articles 8 and 9. In some countries it might not be contained in a statute but reflect judicial precedent. Contrary to the assertion of some speakers, the term “rule of law” in those draft articles was not intended to cover law merchant. That point could be made clear in the commentary, which could also include the material contained in paragraph 68 of the Guide to Enactment.

67. **Mr. Mazzoni** (Italy) said that he found that explanation unconvincing. In addition to denoting a segment of national law, the term “rule of law” could also denote rules of many different national laws. The objective of draft articles 7 and 13 was to exclude encroachment by the draft convention not just on the rules of specific national laws but also potentially on the rules of many national laws, of a private or public law nature, that created a legal obligation. According to his reading, the term “rule of law” in draft articles 7 and 13 covered all potential legal obligations deriving from any rule of any national system.

*The meeting rose at 5 p.m.*

**Summary record of the 800th meeting, held at the Vienna International Centre  
on Thursday, 7 July 2005, at 9.30 a.m.**

[A/CN.9/SR.800]

*Chairman:* Mr. Chan (Singapore), (Vice-Chairman)

*In the absence of Mr. Pinzón Sánchez (Colombia), Mr. Chan (Singapore), Vice-Chairman, took the Chair.*

*The meeting was called to order at 9.45 a.m.*

**Finalization and adoption of a draft convention on the use of electronic communications in international contracts** (*continued*) (A/CN.9/571, 573, 577 and Add.1 and 578 and Add.1-17)

*Article 13. Availability of contract terms (continued)*

1. **The Chairman** reminded the Commission that in the context of the discussion of draft article 13 at the previous meeting, some delegations had questioned the use of the terms “law” and “rule of law” in certain draft articles that had already been approved. The Commission must decide whether to reopen the discussion of those articles.

2. **Mr. Maiyegun** (Nigeria), **Mr. Sandoval** (Chile), **Mr. Buttmore** (Observer for Ireland), **Mr. Potyka** (Austria) and **Mr. Burman** (United States of America) said they were opposed to any reopening of the debate on draft articles that had already been approved.

3. **Mr. Bellenger** (France) said that the best solution was to clarify the use of the terms in the commentary.

4. **Mr. Mitrovic** (Serbia and Montenegro) said that the terms “the law” and “rule of law” were not interchangeable. The term *loi* in French denoted, on the one hand, the “applicable law” and, on the other, the law of a particular country. The term *règle de droit* referred more broadly to rules derived from the law but also from independent sources of law such as treaties. In article 13, “rule of law” was used in that broader sense and should be retained.

5. **Mr. Chong** (Singapore) noted that the Secretariat had already explained that the term “rule of law” was to be understood in the draft convention in the same way as the term “the law”. If that explanation were placed in the commentary, the text was unlikely to present problems.

6. **The Chairman** said he took it that the Commission did not wish to reopen the debate on previously approved articles.

7. *It was so decided.*

8. **The Chairman** said he further took it that the Commission wished to approve article 13 as drafted.

9. *The substance of draft article 13 was approved and the text was referred to the drafting group.*

*Article 14. Error in electronic communications*

10. **Mr. Estrella Faria** (Secretariat) said that article 14 was one of the most contentious provisions of the draft convention. At its forty-fourth session, the Working Group had decided not to delete the draft article as contemplated but to pare it down considerably. The draft article now referred not to any kind of error but only to input errors in electronic communications, and it applied only if an automated system failed to provide a person with the opportunity to correct an error. Furthermore, unlike earlier versions, it did not contemplate an obligation for parties using or offering goods or services through automated message systems or publicly accessible information systems to make available to the parties accessing those systems a means of correcting input errors. That issue had been extensively debated by the Working Group, which had concluded that, much like information and disclosure requirements, any positive obligation requiring a vendor to offer parties the means to correct errors would be meaningful only if that obligation entailed consequences for non-compliance. The Working Group had been unable to reach a consensus on what those consequences should be, whether they should extend to nullification of the contract or simply entail non-enforceability of certain contract terms. It had finally decided that the article should simply focus on providing a party that had made an input error with the opportunity to withdraw the

message or that portion of the message in which the input error had been made.

11. The Working Group had discussed at length the provision in draft paragraph 1 (b) concerning the substantive law conditions governing a party's right to withdraw a message on the basis that it had resulted from an input error. Some delegations had opposed the article on the ground that it constituted substantive law and provided for rules with which they were unfamiliar. Others had held that the provision was reasonable, not only because their own legal systems established similar rules but also because it provided a "safe harbour" for vendors and deterred a party from withdrawing a message in bad faith while at the same time benefiting from a contract that it now sought to nullify.

12. **The Chairman** invited the Commission to consider the two paragraphs of the draft article separately.

#### *Paragraph 1*

13. **Mr. Gabriel** (United States of America), describing the wording of the chapeau of draft paragraph 1 as unduly restrictive, proposed inserting the words "that portion of" after "withdraw" in the last line. For instance, if a person wished to input 100 items but accidentally typed 101, paragraph 1 as drafted would give that party the option of withdrawing from the entire transaction. The text as amended would allow a court or trier of fact to rule that the input error either eliminated only that part of the error that the party had actually made or, in appropriate circumstances, vitiated the entire communication. He submitted that most legal systems would adopt a similar approach in their domestic law of error.

14. **Ms. Schmidt** (Germany) said that her delegation shared the concern that parties might be able to withdraw an entire electronic communication on account of a minor error. Such an error could also take the form of an incorrect word that might alter the meaning of the communication. The proposal by the United States delegation would not fully address that concern, since it dealt only with situations in which the part of a communication in which an error had been made could be isolated and withdrawn. Drawing attention to Germany's written comment (A/CN.9/578/Add.8), she proposed the addition of the following new subparagraph (d) in draft paragraph 1 in order to prevent

the withdrawal of an electronic communication in bad faith:

"It may be assumed that the person or the party on whose behalf that person was acting would not have issued the electronic communication in knowledge of the facts and with a sensible appreciation of the case."

She submitted that the new subparagraph would also address the situation described by the United States delegation. The substantive details of the right of withdrawal should be left to legislators at the national level.

15. **Mr. Yamamoto** (Japan) said that his delegation shared the concern expressed by the German delegation and supported the view that the details of provisions such as those contained in subparagraphs (a) and (b) should be left to national law.

16. **Mr. Caprioli** (France) expressed support for the United States proposal in the interests of legal certainty.

17. The draft paragraph, especially subparagraphs (b) and (c), dealt with matters pertaining to contract law and the general theory of obligations. It should not seek to address substantive issues in those areas. Moreover, the consequences of any of the actions contemplated were governed by national law.

18. **Mr. Lavalle** (Guatemala) said that he found the idea of returning or destroying services referred to in draft subparagraph (b) to be somewhat odd.

19. **The Chairman** asked the German delegation to clarify the meaning of the words "in knowledge of the facts" in proposed new subparagraph (d).

20. **Ms. Schmidt** (Germany) referred, by way of example, to the case of a purchaser who, at the time of formation of a contract, entered a slightly incorrect sum in the belief that that sum was correct. The purchaser might subsequently decide, having become aware that the item purchased was worth less than the sum indicated, to withdraw the communication on the basis of the minor error. The words "in knowledge of the facts" described the contrary situation, i.e. where the person issuing the communication was fully aware of every fact relating to the purchase at the time of formation of the contract.

21. **Mr. Minihan** (Australia) said that while the proposal by the representative of the United States, which he supported, was intended to provide for

withdrawal of just that portion of a communication in which an error had been made, the proposal by the representative of Germany was aimed at preventing withdrawal for ulterior motives, which raised the question of intent and was therefore a separate policy issue.

22. **Mr. Buttimore** (Observer for Ireland) expressed support for the proposal by the delegation of the United States.

23. He had reservations about the proposal by the delegation of Germany because it seemed to introduce an additional qualification based on a subjective assessment of the party's intention or good faith. It would be difficult for the Commission to characterize the type of error to which the draft article was applicable and to avoid encroaching on substantive domestic law and public policy decisions regarding contracts in Member States.

24. **Mr. Chong** (Singapore) expressed support for the United States proposal.

25. The additional element introduced by the German proposal was already covered, in his view, by the concept of input error as discussed at length by the Working Group.

26. **Mr. Gabriel** (United States of America) said that his delegation's proposal aimed solely at dividing a communication into erroneous and non-erroneous parts. The proposal by the German delegation dealt, on the other hand, with intent.

27. **Mr. Caprioli** (France) said that the German proposal was well-intentioned but unduly complex. It was also unnecessary in the light of draft article 5, which stated that regard should be had, in interpreting the convention, for the observance of good faith in international trade. The phrase "It may be assumed" was also unacceptable.

28. **Mr. Boulet** (Belgium) said that the United States proposal raised the issue of the *ratio legis* of draft article 14, which referred to automated message systems that did not permit correction of an input error and implied that such systems were defective because of the risks they entailed. The proposed amendment was balanced inasmuch as the party who issued a communication remained bound by that fact but was free to correct the communication by withdrawing part of it.

29. The German proposal adopted an "objective" approach, disregarding the fact that the system failed to allow for correction. He shared the concern of the German delegation, however, that the draft article could be used for motives other than that intended. The question arose whether the legislative intent was to place the burden of risk on a person using a system with no provision for correction of input errors. It should be noted in that connection that European Union Directive 2000/31/EC required technical means to be made available to correct such errors.

30. **Mr. Sandoval** (Chile) expressed support for the United States proposal.

31. The hypothetical case referred to in the German proposal, on the other hand, was already covered by draft article 14. The proposed amendment would introduce an additional measure of complexity and might encroach on domestic law.

32. **Mr. Chung Wan-yong** (Republic of Korea) expressed support for the United States proposal, which would, in his view, also cover cases of intentional input error such as those that the German proposal was intended to address.

33. **Mr. Lavalle** (Guatemala) wondered whether the German delegation's concern to ensure that persons acted in good faith might be addressed by replacing the words "makes an input error" in the first line of the draft article by "makes a significant input error".

34. **Ms. Lahelma** (Observer for Finland) said she shared the views of the representative of Belgium. The German proposal seemed to be aimed at protecting parties that engaged in unfair business practices by using automated systems that did not permit the detection and correction of input errors. Parties could avert the risk of misuse of the right of withdrawal by setting up a system that offered users the opportunity to correct errors.

35. **The Chairman** noted that it was hoped that the draft convention would encourage people to set up automated systems that allowed users to correct input error, although that aim was not explicitly mentioned in the text. As the observer for Finland had noted, setting up a system that punished parties for genuine errors could be seen as condoning unfair business practices.

36. **Mr. Potyka** (Austria) said that while he had no objection to the United States proposal, he was unsure whether it was the appropriate remedy for a situation in

which it could be established that only part of a number had been entered in error.

37. **The Chairman** said that the idea was to give courts more flexibility to decide that not all but only a portion of a communication could be withdrawn where an error had occurred.

38. **Mr. Yang Lixin** (China) said that his delegation supported the United States proposal.

39. The German proposal introduced reservations and provisos that would make it more difficult to interpret the draft paragraph.

40. He supported the proposal by the representative of Guatemala to insert the word “significant” in the first line of the draft paragraph..

41. **Mr. Ticar** (Observer for Slovenia) proposed, as an alternative to the United States proposal, amending the phrase “has the right to withdraw the electronic communication in which the input error was made” to read “has the right to withdraw the scope of the error of the electronic communication”. That amendment would also address the case mentioned by the representative of Germany.

42. **Mr. Madrid Parra** (Spain) said that while he supported the spirit of the United States proposal, he was not sure whether it would be effective in practice, for instance in a sales contract containing a numerical input error. If the figure was withdrawn, the sales contract would lack a component of fundamental importance for the implementation of the contract. In such cases an electronic communication could not be divided into parts. He was therefore in favour of retaining the text as it stood.

43. **Mr. Estrella Faria** (Secretariat) said that it should perhaps be mentioned in the explanatory notes that one of the reasons why the Working Group had not contemplated the possibility of withdrawal of a communication in whole or in part had been that just mentioned by the representative of Spain, who had also drawn attention to the impact of withdrawal on the formation of the contract. The scale of the impact would depend on whether the information being withdrawn was substantive or merely peripheral. Under the United Nations Sales Convention, the parties needed to have some way of determining major elements such as the quantity of goods involved in the contract and the price. On the other hand, a mistake regarding the arbitration

arrangement in the dispute settlement clause might invalidate that clause but would not prevent the sales contract from being formed. If the Commission endorsed the United States proposal, it might be stated in the commentary that, depending on the factual circumstances, the withdrawal of a portion of a message might or might not affect the validity of the message as a whole. It could be argued, however, that a commentary was not an authoritative text or a compelling source of direction for courts in many countries.

44. **Mr. Boulet** (Belgium) suggested that the reservation expressed by the representative of Spain might be addressed by replacing the word “withdraw” by “correct” in the phrase “withdraw that portion of the electronic communication”. The error could not then be used as a pretext for going back on an express intention to enter into a contract.

45. **The Chairman** pointed out that paragraphs 193 and 194 of the Working Group’s report on its forty-fourth session (A/CN.9/571) explained in detail why it had been decided not to replace the word “withdraw” by “correct”. Although the Commission was not, of course, bound by the Working Group’s views, he submitted that a text representing several years’ work should not be rejected unless there was a compelling reason for doing so.

46. **Ms. Kamenkova** (Belarus) said that her delegation was in favour of retaining the wording recommended by the Working Group, which was sufficiently flexible to be applicable in all circumstances. The wording as it stood gave parties the option of withdrawing either all or only part of a communication. They should enjoy that freedom and should not be bound by the narrower term “correct”.

47. **Ms. Schmidt** (Germany) said that her delegation agreed with the United States that the right to withdraw should be restricted to specific errors, so that a minor error could not be misused to withdraw a whole communication. At the same time, the representative of Spain was right to draw attention to the fact that the United States proposal failed to take sufficient account of the practical difficulties involved.

48. **Mr. Madrid Parra** (Spain) said that, as noted by the Secretariat, in an automated contracting system the vital elements of a contract were data such as the quantity or type of goods or services and price details. In all likelihood, the contract would be null and void if any of



those elements was missing. Similarly, if a portion of the electronic communication was withdrawn, the communication as a whole would, in his view, be null and void.

49. **Mr. Gabriel** (United States of America) said that under the draft paragraph as amended by the United States, an error in an electronic communication would, under some circumstances, vitiate the whole communication and in other circumstances, where it was fair and reasonable for the parties to proceed, only a portion of it.

50. **The Chairman**, noting that there was strong support for the United States proposal, said he thought it would be appropriate, if the proposal was adopted, to include the clarification just provided in the commentary.

51. **Ms. Kamenkova** (Belarus), supported by **Mr. Tikhaze** (Russian Federation), said that she saw no need to qualify the words “input error” by the word “significant” in the first line of the draft article, as proposed by the delegation of Guatemala. That would introduce a whole new concept, entailing the need to establish criteria for determining what a “significant error” was. The effect would be to make the situation even more complicated.

52. **Ms. Schmidt** (Germany) said that her delegation was in favour of the proposed addition of the word “significant”.

53. **The Chairman** noted, however, that most of the Commission seemed to be opposed to the amendment. He also saw no support for the proposal by the delegation of Germany to introduce a new subparagraph or for the proposal by the observer for Slovenia to replace the phrase “has the right to withdraw the electronic communication in which the input error was made” by “has the right to withdraw the scope of the error of the electronic communication”.

*The meeting was suspended at 11.10 a.m. and resumed at 11.40 a.m.*

54. **The Chairman** invited comments on the proposal by the delegation of Belgium to replace the word “withdraw” by “correct”.

55. **Mr. Chong** (Singapore) said that his delegation opposed any such amendment. The question had been discussed at length by the Working Group.

56. **Mr. Mitrović** (Serbia and Montenegro), supported by **Mr. Mazzoni** (Italy), said that the issue hinged on the significance of the word “withdraw”. If it had a purely technical significance, its retention was acceptable; but if it enabled a party to withdraw from a contract on the basis of what might even be a deliberate error, its retention became more questionable and he would prefer the word “correct”.

57. **Mr. Estrella Faria** (Secretariat) said that the Working Group’s decision, after extensive debate, to recommend the word “withdraw” rather than “correct” was due to its concern that it might create a remedy in that context which did not exist for “ordinary” errors under the otherwise applicable law. The normal effect of an error in a legally relevant communication was invalidation of the communication, but the party would not then automatically enjoy the right to replace the invalid communication by another one. The Working Group had sought to maintain absolute parallelism between electronic and non-electronic environments. For example, if the word “correct” was used in an electronic context, a vendor who offered goods at a particularly advantageous price might be compelled to keep the offer open by a purchaser who decided to buy more than originally requested by withdrawing a purportedly mistaken communication and replacing it by another.

58. **Mr. Potyka** (Austria) and **Mr. Gabriel** (United States of America) said that for the reasons stated by the representatives of Singapore and the Secretariat, they were in favour of retaining the word “withdraw”.

59. **Mr. Boulet** (Belgium) said that his delegation recognized the problems that might arise from the right to correct a communication, as illustrated by the Secretariat’s example. However, the partial withdrawal of a communication, in accordance with the wording proposed by the United States, was tantamount to a correction since it also gave the sender an opportunity to correct its content.

60. **Mr. Meena** (India) said that all the proposals made—to replace the word “withdraw” with “correct”, to introduce the idea of partial withdrawal and to insert the word “significant” before “input error”—had potentially controversial implications. His delegation therefore favoured retaining the chapeau of draft paragraph 1 in its current form.

61. **Mr. Khani Jooyabad** (Islamic Republic of Iran) said that his delegation could accept the text in its current form, but if the United States proposal was adopted, the words “right to withdraw” before “that portion of” should be amended to read “right to correct or withdraw”.

62. **Mr. Velázquez** (Paraguay) advocated keeping the text in its current form to avoid any possible ambiguity.

63. **Mr. Mazzoni** (Italy) said that either the text should be left unchanged or, if the concept of partial withdrawal was introduced, the concept of correction should be added in the interests of logical consistency.

64. **Mr. Mitrović** (Serbia and Montenegro) said that he was not convinced by the Secretariat’s argument. Where a letter containing an offer or acceptance of an offer was sent by conventional mail, it had always been possible to send a telegram withdrawing or correcting the offer or acceptance; the withdrawal or correction would be valid provided that the telegram arrived before the letter. Electronic communications were different because, once sent, they could no longer be corrected. He therefore proposed inserting the words “and correct” after “withdraw” in the chapeau of draft paragraph 1.

65. **Mr. Sandoval** (Chile) said that his delegation supported Belgium’s proposal. However, as there did not seem to be sufficient support either for that proposal or for the proposal by the United States, he was in favour of reverting to the text recommended by the Working Group.

66. **Mr. Chong** (Singapore) said that the proposals made by Belgium and the United States had different implications and he continued to support the latter proposal.

67. **Mr. Maiyegun** (Nigeria), **Mr. Minihan** (Australia), **Mr. Caprioli** (France) and **Mr. Bouacha** (Algeria) also expressed support for the United States proposal.

68. **Mr. Yamamoto** (Japan) said that the notions of correction and partial withdrawal were both somewhat ambiguous, but partial withdrawal was perhaps a more flexible concept and his delegation therefore supported the United States proposal.

69. **Ms. Cherif Chefchaoui** (Morocco) said that she saw no contradiction between the proposals made by Belgium and the United States. Correcting an electronic communication could be considered equivalent to

withdrawing the portion of it containing the input error. Both proposals could therefore be incorporated in the text.

70. **The Chairman**, noting that there was no support for the latter proposal and insufficient support for the Belgian proposal, said he took it that the Commission wished to approve the chapeau of draft paragraph 1 as amended by the United States.

71. *It was so decided.*

72. **Ms. Schmidt** (Germany), referring to Germany’s written comments (A/CN.9/578/Add.8), proposed deleting draft paragraph 1 (b) because it described the consequences of the withdrawal of an electronic communication rather than the conditions for the exercise of the right of withdrawal. That was a matter best left to national legislators.

73. **Mr. Mazzoni** (Italy) expressed support for the proposal.

74. **Mr. Caprioli** (France) proposed deleting both draft paragraph 1 (b) and draft paragraph 1 (c) since they dealt with the consequences of withdrawal, which was a matter to be determined by national law.

75. **Mr. Gabriel** (United States of America) said that he had no objection to the deletion of draft paragraph 1 (b) but he would prefer to retain draft paragraph 1 (c).

76. **Mr. Yamamoto** (Japan) expressed support for the German proposal.

77. Referring to the chapeau of draft paragraph 1, he said that the words “that person” after “error”, referring to the “natural person” mentioned in the first line, might cause confusion as they could mean both a private trader as a subject of law and an individual employed by an enterprise. In the interests of clarity, he proposed inserting the phrase “who is the party to the contract” after “that person”.

78. **The Chairman** said that, if he saw no objection, he would take it that the Commission wished to delete draft paragraph 1 (b).

79. *It was so decided.*

80. **Mr. Yamamoto** (Japan) and **Ms. Schmidt** (Germany) expressed support for the proposal to delete draft paragraph 1 (c).

81. **Mr. Yang Lixin** (China) and **Mr. Meena** (India) said that their delegations wished to retain the draft paragraph.

82. **Mr. Minihan** (Australia), supported by **Mr. Chong** (Singapore), said that there was a material difference between draft paragraphs 1 (b) and 1 (c). The latter provided for an element of fairness in that a person who had received a benefit from the goods or services received should not be able to withdraw the electronic communication too easily. That kind of provision was particularly important in an electronic environment, where goods such as music could be delivered instantly. Draft paragraph 1 (c) should therefore be retained.

83. **Mr. Potyka** (Austria) said that it would be illogical to delete draft paragraph 1 (b) while retaining draft paragraph 1 (c) because both related to the consequences of withdrawal of a communication. Draft paragraph 1 (b) referred to the return of goods or services received, but under Austrian law the material benefit received from goods and services under draft paragraph 1 (c) would also have to be returned. He therefore supported the proposal to delete draft paragraph 1 (c).

84. **Mr. Maiyegun** (Nigeria) said that draft paragraph 1 (c) should be retained in the interests of fairness and to limit the possibility of abuse by parties.

85. **The Chairman** said that, in the absence of a consensus in favour of deleting draft article 14, paragraph 1 (c), he would take it that the Commission wished to retain it as draft paragraph 1 (b).

86. *It was so decided.*

87. **Ms. Schmidt** (Germany), referring to Germany's written comments (A/CN.9/578/Add.8), proposed a time limit of two years on the right to withdraw an electronic communication in the interests of legal certainty.

*The meeting rose at 12.30 p.m.*

**Summary record of the 801st meeting, held at the Vienna International Centre  
on Thursday, 7 July 2005, at 2.30 p.m.**

[A/CN.9/SR.801]

*Chairman: Mr. Chan (Singapore), (Vice-Chairman)*

*In the absence of Mr. Pinzón Sánchez (Colombia), Mr. Chan (Singapore), Vice-Chairman, took the Chair.*

*The meeting was called to order at 2.05 p.m.*

**Finalization and adoption of a draft convention on the use of electronic communications in international contracts** (*continued*) (A/CN.9/571, 573, 577 and Add.1, 578 and Add.1-17)

*Article 14. Error in electronic communications (continued)*

*Paragraph 1*

1. **The Chairman** invited the Commission to consider a proposal by the German delegation to insert a new subparagraph in paragraph 1 of draft article 14 introducing a time limit for withdrawal of an erroneous electronic communication. As the Commission had agreed to delete draft subparagraph (b) from that paragraph, so that former draft subparagraph (c) had become draft subparagraph (b), the proposed new subparagraph, if adopted, would become draft subparagraph (c).

2. **Mr. Meena** (India) said that he was not in favour of introducing a time limit. An input error would not cease to be an error with the passage of time. Withdrawal of a communication would in any case be subject to draft subparagraph (a), which required a person or party to notify the other party of the error “as soon as possible” after learning of its existence. A time limit was therefore unnecessary.

3. **Ms. Schmidt** (Germany) said her concern was that a considerable amount of time might elapse before the person “learned of the error”. Withdrawal of a communication after an excessively long period would undermine commercial certainty. If there was no support for the inclusion of a specific time limit under draft paragraph 1, she proposed amending draft paragraph 2 to state that the time limit for withdrawal would be determined by national law.

4. **Mr. Mitrović** (Serbia and Montenegro) said that the German proposal was valid. Certainty was important in contractual relationships. He therefore proposed amending draft subparagraph (a) to read “... as soon as possible, but in any case within two years of having learned ...”.

5. **The Chairman** pointed out that the proposal by the representative of Serbia and Montenegro failed to address the German delegation’s concern, since errors would only have to be notified within two years of a person’s learning of their existence.

6. **Mr. Caprioli** (France) said that while he agreed that there should be a time limit for withdrawal, he found it difficult to imagine a scenario in which a person failed to learn of an error within a few days of an exchange of communications: any error would be bound to come to light during performance of a contract. Moreover, under new draft subparagraph (b), withdrawal of the communication would no longer be possible once performance—for instance through payment or delivery—had begun.

7. **Mr. Yamamoto** (Japan) said that his delegation could not endorse the proposal to introduce a two-year deadline, as such limitations were a matter of public policy in many legal systems. His delegation also had reservations about Germany’s alternative proposal to stipulate in draft paragraph 2 that deadlines should be determined at the national level.

8. **Ms. Kamenkova** (Belarus), pointing out that the word “and” should be inserted at the end of draft subparagraph (a), said that the right to withdraw an electronic communication containing an input error depended, first, on the person or party notifying the other party as soon as possible after learning of the error, and, second, on the person or party not having used or received any material benefit or value from the goods or services received. If the conditions set out in the two

draft subparagraphs were read jointly, there would be no need to provide for a specific time limit.

9. **The Chairman** said he took it that the Commission did not wish to support either of the German proposals.

10. *It was so decided.*

#### *Paragraph 2*

11. **Mr. Mazzoni** (Italy) said that draft paragraph 2 should be recast to better express its underlying purpose, namely that the remedy provided by the draft article for input errors was not intended to interfere with any general doctrine regarding mistakes in national laws. For instance, where there was an element of intent in an input error, the existence of the special rules in draft article 14 did not pre-empt the application of rules of law governing mistakes. He proposed that draft paragraph 2 be amended to read:

“Nothing in this article affects the application of any rule of law that may govern the consequences of any errors made during the formation or performance of the type of contract in question on grounds or for purposes other than providing a special remedy for input errors having occurred in the circumstances referred to in paragraph 1.”

12. **Mr. Field** (United States of America) said that his delegation supported the proposal in principle but proposed shortening the phrase after the words “in question” to read “other than as provided for in paragraph 1”.

13. **Mr. Mazzoni** (Italy) said that he could accept the wording proposed by the United States.

14. **Mr. Caprioli** (France) and **Mr. Gregory** (Canada) expressed support for the more succinct amendment.

15. **Ms. Schmidt** (Germany) said that she supported the more concise wording proposed by the United States which, in her view, rendered the phrase “made during the formation or performance of the type of contract in question” superfluous. The draft paragraph could in fact read: “Nothing in this article affects the application of any rule of law that may govern the consequences of any errors other than as provided for in paragraph 1.”

16. **Mr. Boulet** (Belgium) said that he preferred the Italian proposal as amended by the United States.

17. **Ms. Kamenkova** (Belarus) said that the original version of the draft paragraph was well reasoned and should not be amended.

18. **Mr. Yamamoto** (Japan) associated himself with the proposal made by Italy as fine-tuned by the United States. However, he advocated retaining the words “special remedy” contained in the original Italian proposal. He had reservations about the proposal by the German delegation since it seemed to exclude the applicability of the general doctrine of error to input error.

19. **Mr. Gabriel** (United States of America) said that he could support the wording proposed by Germany as an alternative to his own delegation’s proposal.

20. **Mr. Chung** (Singapore) said that he could accept either the United States proposal or the German wording since their effect, as “safe harbour” provisions, was identical. He did not support the inclusion of the words “special remedy”, which would unnecessarily complicate the wording of the draft paragraph.

21. **The Chairman** said he took it that the Commission wished to approve the version of draft paragraph 2 that read: “Nothing in this article affects the application of any rule of law that may govern the consequences of any errors other than as provided for in paragraph 1.”

22. *It was so decided.*

23. *The Commission approved the substance of draft paragraph 2 and referred the text to the drafting group.*

#### *Article 6. Location of the parties (continued)*

#### *Paragraph 5*

24. **The Chairman** drew attention to the three variants of paragraph 5 of draft article 6 contained in the report of the drafting group (A/CN.9/XXXVIII/CRP.2). The Commission had earlier accepted a proposal by Paraguay to expand the scope of the draft paragraph, which stated that the use of a domain name or electronic address connected to a particular country did not create a presumption regarding the location of a party’s place of business, to cover “other means of electronic communication”. The drafting group had found that the proposed new element fell into a different category from domain names and electronic mail addresses. More crucially, he drew attention to the fact that technological

advances might result in the use of a form of location identifier that justified a presumption regarding a party's place of business. In that context, he invited the Commission to reconsider its earlier decision.

25. **Mr. Field** (United States of America) proposed reverting to the original version of the draft paragraph. If technological developments so required, the paragraph could be amended at a later date.

26. **Mr. Yamamoto** (Japan), **Mr. Sandoval** (Chile) and **Mr. Nordlander** (Sweden) supported the United States proposal.

27. **Mr. Madrid Parra** (Spain) said that if the draft paragraph was to contain a list, the Commission should consider whether to include other existing forms of electronic communication, such as short message service (SMS) facilities and interactive television, which seemed to imply, but did not create a presumption, that a place of business was located in a specific country.

28. **The Chairman** said that, in the absence of support for Spain's proposal, he took it that the Commission wished to revert to the original wording of the paragraph.

29. *It was so decided.*

30. *The Commission approved the text of draft paragraph 5 as recommended by the Working Group.*

#### *Article 2. Exclusions (continued)*

31. **Mr. Yamamoto** (Japan) said that the meaning of draft article 2, paragraph 1 (a), "Contracts concluded for personal, family or household purposes", was ambiguous and should be clarified in the commentary. Otherwise States would be unsure which matters ought to be excluded by means of a declaration under draft article 18. His delegation interpreted such contracts as being broader in scope than "consumer contracts", which consisted solely of contracts concluded between consumers and business firms, whereas "contracts concluded for personal, family or household purposes" also covered contracts concluded between ordinary citizens, for instance between a husband and wife. The commentary should state that paragraph 1 (a) was intended to exclude from the draft convention not only consumer contracts but also various other categories of contract concluded for personal, family or household purposes.

32. **Mr. Mazzone** (Italy) said that it was unclear from draft article 2, paragraph 2, which documents of international commerce were excluded. He mentioned in particular letters of credit for payment purposes, letters of guarantee, which could be transferable, and delivery orders, some of which were transferable and others not.

33. **Ms. Schulz** (Observer for the Hague Conference on Private International Law) expressed strong support for the proposal by the delegation of Japan. Draft article 2, paragraph 1 (a), mirrored a provision in the United Nations Sales Convention although the scope of the draft convention was broader. At its forty-fourth session, the Working Group had failed to agree on whether contracts governed by family law or the law of succession should be explicitly excluded from the scope of the convention under draft article 2. Some delegations had opposed their exclusion because they thought the draft convention should be applicable to those areas; others had felt that explicit exclusions were unnecessary inasmuch as family and succession matters fell outside the Commission's trade-law mandate. The commentary should make it clear that such matters did not fall within the scope of the draft convention.

34. **The Chairman** noted that although commentaries were not legal documents, they were highly regarded and would influence the decisions of judges who were required to interpret the draft convention.

35. **Mr. Burman** (United States of America) said that he would be able to support Japan's proposal only if the clarification did not contradict the conclusions of the Working Group. For instance, the commentary should confirm that consumer-to-consumer contracts were excluded from the scope of the draft convention under draft article 2, paragraph 1 (a). However, the Working Group had deliberately decided against listing specific exclusions in order to allow each State to decide for itself what areas it wished to exclude under article 18. It might be helpful, on the other hand, to clarify in the commentary that the contracts referred to under draft paragraph 1 (a) were not limited to contracts concluded with commercial parties.

36. **Ms. Lahelma** (Observer for Finland) said that it had been the understanding of her delegation from the outset that, for instance, matrimonial contracts, which did not come within the jurisdiction of "trade law", fell outside the scope of the draft convention. Under what circumstances could the phrase "parties whose places of business are in different States" in draft article 1,

paragraph 1, be deemed to be applicable to a husband and wife? The commentary should spell out the scope of application of the draft convention.

37. **Mr. Burman** (United States of America) reiterated the Working Group's conclusion after lengthy debate that several specific exclusions should be deleted from draft article 2 on the grounds that States wishing to exclude them would be free to do so under draft article 18.

*The meeting was suspended at 3.30 p.m. and resumed at 3.55 p.m.*

38. **Mr. Mazzoni** (Italy) expressed support for Japan's proposal.

39. **Mr. Madrid Parra** (Spain) said that it was unnecessary to exclude under draft article 2 matters that were already implicitly excluded by virtue of draft article 1 on the scope of application. If clarifications were necessary, they should be inserted in the commentary to the appropriate article.

40. **Mr. Field** (United States of America), supported by **Mr. Minihan** (Australia), proposed that the Secretariat should base any clarification on the record of the Working Group's discussions. The broad formulation of the chapeau of draft article 2, paragraph 1, was one of the reasons why the Working Group had decided to remove some of the earlier explicit exclusions.

41. **Mr. D'Allaire** (Canada) said that Japan had been right to emphasize that clarification of the meaning of draft paragraph 1 (a) was required to enable States to assess the impact of the draft convention and make such declarations under draft article 18 as they saw fit. It was clear, in his view, that family matters fell outside the scope of the draft convention because an individual did not usually have a "place of business". He proposed that the commentary should indicate that the words "personal, family or household purposes" had the same meaning as in the United Nations Sales Convention.

42. **Ms. Schmidt** (Germany) supported the proposal by the observer for the Hague Conference on Private International Law that it should be made clear in the commentary that the draft convention applied only to trade-related matters.

43. **Mr. Burman** (United States of America) said that the commentary should reflect what he understood to be the conclusion of the Working Group, namely that

family and succession matters could be covered by the Convention unless a declaration was made to exclude them under draft article 18.

44. **Mr. Chung** (Republic of Korea) expressed support for the proposal for a clarification of draft article 2 in the commentary.

45. **Mr. Yamamoto** (Japan) reiterated his proposal, which was that the commentary should state that draft article 2, paragraph 1 (a), covered not only consumer contracts but also other contracts concluded for personal, family or household purposes.

46. **Mr. Burman** (United States of America) said that it had emerged during the deliberations of the Working Group that some countries were already allowing some procedures pertaining to family contracts and the law of succession to be conducted by means of electronic communications. The conclusion of the Working Group had therefore been that family and succession matters should not be the subject of a mandatory global exclusion. The Commission should not seek to cover ground that had already been explored in depth by the Working Group. It was in any case an issue that would not, in his view, have a significant impact on the general outcome of the draft convention.

47. **Mr. Chong** (Singapore) said he agreed with the representative of the United States that the Working Group, at its forty-fourth session, had decided against a large number of global exclusions, preferring to leave States free to make their own exclusions. He was unable to support Japan's proposal, which would amount to incorporation of the now defunct draft subparagraph (e) concerning family law and the law of succession in draft subparagraph (a). On the other hand, he supported the proposal by Canada that it be made clear in the commentary that the wording of the latter subparagraph was borrowed from the United Nations Sales Convention and referred to consumer contracts.

48. **Mr. Mazzoni** (Italy) said that he perceived considerable support for Japan's proposal that the draft convention should be deemed not to apply to contracts pertaining to family matters. Subparagraph (a) should not be read in isolation but interpreted in the light of draft article 1, in particular the reference to the "places of business" of the parties, which implied that such matters were excluded. Moreover, the Commission's mandate did not extend to succession or family matters. The Secretariat should therefore spell out in the

commentary not only what was explicitly excluded under draft paragraph 1 (a) but also what was excluded by implication under draft article 1.

49. **Ms. Schmidt** (Germany) expressed support for Italy's position.

50. **The Chairman** said he was concerned that the Commission might instruct the Secretariat to include a comment that would be inconsistent with its own written records and those of its Working Group.

51. **Mr. Maiyegun** (Nigeria) expressed support for the remarks by the delegation of Singapore. The Secretariat should be directed to base its commentary on the reports of the Working Group.

52. **Mr. Minihan** (Australia) said he agreed that any commentary should be drawn from the reports of the Working Group.

53. **Mr. Williams** (South Africa) pointed out that the draft convention would be open for signature not only by States that had been members of the Working Group but by all States Members of the United Nations. While States that had participated in the Working Group were familiar with all the arguments underlying its provisions, other States were not and would be unlikely to look into the proceedings of the body that had adopted an instrument when deciding whether to adhere to it. For that reason, he strongly supported the inclusion of a commentary.

54. **The Chairman** suggested that, in the absence of a consensus on a specific direction to the Secretariat regarding the commentary, the Commission should authorize the Secretariat to establish the commentary on the basis of the reports of the Working Group.

55. *It was so decided.*

56. **Mr. Mazzoni** (Italy), referring to paragraph 2 of draft article 2, said he understood that the intention had been to exclude instruments that were designed to "circulate". He therefore took it that letters of credit and letters of guarantee were not covered by the draft paragraph and proposed inserting the word "similar" between the words "any" and "transferable", and the word "negotiable" before the word "instrument" with a view to removing some, if not all, of the ambiguity.

57. **Mr. Maiyegun** (Nigeria), opposing the proposed amendment, said that any necessary clarification should be included in the commentary.

58. **Mr. D'Allaire** (Canada) said that the text as drafted was satisfactory. Letters of credit were not covered by draft paragraph 2 and it would be inappropriate to include a statement to that effect in the commentary.

59. **The Chairman** noted that Italy's proposal did not have the Commission's support.

#### *Chapter IV. Final Provisions*

##### *Article 15. Depositary*

60. **Mr. Estrella Faria** (Secretariat) said that the article designating the depositary was a standard provision that appeared in most United Nations conventions.

61. *The Commission approved the substance of draft article 15 and referred the text to the drafting group.*

##### *Article 16. Signature, ratification, acceptance or approval*

62. **Mr. Estrella Faria** (Secretariat) said that the article on signature, ratification, acceptance or approval was also a standard provision in United Nations conventions. The Commission must decide whether it wished to recommend adoption of the draft convention by the General Assembly as a United Nations convention, or to request that a diplomatic conference be convened for the purpose. If the Commission elected to refer the draft convention to the General Assembly, the place of signature would be United Nations Headquarters in New York. Although it was for the Sixth Committee of the General Assembly to set the date on which the draft convention, if adopted, would be opened for signature, the Commission could make a recommendation regarding the period during which it should remain open. It had not been the practice in recent years, largely on cost grounds, to convene diplomatic conferences. However, that did not preclude the organization of a special event to mark the opening of the convention for signature.

63. **Mr. Burman** (United States of America) said he expected that any budgetary request in respect of the convening of a diplomatic conference would encounter strong resistance. He therefore advocated following the standard practice of recommending the draft convention to the Sixth Committee for submission to the General Assembly, presumably before the end of 2005. However, that did not prevent the Commission from



organizing a special event to mark the opening of the convention for signature. He suggested that the Commission organize a signing ceremony at its thirty-ninth session in 2006, an event that would have no budgetary implications.

64. **The Chairman** said he took it that the Commission wished to recommend to the General Assembly that it adopt the draft convention as a United Nations convention.

65. *It was so decided.*

66. **The Chairman** asked the Commission how long it wished the draft convention to remain open for signature.

67. **Mr. Burman** (United States of America) said that he wished to amend the recommendation of three years contained in the written comments by the United States (A/CN.9/578/Add.13) to two years, which would allow time for the special event he had suggested and leave some additional time thereafter.

68. **Mr. Madrid Parra** (Spain) supported the proposal for a two-year period.

69. **Mr. Martens** (Germany) said that, in deciding on an appropriate duration, the Commission should take into account draft article 23 concerning the number of instruments of ratification, acceptance, approval or accession that would be required for the draft convention to enter into force. He requested advice from the Secretariat on the customary practice for UNCITRAL conventions, in terms of duration of the signature period and the number of ratifications required for entry into force.

*The meeting rose at 5 p.m.*

**Summary record of the 802nd meeting, held at the Vienna International Centre  
on Friday, 8 July 2005, at 9.30 a.m.**

[A/CN.9/SR.802]

*Chairman:* Mr. Chan (Singapore), (Vice-Chairman)

*In the absence of Mr. Pinzón Sánchez (Colombia), Mr. Chan (Singapore), Vice-Chairman, took the Chair.*

*The meeting was called to order at 9.40 a.m.*

**Finalization and adoption of a draft convention on the use of electronic communications in international contracts** (*continued*) (A/CN.9/571, 573, 577 and Add.1, 578 and Add.1-17)

*Article 16. Signature, ratification, acceptance or approval (continued)*

1. **Mr. Estrella Faria** (Secretariat) said that there was no standard practice for fixing the period during which an UNCITRAL convention would remain open for signature or for specifying the number of ratifications that would be required for entry into force. Signature periods ranged from six months to two years and some conventions required as few as three ratifications to enter into force.
2. **Mr. Sekolec** (Secretary of the Commission) said that States sometimes found it difficult to meet the deadline, in some cases handing in signatures to the Treaty Section of the United Nations Office of Legal Affairs on the very day that the deadline expired.
3. **The Chairman** said that if he heard no objections he would take it that the Commission wished to approve the proposal by the United States delegation to recommend a two-year signature period to the General Assembly.
4. *It was so decided.*
5. **Mr. Maiyegun** (Nigeria) proposed recommending to the Sixth Committee of the General Assembly that it request the Office of Legal Affairs to include the signing ceremony among the treaty events organized each year concurrently with the Assembly.
6. **Mr. Estrella Faria** (Secretariat) said that the Commission would be recommending to the Sixth Committee that the draft convention be adopted by the General Assembly. The established practice was to leave

the dates of the signature period in paragraph 1 of draft article 16 in square brackets because the period would begin to run on the date of adoption of the draft convention by the Assembly. The Commission could insert a footnote drawing the attention of the Sixth Committee to its recommendation of a two-year signature period. The signing ceremony might be organized as a special event during the thirty-ninth session of the Commission to be held in New York in 2006.

7. *The substance of draft article 16 was approved and the text was referred to the drafting group.*

*Article 16 bis. Participation by regional economic integration organizations*

8. **Mr. Estrella Faria** (Secretariat) said that draft article 16 bis had been included at the request of the delegations to the forty-fourth session of the Working Group listed in footnote 7 to document A/CN.9/577. It was not an entirely unprecedented provision for a United Nations instrument. Some additional wording such as the final sentence of draft paragraph 1 had been suggested by the Treaty Section of the United Nations Office of Legal Affairs.
9. The European Commission had submitted a written comment (A/CN.9/578/Add.5) proposing the insertion of a new paragraph in draft article 1. Following consultations, it had agreed to have that proposal considered in the context of draft article 16 bis.
10. **The Chairman** drew attention to the fact that the whole of draft article 16 bis was in square brackets.
11. **Ms. Struncova** (Observer for the European Commission) said that the European Union (EU) was keen to ensure that European companies derived maximum benefit from a new framework for international contracting. The European Commission, as custodian of the Treaty establishing the European

Community and the Community rules derived therefrom, was required to ensure compatibility between the draft convention and Community rules, in particular Directive 2000/31/EC on electronic commerce. Such compatibility would ensure that the high level of legal certainty of electronic commerce achieved within the EU was maintained. She trusted that the draft convention would achieve the same goal of legal certainty at the international level, thereby encouraging international trade.

12. The European Commission, acting on a mandate from the European Council of Ministers, supported the inclusion of article 16 bis on regional economic integration organizations (REIOs) in the draft convention. Moreover, to prevent any challenging or misinterpretation of Community rules governing relations between EU member States, it proposed that the following disconnection clause be inserted in draft paragraph 16 bis as paragraph 4 :

“4. In their mutual relations, States Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned and applicable to the case.”

If the Commission so decided, the European Commission would consider replacing “European Community” with “regional economic integration organization”.

13. The proposed disconnection clause was based on standard wording used, for example, in the Kiev Protocol on Civil Liability and Compensation for Damage Caused by Transboundary Effects of Industrial Accidents, and Council of Europe Conventions No. 132 on Transfrontier Television, No. 136 on Certain International Aspects of Bankruptcy, and No. 178 on the Legal Protection of Services based on, or consisting of, Conditional Access.

14. As it stood, the draft convention might result in incompatibilities with, in particular, articles 2, 9, 10 and 11 of the European Union Directive on electronic commerce. Moreover, the European Commission was duty bound to maintain the European Community’s powers to adjust its rules to developments in areas covered by the draft convention. The disconnection clause would apply only to relations between EU member States and would not affect the applicability of

the draft convention to relations with third countries. Furthermore, the Directive on electronic commerce was consistent with the draft convention inasmuch as it allowed companies in EU member States to choose third-country law for contractual purposes.

15. The European Commission hoped that the Commission would accept the proposed disconnection clause, since it would otherwise be unable to commit the European Community to ratification of the draft convention.

16. **Mr. Buttimore** (Observer for Ireland) said that his delegation strongly recommended the incorporation in the draft convention of both draft article 16 bis and the disconnection clause proposed by the representative of the European Commission. That clause was similar to the “safe harbour” rule already provisionally accepted in draft articles 7 and 13 and was aimed at preventing any conflict between Community rules and the draft convention as interpretations by the Contracting States and national courts gradually evolved. He submitted that the scope for conflict was narrow inasmuch as the draft convention was applicable only to transactions among businesses, whereas the European Community rules were applicable, in addition, to consumer transactions.

17. The proposed disconnection clause should be seen as a flexible link between the draft convention and Community rules that would facilitate EU member States’ position vis-à-vis third countries. It would not only afford legal certainty to courts but would also obviate the need for a large number of exclusions under draft article 18, paragraph 2, resulting in a tattered patchwork of reservations to the draft convention.

18. **Mr. D’Allaire** (Canada) said that his delegation supported draft article 16 bis to the extent that REIOs enjoyed undisputed competence in respect of matters covered by the draft convention. It would be problematic if an organization that was a party thereto had competence for only a portion of the draft convention, while its member States had competence for other provisions. He therefore had reservations about the words “has competence over certain matters” in the first sentence of draft paragraph 1. It was unclear whether member States of REIOs would be bound by some but not all of the provisions of the draft convention. He also stressed that the rules of REIOs should not affect third parties in countries that were not members of the organization.

19. **Mr. Tikhaze** (Russian Federation) queried the propriety of restricting participation in the draft convention to regional organizations. In his view, any international organization whose members were sovereign States and which had competence over matters governed by the draft convention should be equally eligible to participate.

20. **Mr. Burman** (United States of America) said that the representative of the Russian Federation had raised an important issue that called for further deliberation.

21. While his delegation had no fundamental objection to the disconnection clause, it did not consider its incorporation in the draft convention as sound policy in the field of electronic commerce. Furthermore, his delegation had strong objections to the wording proposed by the European Commission. It was not appropriate for a United Nations body to use language in a treaty that mandated a particular effect for the member States of another organization. Hence wording such as “States Parties which are members of the European Community shall apply Community rules” was entirely unacceptable. The proper procedure was for the European Union or any other regional or international organization to make an appropriate declaration under the draft convention.

22. **The Chairman** said that the Commission should first settle the question as to whether paragraph 16 bis should be included in the draft convention.

23. **Mr. Mitrović** (Serbia and Montenegro) said that his delegation was opposed to the inclusion of draft paragraph 16 bis, which raised a whole array of legal questions. One was what constituted a “relevant” number of Contracting States; another was whether the REIO concerned was to have the status of a Contracting State. The word “similarly” in the first sentence of draft paragraph 1 was also suspect. He wondered whether it denoted similarity to the organization’s member States or to other States. And if no member State of an organization signed the convention, was the organization still entitled to do so? Equally, what would the situation be if a State made a declaration on a particular point under draft article 18 and the organization did not, or vice versa? Furthermore, the reference, in draft paragraph 2, to transfers of competence by member States to the organization implied that in doing so member States were voluntarily limiting their sovereignty. Would that constitute an impediment to their signing the convention?

24. **Mr. Carvell** (United Kingdom) said that, although his delegation had not actively participated in the Working Group and did not appear in the list of European Union countries in footnote 7 to document A/CN.9/577, it supported the inclusion of draft article 16 bis.

25. **Mr. Adensamer** (Austria) said that any State or organization that ratified the convention thereby committed itself to aligning its legislation with the convention’s provisions. While it might be argued that there was no point in an organization ratifying the convention if it had no competence at all to enact the requisite legislation, he submitted that if it had at least some competence, as in the case of the European Union, ratification made sense. Otherwise, if the European Union passed a law that was not in compliance with the convention, its member States might be compelled to denounce the convention themselves.

26. **Mr. Khani Jooyabad** (Islamic Republic of Iran) said that two recent international instruments, the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime, allowed REIOs to become parties. His delegation could therefore accept the inclusion of draft article 16 bis. With regard to the misgivings expressed by the Canadian delegation, he drew attention to article 67, paragraph 4, of the United Nations Convention against Corruption, which stated that an REIO “shall declare the extent of its competence with respect to matters governed by this Convention”.

27. **Mr. Bellenger** (France) said that ratification of the convention by the European Union as a whole would in no way preclude individual member States from doing so as well. It followed that there would be no ambiguity regarding the applicability of the convention as a whole.

28. **Mr. Meena** (India) said that it was unclear what the position would be if States members of an REIO did not ratify the convention, while the organization itself did. His delegation would have no objection to participation by such organizations if the prior approval of their sovereign member States had been obtained.

29. **Mr. Martens** (Germany) said that, since the aim was to secure universal acceptance of the draft convention, participation by REIOs in international conventions should be encouraged even if they did not have the same all-encompassing powers as sovereign States. The Canadian delegation’s fears were

unwarranted: the adoption of draft article 16 bis, which his delegation strongly supported, would neither have an impact on the powers or competence of the Contracting Parties, nor would it give the organization any rights or privileges that infringed on those of other parties.

30. **Mr. Sandoval** (Chile) said that draft article 16 bis was acceptable to his delegation. The success of a convention depended on securing the widest possible support; and there had been cases where the reluctance of major States to sign a convention had impeded its progress, a case in point being the United Nations Convention on the Carriage of Goods by Sea.

31. **Mr. Yamamoto** (Japan) said that his delegation could support the draft article if REIOs did not enjoy rights, especially voting rights, in addition to those of its members. The last sentence of paragraph 1 of draft article 16 bis appeared to dispose of that concern, but the distinction between “States Parties” and “Contracting States” in paragraph 3 remained ambiguous. If the two had different meanings, his delegation would be unable to support the draft article in view of the provisions of draft article 19 bis, paragraph 3, and draft article 22, variant B, paragraph 2, which organizations might invoke to claim voting rights over and above those of their member States.

32. **Mr. Burman** (United States of America) noted that the language of the draft article was very similar to that of a clause in the Convention on International Interests in Mobile Equipment (Cape Town Convention) adopted at a conference of the International Institute for the Unification of Private Law (UNIDROIT) that had been attended by many of the delegations discussing the draft convention. He sought clarification, however, of the points raised by the delegations of Canada and Japan. It might be preferable, for instance, to avoid using the parallel terms “States Parties” and “Contracting States”.

33. With regard to the proposal by the Russian Federation, he suggested deferring discussion until delegations—including his own—had had time to receive instructions from their capitals.

34. **Mr. Chong** (Singapore) said that his delegation supported the draft article in principle. He wondered, however, whether the competence of sovereign States and that of REIOs were mutually exclusive or concurrent. If, for example, an organization signed the convention but failed to take steps to carry it into effect,

should members of the international community look to the organization or to its member States when seeking performance of obligations under the convention? And, as already asked by the representative of Serbia and Montenegro, what was the situation if a member State made a declaration, say under draft article 18, which was different from that of the organization? If competence was mutually exclusive, it followed that where all member States but one agreed on a common set of declarations, the dissent of that one member would in practice delay accession to the convention by all other member States.

35. **Mr. Nordlander** (Sweden), **Ms. Lahelma** (Observer for Finland) and **Mr. Madrid Parra** (Spain) said that the draft article was acceptable as it stood.

36. **Mr. Chung Wan-Yong** (Republic of Korea) said that the proposed draft article did not exist in a vacuum: it reflected the practical needs of a group of countries that wished to implement the draft convention as effectively as possible. The draft article would facilitate wider participation in the convention. Problems would arise only if accession by REIOs affected the rights and obligations of other parties, but he was confident that that would not be the case.

37. **Mr. Maiyegun** (Nigeria) said that his delegation supported the inclusion of draft article 16 bis in its current form and opposed the proposal by the Russian delegation to replace references to regional economic integration organizations with references to international organizations.

38. **Mr. Boulet** (Belgium), endorsing the comments made by the representatives of Germany and Austria, said that his delegation was in favour of including draft article 16 bis.

39. **The Chairman** said that although there was strong support for including draft article 16 bis, a number of requests for clarification had been made. It was as yet unclear, for instance, which position would prevail if an REIO made a declaration on a particular matter under the draft convention and one of its member States did not, or vice versa. That ambiguity would affect the certainty of contracts.

*The meeting was suspended at 10.55 a.m. and resumed at 11.30 a.m.*

40. **Mr. D’Allaire** (Canada) said that his delegation strongly supported draft article 16 bis in principle

because it allowed the draft convention to enter into force on a single day for a large number of States—25 in the case of the EU. That would be highly advantageous from a business perspective.

41. However, his delegation still had misgivings about the fact that an REIO which had competence over certain matters could ratify the convention and implement only the relevant articles. Even if, in the case of the EU, individual member States were also likely to adopt their own legislation to give full effect to the convention, the benefits of article 16 bis would be undermined because businesses outside the EU would still have to consider on a country-by-country basis whether the convention applied. If the European Commission had been granted full authority by member States to negotiate the draft convention, it should be in a position to implement it for all member States and the word “certain” before “matters” in draft paragraph 1 could be deleted.

42. **Ms. Struncova** (Observer for the European Commission) said that competence would be shared between the EU and its member States. The mandate of the European Commission would not prevent individual member States from negotiating in their own right.

43. With regard to the question of possible inconsistencies in declarations made by the EU and individual member States, she said that one reason for the proposed disconnection clause was to ensure that all declarations made by member States were coordinated.

44. **Mr. Meena** (India) proposed that the phrase “after obtaining prior consent of such sovereign States” should be added at the end of the first sentence of paragraph 1 of draft article 16 bis.

45. **Mr. Correia** (Observer for Portugal) said that his delegation supported draft article 16 bis in its current form.

46. **Mr. Buttimore** (Observer for Ireland) said that if an REIO, such as the EU, were to accede in its own right to the draft convention, it would be presumed to have the requisite competence, and that was a matter to be determined by its member States. With regard to the issue of mixed competence, he pointed out that the term “competence” had a specific meaning in the context of the EU. Member States normally coordinated their positions, both on accession and on declarations, when they were ratifying a convention in their own right. He reassured the Commission that every effort would be

made to avoid inconsistencies in the ratification of the draft convention by the EU and its member States. However, that was an internal issue for the EU and should not constitute an impediment to the inclusion of draft article 16 bis, which seemed to be generally welcomed by the Commission as a means of facilitating the broadest possible ratification of the draft convention.

47. **Mr. Chong** (Singapore), welcoming the reassurances given by the observer for Ireland, requested further clarification of the concept of “concurrent” or “shared” competence. If there were, for example, four areas of competence under the draft convention, he would like to know whether “shared competence” meant that competence over, say, the first two areas lay exclusively with the REIO, while competence over the third and fourth was retained by the member States, or, alternatively, whether it meant that competence over all four areas was shared between the REIO and its member States. For example, if the EU made a declaration on a specific matter, could an individual member State withdraw the declaration in respect of itself alone or would all 25 members have to withdraw the declaration together? Although that was an internal matter for the EU to decide, third parties needed to know what the position would be.

48. **Mr. Burman** (United States of America) said that the representative of Singapore had raised a crucial question. While he had no doubt that the EU and its individual member States would make every effort to ensure that their actions were not mutually incompatible, it was unclear whether those efforts would be successful. The issue of incompatibility might therefore need to be addressed in the future.

49. **Mr. Adensamer** (Austria) said that the issue was not as complex as it might appear. If two private parties concluded a contract electronically, the rules of private international law would apply, i.e. the law of an individual country not of an REIO. For example, if one of the parties had its place of business in Germany, the other party would know that German law and any declarations made by Germany would apply and that there was no need to look further. Contracting States would never apply the law of an REIO directly but rather the law of the relevant individual country.

50. **Mr. D’Allaire** (Canada) requested the representatives of EU States to provide an example of a matter governed by the draft convention in respect of which competence lay with individual member States

and of a matter in respect of which competence lay with the EU.

51. **Mr. Mitrović** (Serbia and Montenegro) asked what would happen if the EU ratified the draft convention and one member State made a declaration under draft article 18, paragraph 1 (a). How would the draft convention be applied in that member State? Third parties needed to know the answer to that question, irrespective of relations between the EU and its members.

52. **Mr. Carvell** (United Kingdom) said that, as his country currently held the presidency of the EU, he would like to consult fellow EU member States before giving a considered response to the concerns that had been expressed.

53. **The Chairman** suggested deferring consideration of draft article 16 bis.

54. *It was so decided.*

#### *Article 17. Effect in domestic territorial units*

55. **Mr. Estrella Faria** (Secretariat) said that draft article 17 reflected the wording of similar provisions in previous UNCITRAL instruments. The main issue to be addressed by the Commission was whether to uphold the decision of the Working Group to delete the words “according to its constitution” which had appeared after the words “two or more territorial units in which” in draft paragraph 1, as outlined in footnote 8 to document A/CN.9/577.

56. **Mr. Burman** (United States of America) said that his delegation supported draft article 17 and had no objection to maintaining the amendment mentioned in footnote 8.

57. *The substance of draft article 17 was adopted and the text was referred to the drafting group.*

#### *Article 18. Declarations on the scope of application*

58. **Mr. Estrella Faria** (Secretariat) said that draft article 18 had initially provided only for declarations excluding matters from the scope of application of the convention. At its forty-fourth session, however, the Working Group had agreed to transfer certain conditions governing the applicability of the convention—essentially that the convention should apply only when the parties to a contract were located in Contracting States or when the parties had agreed that it applied—

from draft article 1 to draft article 18 in order to provide States that were uncomfortable with the scope of application of the convention as defined in draft article 1, paragraph 1, with the opportunity to restrict its scope through a declaration under draft article 18.

59. As the Commission, when considering draft article 1, had confirmed the Working Group’s understanding that the draft convention applied when the law of a Contracting State was the law applicable to a contract, its application was not autonomous but required a positive determination by the forum State that its own law or the law of another Contracting State was the law governing a transaction, thus rendering the entire convention subject to the rules of private international law. It would therefore be logical to delete paragraph 1 (b) of draft article 18, which would serve a meaningful purpose only if the scope of application of the draft convention was deemed to be autonomous.

60. There had been many strong arguments in the Working Group against the open-ended scope for unilateral declarations of exclusion offered by draft article 18, paragraph 2, which many delegations felt was contrary to the spirit of international unification of law. However, the concluding consensus had been that the paragraph had to be retained, since States would otherwise be unlikely to accede to the convention and it would be almost impossible to draw up a common list of exclusions.

61. **The Chairman** invited the Commission to consider the draft article paragraph by paragraph.

#### *Paragraph 1*

62. **Mr. Mazzoni** (Italy) expressed support for the deletion of draft paragraph 1 (b) and also proposed deleting draft paragraph 1 (c). It was extremely unusual for parties to agree to subject their contract to the provisions of a convention. If a State made such a declaration, its accession to the convention would be virtually meaningless.

63. **Mr. Bellenger** (France) said that his delegation supported the deletion of draft paragraph 1 (b). As draft article 1 could be interpreted as stipulating that the rules of private international law governed the applicability of the convention, it would be redundant to include a provision with identical effect in draft article 18.

64. His delegation also supported the deletion of draft paragraph 1 (c), since it would create a situation of legal uncertainty.

65. **Mr. Lavalle** (Guatemala) argued that draft paragraph 1 (b) might not be superfluous if it were interpreted as referring to circumstances in which the rules of private international law differed from the rules applicable by Contracting States under draft article 1. He admitted, however, that the flaw in that line of reasoning was that the provisions of draft article 1 would prevail over any conflicting rule of private international law in a Contracting State.

66. **Mr. Mitrović** (Serbia and Montenegro) said that draft articles 1 and 18 contemplated four possible legal regimes of application of the draft convention. It was unclear whether those regimes were alternative or cumulative. It would be more appropriate, in his view, to incorporate the provisions of draft article 18, paragraph 1 (a), in draft article 1 and the provisions of draft article 1 in draft article 18, thus providing for two regimes. However, the deletion of paragraph 1 (b) of draft article 18 had the advantage of eliminating one regime. He stressed that “the law of a Contracting State” denoted the ordinary domestic law of that State, which would, in principle, include the provisions of the convention.

67. His delegation also supported the deletion of draft paragraph 1 (c) to further reduce the number of regimes of application, although it continued to support party autonomy under draft article 3, which implied that the convention contained no peremptory norms and that the parties were free to make such exclusions as they saw fit. It was hard to imagine parties agreeing to apply the convention in non-contracting States and it would be difficult for the courts of a non-contracting State to apply the provisions of the convention.

68. **Mr. Yamamoto** (Japan) said that his delegation had no strong views regarding draft paragraph 1 (b). It was for the Commission to decide whether it wished to retain the possibility of autonomous application of the draft convention. A decision to rule out that possibility would have the advantage of respecting more fully the intentions of Contracting States that made declarations under draft article 18, paragraph 2, and draft article 19, since the courts of the forum State were required to apply the convention subject to those declarations if the rules of private international law of the forum State led to the application of the law of the Contracting State. However, there were also advantages to be gained from

retaining the possibility of autonomous application, since the courts of a Contracting State as forum State would not then need to examine which law was applicable or how that law affected the scope of application of the convention.

69. With regard to draft paragraph 1 (c), his delegation associated itself with the statements made by the delegations of Italy, France and Serbia and Montenegro. It would be odd for a State to declare that the convention would apply only if the parties had so agreed. That possibility was already covered by draft article 3 on party autonomy.

70. **Mr. Madrid Parra** (Spain) said that, since draft article 18, paragraph 2, provided States with unlimited scope to make such exclusions as they deemed appropriate, paragraph 1 fulfilled no function other than to indicate explicitly what those possibilities were. Hence his delegation not only had no objection to the deletion of draft subparagraphs (b) and (c) but would also be in favour of deleting draft subparagraph (a).

71. **Mr. Burman** (United States of America) said that the words “any State” should be replaced by either “any Contracting State” or “any State Party” or possibly both, depending on how those terms were differentiated. He requested the Secretariat to present a recommendation in that regard.

72. Draft paragraph (c) served the useful purpose of enhancing the likelihood of wider adoption of the draft convention, since it took into account States that might wish to adopt the convention but to leave scope for commercial parties to opt in or opt out. It would then apply to contracts that were subject to the law of a Contracting State when commercial parties so agreed.

73. He noted with interest the recognition by the representative of Spain of the scope of draft paragraph 2, which might also encourage States to accede to the convention. Given that the application of rules of electronic commerce was in its early stages, many exclusions by Contracting States were likely at the outset but the need for them would decrease over time.

74. **Mr. Chong** (Singapore) said that his delegation shared the United States delegation’s interpretation of the purpose of draft paragraph 1 (c). It would apply, for example, if parties agreed that the law of a non-contracting State should govern a contract but the forum State ruled instead that the law of a Contracting State should apply. If the latter State had made a declaration



under draft paragraph 1 (c), the convention would not apply because the parties had not agreed that it should. Draft paragraph 1 (c) therefore provided reassurance to States wishing to adopt the convention. His delegation supported the retention of draft paragraphs 1 (a) and 1 (c). It was opposed to the deletion of all subparagraphs because that would make draft paragraph 1 unduly broad and flexible.

*The meeting rose at 12.30 p.m.*

**Summary record of the 803rd meeting, held at the Vienna International Centre  
on Friday, 8 July 2005, at 2 p.m.**

[A/CN.9/SR.803]

*Chairman:* Mr. Chan (Singapore), (Vice-Chairman)

*In the absence of Mr. Pinzón Sánchez (Colombia), Mr. Chan (Singapore), Vice-Chairman, took the Chair.*

*The meeting was called to order at 2.10 p.m.*

**Finalization and adoption of a draft convention on the use of electronic communications in international contracts** (*continued*) (A/CN.9/571, 573, 577 and Add.1, 578 and Add.1-17)

*Article 16 bis. Participation by regional economic integration organizations (continued)*

1. **Mr. Carvell** (United Kingdom), speaking as a representative of the current holder of the presidency of the European Union (EU), said that the delegations of EU member States had held informal consultations on the queries that had been raised at the previous meeting regarding possible EU ratification of the draft convention. The position was that it was for the European Council to decide whether to ratify and whether declarations needed to be made. In doing so, the Council would take into account the possibility that individual member States of the European Union might wish to make declarations. Any areas of inconsistency would thus be resolved and a coherent legal position would be established. Indeed there was a legal obligation on member States under European Treaty rules not to breach Community law. It was therefore highly unlikely that any areas of conflict would arise between the EU and its member States. Furthermore, paragraph 58 of the preamble to Directive 2000/31/EC of the European Union on electronic commerce stated that the Directive should not apply to services supplied by service providers established in a third country and that, in view of the global dimension of electronic commerce, it was appropriate to ensure that Community rules were consistent with international rules. The same paragraph stated that the Directive was without prejudice to the results of discussions within international organizations - including UNCITRAL - on legal issues.

2. **Mr. Chong** (Singapore) said that, while his delegation welcomed the assurances provided by the representative of the United Kingdom, its primary concern was that the instrument of accession or ratification should make clear how competences would be shared so that other parties could know, for instance in the event of an EU member State deciding to withdraw a declaration and amend its national law, to what extent that amended law was effective and whether other parties could continue to do business with a company in that EU State. His delegation had also sought a clarification as to whether the sharing of competences took the form of an absolute transfer of competence to the European Union in particular areas, with States retaining competence over other areas, or whether competence over certain areas was shared by the Union and its member States.

3. **Ms. Struncova** (Observer for the European Commission) said that, although the European Commission was responsible for making declarations under the draft convention regarding matters in respect of which it had competence, responsibility for deciding in which areas the European Commission shared competence with member States or had exclusive competence lay with the European Council. It would be clear from the instrument of accession or ratification which areas were regulated by Community instruments and which were governed by national law.

4. **Mr. Burman** (United States of America) suggested that the points raised by the representative of Singapore be reflected in the commentary, which should state that a declaration by the European Union or any other regional economic integration organization (REIO) should provide specific information on exclusive or shared competence, so that other Contracting States, and transacting parties that applied the terms of the convention, could predict how the convention would be applied under particular circumstances.

5. **Mr. Chong** (Singapore) said that his delegation wished to see reflected in the commentary its understanding that the transfers of competence from a member State to an REIO referred to in draft paragraph 2 did not necessarily mean exclusive transfers that deprived the member State concerned of competence in respect of those matters.

6. **The Chairman**, speaking in response to a query by **Mr. Tikhaze** (Russian Federation) regarding his delegation's proposal that the concept of "regional organization" should be expanded to cover all international organizations, said that there seemed to be no support for that proposal. He therefore took it that the Commission wished to adopt the text of draft article 16 bis as it appeared in document A/CN.9/577, with the square brackets removed.

7. *It was so decided.*

8. The Chairman invited comments on the "disconnection clause" proposed by the European Union, the text of which appeared in document A/CN.9/578/Add.5 and which would, if adopted, constitute draft article 16 bis, paragraph 4.

9. **Mr. Buttmore** (Observer for Ireland) reiterated his delegation's strong support for the proposed paragraph.

10. **Mr. Burman** (United States of America) said that his delegation was strongly opposed to the wording of the proposed new paragraph, since it was wholly inappropriate for a United Nations body to be asked, in drafting a treaty, to set out mandatory terms governing its application to member States of another organization. However, his delegation was prepared to work towards more appropriate wording.

11. **The Chairman** said that the United States delegation had raised a fundamental issue of public international law, which might be more appropriately dealt with by the Sixth Committee of the General Assembly. If the Commission chose to address the issue, it might be criticized for exceeding its private international law mandate.

12. **Mr. Burman** (United States of America) said that the Commission was fully competent to accept or reject proposals regarding a legal text that it was drafting. It would be a mistake for the Commission to submit the draft convention to the Sixth Committee without settling

what was a crucial issue, since it might entail an unacceptable delay in its adoption.

13. **Mr. Carvell** (United Kingdom) said that the proposed clause provided a vehicle for reconciling potential differences between the draft convention and the European Union Directive. It might also serve as a model for dealing with problems encountered by other groupings of States.

14. **Mr. Martens** (Germany) said he agreed with the views expressed by the representative of the United States regarding the risks of referral of the matter to the Sixth Committee. He pointed out that the final provisions under chapter IV came within the ambit of public international law and that the Commission's competence to deal with such questions was indisputable. While his delegation supported the disconnection clause, it had considerable sympathy with the objections to the wording raised by the United States. If necessary, his delegation was prepared to propose alternative wording that would serve the purpose intended by the clause, while avoiding potential problems.

15. **The Chairman** said that the difference between the proposed disconnection clause and the final provisions was that the latter were all taken from established precedents. He was prepared to accept the view, however, that the Commission was entitled to decide the matter without referring it to the Sixth Committee. The objection raised by the United States delegation was a real one and, in view of the German delegation's willingness to work on producing a compromise text, he suggested that an ad hoc drafting group should be entrusted with the task.

16. **Mr. D'Allaire** (Canada) supported the Chairman's suggestion.

17. **Mr. Mitrović** (Serbia and Montenegro) said that the proposed disconnection clause amounted to a reservation, for which the draft convention had already made provision. Moreover, although the proposal had ostensibly been made by the European Union, the result would be that the 25 member States of the Union would be able to invoke draft article 18, paragraph 2, to argue that the rules promulgated by the European Union were applicable in place of those of the draft convention.

18. **The Chairman** said he took it that the Commission wished to convene an ad hoc group to draft an alternative text.

19. *It was so decided.*

*Article 18. Declarations on the scope of application (continued)*

*Paragraph 1 (continued)*

20. **The Chairman** noted that there seemed to be almost unanimous support for the deletion of draft article 18, paragraph 1 (b), but that opinions were divided on whether to retain draft paragraph 1 (c).

21. **Mr. Nordlander** (Sweden) said that, having heard the statements by the representatives of the United States and Singapore, he thought it preferable to retain draft paragraph 1 (c).

22. **The Chairman** said he took it that the Commission wished to delete draft paragraph 1 (b) but to retain draft paragraph 1 (c).

23. *It was so decided.*

*Paragraph 2*

24. **Mr. D'Allaire** (Canada) said that the question of the scope and application of draft paragraph 2 had given rise to divergent views in the Working Group, with some delegations arguing that there were inherent restrictions on the declarations that could be made and others considering that open-ended declarations were acceptable. His delegation therefore wished to place on record its understanding that a declaration of the following kind could be made under the draft paragraph:

"1. All matters are excluded from the application of the Convention with the exception of matters involving the application of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) and matters involving the application of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980).

2. The application of the Convention as provided in paragraph 1 extends only to territorial units [a] and [b]."

The effect of such a declaration would be that, in a federal State, the draft convention would apply only to some territorial units, and then only in respect of matters involving two United Nations conventions. Its applicability to business-to-business contracts not involving those two conventions would be excluded. He

added that his delegation did not wish to amend the text of draft paragraph 2.

25. **Mr. Burman** (United States of America) said that, in his view, a State could properly make such a declaration under draft paragraph 2, although his delegation hoped that not many States would feel compelled to do so. Every ratification of the draft convention, even if some States initially felt the need for a more conservative approach, extended the reach of the basic rules of electronic commerce, and that in turn would contribute to ratification by yet more States.

26. **Mr. Mitrović** (Serbia and Montenegro) said that, although his delegation was in favour of draft paragraph 2, it was concerned about the implications of a State making a series of declarations that would deprive the convention of much of its force.

27. **Mr. Madrid Parra** (Spain) endorsed the view expressed by the representative of the United States. It was important to allow for declarations of exclusion so that as many States as possible, at different stages of technological development, were encouraged to ratify the convention, thereby contributing to the development of electronic commerce. At the same time, he wished to echo the note of caution sounded by the representative of Serbia and Montenegro. By endorsing the type of declaration suggested by the delegation of Canada, the Commission might be perceived to be recommending such a course of action.

28. **Mr. D'Allaire** (Canada) said he was not proposing that the declaration should be included in the commentary to the draft paragraph.

29. **Mr. Laval** (Guatemala) said that it was clear from the list of definitions in article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties that some declarations under draft article 18, paragraph 2, would amount to reservations, notwithstanding the fact that draft article 21 prohibited reservations. A unilateral statement did not need to be characterized as a reservation for it to be taken as such. Moreover, pursuant to article 20 of the draft convention such declarations could be made at any time. But according to the draft guidelines on reservations to treaties issued by the International Law Commission, a reservation by a State after expressing its consent to be bound by a treaty was valid only if the other contracting parties raised no objection. He wondered whether the rules of the Vienna Convention would apply to declarations made under

draft article 18, paragraph 2, in particular the rule that a reservation was invalid if it was incompatible with the object and purpose of a treaty. One possible solution would be to insert a proviso in draft article 21 stating that its provisions were without prejudice to those of draft article 18, paragraph 2, and to make it clear in the commentary that declarations under draft paragraph 2 were not subject to the objections regime under the Vienna Convention.

30. **Mr. Burman** (United States of America) said that the travaux préparatoires of the Vienna Convention showed that the Convention did not apply to private international law. Private-law conventions drafted by the Commission and other bodies traditionally provided for declarations that were structured mechanisms for adjustment by an individual State party and did not constitute reservations under the Vienna Convention. Hence the provisions of the Convention with regard to objections to reservations did not apply either. In any case, a significant number of members of the Commission were not parties to the Vienna Convention. While he was not opposed to a reference in the commentary to the long tradition of structured declarations in private-law conventions, he was unable to support the proposed amendment to draft article 21.

31. **Mr. Estrella Faria** (Secretariat) said that the Secretariat, before issuing the text of the draft convention as document A/CN.9/577, had submitted the final clauses to the Treaty Section of the United Nations Office of Legal Affairs, which was responsible for clearing the final clauses of any treaty negotiated by a United Nations body. Most United Nations treaties related to public international law, but the Treaty Section was aware that it had become accepted practice in private-law conventions for States to adjust individual provisions by declaration, since such conventions applied only to private contracts. Thus, although the Secretariat's advice was clearly not binding on Member States, he wished to reassure the Commission that, internally at least, the wording had been approved.

32. **Ms. Schulz** (Observer for the Hague Conference on Private International Law) noted that the Commission had decided that the draft convention would apply where the rules of private international law led to the application of the law of a Contracting State. However, the situation was not entirely clear. She posited a case in which a State made a declaration under draft article 18, paragraph 2, to exclude the application of the convention

to, for example, family law matters. If a case came before the courts of that State and the private international law rules of the State led to the application of the law of another Contracting State that had not excluded family law, the question arose whether the courts would then be required to apply the convention to family law. Under private international law, that would seem to be a perfectly reasonable solution, but the draft convention would be applied by people who were not necessarily experts in private international law. It might therefore be useful for the Commission to clarify the matter in the commentary.

33. **The Chairman** said that the statement by the observer for the Hague Conference on Private International Law amounted to a request for legal advice and he questioned whether it was in the Commission's best interests to respond to that request in plenary. He suggested that the matter be taken up privately with members of the Commission who had actively participated in drafting the text.

34. **The Chairman** said he took it that the Commission wished to approve the text of draft paragraph 2.

35. *It was so decided.*

36. *The substance of draft article 18, as amended, was approved and the text was referred to the drafting group.*

*The meeting was suspended at 3.25 p.m. and resumed at 3.55 p.m.*

*Article 16 bis. Participation by regional economic integration organizations (resumed)*

37. **Mr. Burman** (United States of America) said that the ad hoc drafting group had agreed on the following compromise wording for paragraph 4 of draft paragraph 16 bis:

“This Convention shall not prevail over any conflicting mandatory rules of any regional economic integration organization as applicable to parties whose respective places of business are situated in member States of any such organization, as set out by declaration.”

The wording was based on article 90 of the United Nations Sales Convention and seemed to have wide support.

38. **Ms. Struncova** (European Commission) said that her delegation had reservations regarding the proposed wording because the concept of “place of business” was different from that of a “place of establishment” in the European Union Directive on electronic commerce and because the phrase “conflicting mandatory rules” was an alien concept in Community law that would create uncertainty as to which rules were applicable. The European Commission would be unable to sign and ratify the instrument under those circumstances.

39. **Mr. Burman** (United States of America) said that his understanding was that it would be left to individual REIOs to interpret “place of business” when making a declaration. The REIO would be free to use whatever definition of “place of business” it required for its purposes. He indicated that his delegation was willing to discuss an alternative to the word “mandatory”.

40. **Mr. D’Allaire** (Canada) expressed support for the text as it stood and for the views expressed by the United States delegation. In addition to defining the concept of “place of business”, the declaration made by an REIO could indicate that the “mandatory rules” were essentially those rules applied by the organization itself, such as the European Directive.

41. **Mr. Bellenger** (France) said that the European Commission’s preliminary view that it might be unable to ratify the convention should not be taken as the final word on the matter. It was ultimately for the European Community to decide whether to proceed with ratification.

42. **Ms. Lahelma** (Observer for Finland), **Mr. Boulet** (Belgium), **Mr. Nordlander** (Sweden) and **Mr. Adensamer** (Austria) expressed support for the compromise text.

43. **Mr. Martens** (Germany) said his delegation also supported the compromise text and would accept it even if the word “mandatory” was deleted. The question as to whether the European Union would ratify the convention would be decided according to the Union’s normal decision-making procedure.

44. **Mr. Buttimore** (Observer for Ireland) said that the text drawn up by the ad hoc drafting group offered a fair compromise. He suggested stating in the commentary that the phrases “place of business” and “conflicting mandatory rules” could be defined by an REIO in a declaration. His delegation had no objection to the deletion of the word “mandatory”.

45. **Mr. Carvell** (United Kingdom) expressed support for the suggestion that REIOs should be free to clarify the definition of “place of business” in a declaration. His delegation was also in favour of deleting the word “mandatory”.

46. **Mr. Laval** (Guatemala), noting that the original text proposed by the European Commission referred to the special rules applicable to “mutual relations” between member States of a particular organization, proposed inserting the words “in their mutual relations” after the word “applicable” in the compromise text.

47. **Mr. Mitrović** (Serbia and Montenegro) proposed the following text:

“Member States of a regional economic integration organization may make declarations concerning their obligation to apply among themselves the respective rules of their organization that differ from those provided for in the Convention.”

48. **Mr. Burman** (United States of America), **Mr. Adensamer** (Austria) and **Ms. Lahelma** (Observer for Finland) expressed support for the deletion of the word “mandatory” in the text proposed by the ad hoc drafting group.

49. **The Chairman** said he took it that the Commission wished to delete the word “mandatory”.

50. *It was so decided.*

51. **Mr. D’Allaire** (Canada) pointed out that the proposed provision did not specify who would make the declaration referred to in the phrase “as set out by declaration”. It was his delegation’s understanding that it was the regional economic integration organization.

52. **Mr. Maiyegun** (Nigeria) expressed concern that the text was establishing a precedent whereby a United Nations convention was in effect limiting its own scope. That question should perhaps be made clear in the commentary.

53. **Mr. Estrella Faria** (Secretariat) said that the compromise text was partly inspired by the language of article 94 of the United Nations Sales Convention, which allowed two or more Contracting States with the same or similar legal rules to declare that the Convention would not apply to contracts of sale or to their formation where the parties had their places of

business in those States. Although the structure of the provision was different, it would have the same effect.

54. He suggested inserting the words “submitted in accordance with article 20” after the word “declaration” at the end of the draft paragraph.

55. **Mr. Martens** (Germany) said it was his understanding that the phrase “as set out by declaration” denoted a declaration by an REIO. That should perhaps be made explicit in the commentary or by adding the words “made by it” after “as set out by declaration”.

56. **Mr. Adensamer** (Austria), opposing Germany’s proposal, questioned the wisdom of allowing only an REIO to make a declaration under the draft article. For instance where an REIO had not ratified the convention, its member States might need to take advantage of the disconnection clause and make a declaration themselves.

57. **Mr. Estrella Faria** (Secretariat) said it was the Secretariat’s understanding that the provision logically applied only to declarations submitted by REIOs and that article 16 bis would be irrelevant in the event of non-ratification by an REIO, since it would be assumed that its member States, before ratifying the convention, would verify their obligations under the regional treaties to which they had acceded and would submit a declaration under article 18, paragraph 2, that ensured compliance with those agreements.

58. **Mr. Lavalle** (Guatemala) said that if the Commission accepted the German proposal, an REIO would be able to make and modify a declaration at any time, even after acceding to the convention. He wondered whether the Commission really wished to provide for that possibility.

59. **Mr. Madrid Parra** (Spain), endorsing the comment by the delegation of Austria, said he was against allowing an REIO to make a declaration without the consent of its member States. It also entailed the risk of inconsistency with draft article 18, paragraph 2, which provided States with broad flexibility to decide on the scope of application of the convention. His delegation was in favour of reverting to the wording of article 90 of the United Nations Sales Convention.

60. **Mr. Martens** (Germany) said that he wished to withdraw his proposal in the light of the objections by previous speakers.

61. **Mr. Estrella Faria** (Secretariat) said that nothing prevented the member States of an REIO that had not

ratified the convention from declaring that they wished to exclude certain matters from the scope of the convention or that the rules of the REIO of which they were members prevailed over the rules of the convention.

62. **Mr. Adensamer** (Austria) said that, in the light of the Secretariat’s explanation, he wished to withdraw his objection to the understanding that only REIOs could make declarations.

63. The Chairman said he took it that the Commission wished to accept the text of draft article 16 bis, paragraph 4, as proposed by the ad hoc drafting group with the deletion of the word “mandatory” and the addition suggested by the Secretariat.

64. *It was so decided.*

65. *The substance of draft article 16 bis, as amended, was approved and the text was referred to the drafting group.*

#### *Article 19. Communications exchanged under other international conventions*

66. **Mr. Estrella Faria** (Secretariat) said that paragraph 1 of draft paragraph 19 was intended to make clear that the provisions of the draft convention could be used to facilitate the operation of the instruments listed. The remainder of the draft article provided Contracting States with options as to the extent to which they would apply the convention to facilitate the operation of other international treaties or agreements to which they were parties. Draft paragraph 2 enabled States to extend the application of the convention to instruments not listed in draft paragraph 1, unless they declared that they would not be so bound. Notwithstanding such exclusions of open-ended application, States could declare under draft paragraph 3 that they would apply the convention to specific instruments in addition to those listed in draft paragraph 1. Draft paragraph 4 provided another option for non-application of the convention to specific instruments, including any of those listed in paragraph 1, even if a State had not excluded the application of paragraph 2. The complexity of the provision in its current form was the result of extensive discussion in the Working Group.

67. **The Chairman** said that the finely balanced text, with its series of opt-in and opt-out clauses, attempted to accommodate a wide range of different concerns and scenarios.

68. **Mr. Mitrović** (Serbia and Montenegro) noted that draft paragraph 4 provided a solution to the issues raised earlier by the European Commission proposal.

69. **The Chairman** said he took it that the Commission wished to accept article 19 as drafted.

70. *The substance of article 19 was approved and the text was referred to the drafting group.*

*Article 19 bis. Procedure for amendments to article 19, paragraph 1*

71. **Mr. Estrella Faria** (Secretariat) said that draft article 19 bis had been added at a relatively late stage in the Working Group's deliberations by the delegation of Belgium, which thought it might be wise to have a simple procedure for amending the list of instruments in paragraph 1 of draft article 19 in order to avoid the rather cumbersome traditional amendment procedure under public international law. Of course, the need for such an article would also depend on what overall amendment procedure the Commission decided to adopt for the draft convention. Draft article 22 contained two variants: a "classical" variant A and a somewhat more modern variant B.

72. **The Chairman** drew attention to the fact that the whole draft article was in square brackets.

73. **Mr. Burman** (United States of America) proposed deferring the discussion of draft article 19 bis until the Commission had concluded its discussion of draft article 22.

74. **Mr. Madrid Parra** (Spain), supported by **Mr. Chung Wan-yong** (Republic of Korea), said that draft article 19 bis appeared to be redundant, since its content was already covered by draft articles 19 and 22. His delegation therefore proposed that it be deleted right away.

75. **Mr. D'Allaire** (Canada) supported the proposal to defer discussion of draft article 19 bis until the Commission concluded its discussion of draft article 22.

76. **The Chairman** said that, in the absence of a consensus on changing the order of discussion of the draft articles, the Commission would resume its discussion of draft article 19 bis at its next meeting.

*The meeting rose at 5 p.m.*



**Summary record of the 804th meeting, held at the Vienna International Centre  
on Monday, 11 July 2005, at 9.30 a.m.**

[A/CN.9/SR.804]

*Chairman:* Mr. Chan (Singapore), (Vice-Chairman)

*The meeting was called to order at 9.45 a.m.*

**Finalization and adoption of a draft convention on the use of electronic communications in international contracts** (*continued*) (A/CN.9/571, 573, 577 and Add.1, 578 and Add.1-17)

*Article 19 bis. Procedure for amendments to article 19, paragraph 1 (continued)*

1. **The Chairman** welcomed the Chairman of the Commission, Mr. Pinzón Sánchez, who had requested him, as Vice-Chairman, to continue chairing the proceedings relating to agenda item 4. He invited the Commission to resume consideration of draft article 19 bis.

2. **Mr. Tikhaze** (Russian Federation) objected to draft paragraph 3 on the ground that Contracting States which omitted, for whatever reason, to state their position on a given amendment, would be assumed to have consented to it. As an alternative to such default approval, he proposed amending the draft paragraph to require the written approval of two thirds of Contracting States within 12 months rather than 180 days. Moreover, since an amendment adopted by default might enter into force in a State that had not supported it, his delegation proposed inserting a sentence to the effect that, where a State had not positively accepted an amendment, the amendment should enter into force for that State 30 days after its adoption.

3. **Mr. Yamamoto** (Japan) said that his delegation was reluctant to introduce a provision that would facilitate the process of amending the convention. In any case, paragraphs 2 to 4 of draft article 19 offered States ample opportunity to curtail or extend the list of conventions in paragraph 1. Moreover, Contracting States wishing to introduce an amendment could do so under draft article 22. He was therefore opposed to draft article 19 bis.

4. **Mr. Khani Jooyabad** (Islamic Republic of Iran) said that his delegation was in favour of retaining the draft article.

5. **Ms. Schmidt** (Germany) said she supported the views expressed by the representative of Japan and the proposal by the representatives of Spain and the Republic of Korea at the previous meeting to delete the draft article. If it were adopted, her delegation would have serious concerns about draft paragraph 3.

6. **Mr. D'Allaire** (Canada) expressed support for the draft article. Although the general rules on amendments were laid down in draft article 22, and although Canada had stated in its written comment (A/CN.9/578/Add.15) that any amendment to the convention should be binding only on States that expressed the desire to be bound, draft article 19 bis was a special case inasmuch as it addressed the specific issue of the list of UNCITRAL conventions contained in paragraph 1 of the draft article. The reason for including the list was to promote their adoption and the applicability of the draft convention thereto. The procedure for amending the list should be flexible with that end in view.

7. **Mr. Sandoval** (Chile) said that his delegation was opposed to the adoption of draft article 19 bis since amendment procedures already existed.

8. **Mr. Burman** (United States of America) said that, although his delegation supported efforts to add to the list of instruments contained in draft article 19, paragraph 1, the provision for tacit approval of amendments in paragraph 3 of draft article 19 bis presented a serious problem, as noted by the representative of the Russian Federation. The reference in draft paragraph 2 to the depositary seeking the views of Contracting States was also inappropriate treaty language.

9. **Mr. Bellenger** (France) said that draft article 19 was already excessively complex. Commercial operators would be uncertain about whether the convention applied to a given country or instrument. Draft article 19 bis would complicate matters still further.

10. **Mr. Correia** (Observer for Portugal) said that he supported the position of the United States and France.

11. The Chairman, while noting the strong support for the idea of promoting the applicability of the draft

convention to other UNCITRAL instruments, said he took it that the Commission wished to delete draft article 19 bis.

12. *It was so decided.*

*Article 20. Procedure and effects of declarations*

13. **Mr. Estrella Faria** (Secretariat), after noting that draft article 20 was a standard provision analogous to those in other conventions, reminded the Commission that it had been suggested at a previous meeting that the reference in draft paragraph 1 to article 17, paragraph 1, should be deleted on the ground that declarations regarding the effect of the convention in domestic territorial units were typically made on ratification.

14. **Mr. D'Allaire** (Canada) wondered whether it might not be appropriate to insert a reference in paragraph 1 of draft article 20 to draft article 16 bis.

15. Although declarations made at the time of signature or ratification took effect simultaneously with the entry into force of the convention, his delegation proposed that paragraphs 3 and 4 of draft article 20 be amended to state that subsequent declarations, modifications or withdrawals would take effect three months rather than six months after the date of receipt by the depositary. That was the time scale for initial or subsequent declarations in the recently negotiated Hague Convention on Choice of Court Agreements.

16. **Mr. Estrella Faria** (Secretariat) said that if a reference to draft paragraph 16 bis was included, it should refer to paragraph 4 and not to paragraph 2 of that draft article.

17. With regard to the proposal to reduce the six-month time limit to three months, the Commission should consider to what extent a parallel amendment to draft paragraph 24 concerning transitional rules might be needed.

18. **Mr. Burman** (United States of America) said that his delegation supported the reference in draft article 20, paragraph 1, to draft article 16 bis, paragraph 4. The reference to article 17, paragraph 1, was incorrect since the Commission had—rightly in his view—decided that declarations must be made at the time of ratification.

19. His delegation supported, in principle, the proposal for a shorter time limit. However, commercial groups needed sufficient notice to arrange financial transactions and to obtain advice on the extent to which

a given declaration might affect a particular jurisdiction. Whether his delegation supported the proposal therefore depended on the ability of the International Trade Law Branch to work closely with the Treaty Section of the United Nations Office of Legal Affairs to ensure that declarations were made available immediately. If the Secretariat could not provide a guarantee to that effect, the six-month time limit should be retained in order to give commercial parties time to adjust their commercial undertakings.

20. **Mr. Sekolec** (Secretary of the Commission) said that the Treaty Section had introduced the practice of sending out notifications of treaties and declarations promptly by e-mail to Member States. It also transmitted the same information in writing to permanent missions.

21. **Ms. Kamenkova** (Belarus) said that if the phrase “at any time” in draft article 20, paragraph 1, meant at the time of signature, ratification, acceptance, approval or accession, her delegation would have no objection to the reference in that paragraph to draft article 17, paragraph 1. However, if it meant at any time after the draft convention had entered into force in a given State, the reference should be deleted.

22. **Mr. Estrella Faria** (Secretariat) said that the Working Group had initially taken the view that, in the interests of legal certainty, all declarations should be made at the time of ratification. The view that eventually prevailed, however, was that it should be possible to make declarations under draft articles 18 and 19 at any time, especially since a State might not wish to make a declaration under those articles at the outset and the draft convention should not be interpreted as encouraging such declarations.

23. Draft article 17, however, dealt with the geographic scope of application of the draft convention in respect of particular jurisdictions rather than with its substantive scope of application. Given that in some jurisdictions—for constitutional or other reasons—a convention might apply only to certain territorial units, the Working Group had decided to retain the requirement that a declaration under draft article 17, paragraph 1, should be made at the time of ratification. In the case of draft article 16, it had been agreed that an organization had to demonstrate at the outset, i.e. when ratifying the convention, that it had competence over certain matters.

24. **Mr. Field** (United States of America), supported by **Ms. Schmidt** (Germany), said that his delegation opposed Canada's proposal to replace the words "six months" in draft article 20, paragraphs 3 and 4, with the words "three months". Although e-mail had speeded up communications, changing contracts in the commercial world could still be a lengthy process.

25. **Mr. Potyka** (Austria) and **Ms. Schmidt** (Germany) expressed support for the proposal to delete the reference to draft article 17, paragraph 1, in draft article 20, paragraph 1, and for the proposal to add a reference to draft article 16 bis, paragraph 4.

26. **The Chairman** said that, if he heard no objections, he would take it that the Commission wished to delete the reference to draft article 17, paragraph 1, in draft article 20, paragraph 1, and to add a reference to article 16 bis, paragraph 4. As there seemed to be insufficient support for the Canadian proposal to amend paragraphs 3 and 4 of draft article 20, he would take it that the Commission wished to retain the current wording of those paragraphs.

27. *The substance of draft article 20, as amended, was approved and the text was referred to the drafting group.*

#### *Article 21. Reservations*

28. **Mr. Estrella Faria** (Secretariat) said that draft article 21 was a standard provision in UNCITRAL instruments and was without prejudice to any declarations made under draft articles 16, 17, 18 and 19. However, it ruled out reservations such as exclusion of the application of the draft convention to a particular regional organization or exclusion of the application of individual articles.

29. **Mr. Mitrović** (Serbia and Montenegro), expressing the view that certain articles of the draft convention permitted declarations that were de facto reservations, proposed that, in the interests of legal clarity, draft article 21 should be amended to read: "Except for declarations made under article 20, no reservations may be made under this Convention."

30. **The Chairman** pointed out that if the amendment was adopted, draft article 21 would imply that declarations were tantamount to reservations.

31. **Mr. Burman** (United States of America), supported by **Mr. D'Allaire** (Canada), said that his

delegation opposed the proposed amendment as it would reverse what had been established UNCITRAL practice since 1974. Article 27 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit stated that no reservations could be made to the Convention although other articles provided for declarations. Article 56 of the recently adopted Convention on International Interests in Mobile Equipment excluded the possibility of reservations but stated that declarations could be made under a number of articles, thereby drawing a clear distinction between reservations under the Vienna Convention on the Law of Treaties and declarations under private-law conventions. Draft article 21 should therefore be retained in its current form.

32. *The substance of draft article 21 was adopted and the text was referred to the drafting group.*

#### *Article 22. Amendments*

33. **Mr. Estrella Faria** (Secretariat) said that variant A of draft article 22 reflected provisions of earlier UNCITRAL conventions. It followed the traditional practice whereby proposed amendments to international treaties were deliberated and voted on by Contracting States at diplomatic conferences. The Protocol amending the Convention on the Limitation Period in the International Sale of Goods, for instance, had been adopted at a diplomatic conference in 1980. The consensual basis on which the Commission operated could, in principle, be subsumed in the voting requirements laid down in draft article 22.

34. Variant B had been proposed by the United States at the forty-fourth session of the Working Group. It required the UNCITRAL Secretariat to monitor developments of relevance to the application of the convention and to identify areas that might require amendment. The Secretariat would also undertake some of the preparatory work needed for the adoption of amendments at a conference of Contracting States. Another possibility implicit in variant B was that, since nearly all Contracting States would be members of the Commission or States Members of the United Nations, amendments could be agreed upon by the Commission and then submitted to the General Assembly of the United Nations, dispensing with the need for a diplomatic conference. That procedure was being recommended for the adoption of the draft convention itself and might be a more pragmatic and efficient

approach than the traditional procedure outlined in variant A.

35. In draft paragraph 2 of variant B, the Commission might wish to refer simply to the “Secretary-General of the United Nations” or “the depositary”, as appropriate, since the UNCITRAL Secretariat was not an independent legal body.

36. **Mr. Burman** (United States of America) said that there was no need for draft article 22 because, in line with Commission practice since the late 1980s, amendments to the draft convention could simply be discussed by the Commission during the normal course of its work. However, if the Commission wished to retain the draft article, his delegation would endorse variant B. Variant A introduced the formalism of a diplomatic conference, which was not in line with the Commission’s traditional practice, as well as strict voting procedures that tended to politicize the proceedings. Diplomatic conferences were also costly events, and it would be difficult to obtain approval of the necessary budgetary resources from the Fifth Committee of the General Assembly.

37. Variant B, on the other hand, would serve a useful purpose because it required the Secretariat to monitor developments, bring them to the attention of Contracting States and convene review conferences that would fall within the Commission’s normal workload and would not require an additional budget.

38. His delegation would not object to the deletion of draft paragraph 3 of variant B, which provided for an amendment process. However, it was not a tacit amendment provision since amendments would be effective only when they had been ratified, accepted or approved by States in their individual capacity.

39. The Chairman suggested that the Commission should decide which variant, if either, it wished to choose before proceeding to a detailed discussion.

40. *It was so decided.*

*The meeting was suspended at 10.50 a.m. and resumed at 11.20 a.m.*

41. **Mr. Al-Jazy** (Jordan) said that his delegation advocated deleting draft article 22 because the Commission already had a mechanism for amending conventions. However, if the draft article were retained, his delegation would prefer variant B to variant A, largely because variant B would be more practical in

terms of time and budget requirements. If variant B were chosen, it should ensure that the UNCITRAL Secretariat played a key role.

42. **Ms. Ladová** (Czech Republic) and **Mr. Velázquez** (Paraguay) said that their delegations wished to retain article 22 and preferred variant B because it was more practical and would ensure greater legal certainty.

43. **Mr. Khani Jooyabad** (Islamic Republic of Iran) said that his delegation was in favour of deleting draft article 22. However, should it be retained, he considered that variants A and B each had advantages and disadvantages. While variant B was preferable in budgetary terms and because it provided for monitoring of developments in electronic commerce, it also set precedents and raised difficult issues pertaining to implementation of the convention, monitoring and reporting. Variant A was more in keeping with traditional practice.

44. **Mr. Yamamoto** (Japan) said that his delegation’s position was flexible with regard to draft article 22 and its proposed variants. However, if the Commission decided to retain variant B, his delegation proposed deleting draft paragraph 3, since he understood that review conferences would be open not only to Contracting States but to other States members of the Commission, and that might influence the amendment procedure.

45. **Ms. Schmidt** (Germany) said that her delegation supported the deletion of draft article 22 for the reasons stated by other speakers.

46. **Mr. Estrella Faria** (Secretariat) invited the Commission to consider the consequences of deleting draft article 22. It was customary for treaties to establish procedures for their own amendment. If a treaty failed to do so, the rules of public international law for amending multilateral treaties, as laid down in the Vienna Convention on the Law of Treaties, would be applicable. However, not all States Members of the United Nations had ratified the Vienna Convention. Although a large number of Member States regarded it as a codification of customary public international law, that understanding was not universally shared. Even if it were agreed that a majority of Contracting States could propose the convening of a conference to consider amendments, further questions would arise regarding, for example, the majority required for their adoption. He

also advised the Commission to consider the practical implications of deleting draft paragraph 3 of variant B regarding the amendment procedure.

47. In response to a question from the Chairman, he said that although he did not have the texts of all UNCITRAL conventions before him, he would be surprised if any instrument omitted to make provision for an amendment procedure.

48. **Mr. Bouacha** (Algeria) expressed support for the deletion of article 22 and for the statements made by the representatives of Jordan and the Islamic Republic of Iran.

49. **Mr. Sandoval** (Chile) said that his delegation was in favour of retaining article 22, since some provision for an amendment procedure was necessary, and of adopting variant A, which reflected established practice in respect of UNCITRAL and other United Nations instruments.

50. **Mr. Burman** (United States of America) said that UNCITRAL conventions did not, as a rule, contain any provision for amendment. It would therefore be acceptable to delete article 22. It was generally understood from UNCITRAL practice that member and observer States attending plenary sessions of the Commission enjoyed competence to approve amendments, including, for instance, protocols to an existing convention.

51. His delegation strongly opposed variant A, which would introduce a highly formal and costly procedure that would be more likely to discourage than to promote the adoption of amendments.

52. On the other hand, his delegation had been persuaded by other delegations that variant B would help to clarify the existing *de facto* amendment procedure and it was therefore prepared to support that variant.

53. **Mr. Pinzón Sánchez** (Colombia) said that, in the light of the Secretariat's comments, his delegation supported the inclusion of a provision for an amendment procedure. With regard to variant B, the Commission should consider the effective capacity of the Commission's Secretariat to assume the monitoring role proposed in draft paragraph 1. The Commission itself would in any case continue to fulfil that role.

54. **Mr. Chung Wan-yong** (Republic of Korea) said that article 22 should be retained because an amendment

procedure was a common and necessary component of any international convention. His delegation supported variant A for the reasons stated by the Chilean delegation. With regard to variant B, it would, in his view, be inappropriate for the Secretariat to play the role of a monitoring body by preparing reports on international conventions.

55. **Mr. Chong** (Singapore) said that his delegation shared the Secretariat's views regarding the usefulness of an amendment procedure and opted for variant B.

56. **Mr. Bellenger** (France) said that his delegation was in favour of retaining a provision for an amendment procedure. If the convention itself was adopted by a flexible procedure, it would be inappropriate to provide for a less flexible procedure for amendment. His delegation therefore preferred variant B, which could be streamlined by deleting draft paragraphs 1 and 2. Noting that draft paragraph 3 required ratification, acceptance or approval by three States for an amendment to enter into force, he proposed that the number of States should be the same as that indicated under draft article 23, which had not yet been discussed. He further proposed replacing the words "States participating in the conference" with "Contracting States".

57. **Mr. Mitrović** (Serbia and Montenegro) opposed the adoption of draft article 22. The procedure for amending the convention could be considered at a later stage. However, the proposal in variant B to monitor implementation of the convention, particularly the impact of declarations, was of some interest.

58. **Mr. Markus** (Switzerland) said that, in his view, draft article 22 could probably be deleted. The provision for a conference of "States Parties" under variant A was cumbersome and unnecessary. Although the Commission normally approved texts by consensus, he conceded that the adoption of a rule to facilitate consideration of amendments might speed up the process. However, he was strongly opposed to the provision in draft paragraph 2 of variant A for a procedure governing the adoption, ratification and entry into force of amendments, particularly the requirement, in square brackets, for adoption and deposit of instruments by two thirds of Contracting States. His delegation therefore preferred variant B.

59. **Mr. Tikhaze** (Russian Federation) and **Ms. Kamenkova** (Belarus) expressed a preference for variant A.

60. **Mr. Yang Lixin** (China) and **Ms. Cherif Chefchaoui** (Morocco) supported the adoption of an amended version of variant B.

61. **Mr. Ndiaye** (Observer for Senegal) said he preferred variant A but could also accept variant B.

62. **Mr. D’Allaire** (Canada), **Mr. Rodrigo** (Sri Lanka), **Mr. Asawawattanaporn** (Thailand), **Ms. Mosoti** (Kenya) and **Mr. Olutujoye** (Nigeria) opted for variant B.

63. **The Chairman**, noting that there was strong support for retaining draft article 22 as well as for variant B, said he took it that the Commission wished to delete variant A.

64. *It was so decided.*

65. **The Chairman** invited the Commission to consider variant B paragraph by paragraph.

#### *Paragraph 1*

66. **Mr. Burman** (United States of America) said that draft paragraph 1 was intended to promote regular monitoring of developments affecting the convention, since it covered a new area of economic practice that was still at an early stage of development and was expected to change rapidly in the years ahead. He proposed deleting “Office of Legal Affairs of the United Nations” and “secretariat of the United Nations Commission on International Trade Law” and replacing both with either “Secretary-General of the United Nations” or “Secretariat of the United Nations”. He also proposed deleting the words “yearly or” and “other” in square brackets, thus allowing the Secretariat to determine at what point relevant developments warranted preparation of a report.

67. **Mr. Estrella Faria** (Secretariat) suggested referring to the Secretary-General rather than to the Secretariat of the United Nations.

68. **Mr. Potyka** (Austria) said that his delegation supported draft paragraph 1 as amended by the United States delegation.

69. **The Chairman** said he took it that the Commission wished to adopt draft paragraph 1 as amended.

70. *It was so decided.*

#### *Paragraphs 2 and 3*

71. **Mr. Burman** (United States) said that the purpose of draft paragraph 2 was to provide a procedure for placing the convention on the Commission’s agenda in the future. As the phrase “[not less than twenty-five per cent of] the States Parties” reflected an attempt to incorporate some of the wording of variant A, he no longer thought its inclusion either necessary or appropriate. He therefore recommended that the chapeau of the draft paragraph be amended to read as follows:

“At the request of member States of the United Nations Commission on International Trade Law, review conferences shall be convened from time to time by the Secretary-General to consider:”.

He conceded, however, that the term “review conferences” might be open to misinterpretation. The idea was that amendments should first be taken up in the Commission in order to ensure correspondence between the method of approval of the instrument itself and of amendments thereto. The Fifth Committee would also prefer such a procedure to separate conferences with budgetary implications. It might therefore be advisable to replace the words “review conferences” by the word “meeting”.

72. **The Chairman** said that the chapeau should specify the form in which member States of the Commission might request the convening of a review conference or other meeting.

73. **Mr. Burman** (United States) said that his delegation’s assumption had been that requests would be made during the ordinary proceedings of the Commission, in the same manner as requests for inclusion of an item on the agenda.

74. **The Chairman** pointed out that the wording of draft paragraph 2 would require the Secretary-General to ensure that review conferences were convened “from time to time”, which was inconsistent with their being convened in response to specific requests by Member States.

75. **Mr. Burman** (United States) proposed deleting the words “from time to time”.

76. **Mr. Estrella Faria** (Secretariat) said he assumed that it was not the intention of variant B to have amendments adopted internally by the Commission without submitting them to the Sixth Committee of the General Assembly. As he understood it, the Secretariat

of the Commission would be asked to prepare reports to assist member States of the Commission or Contracting States in ensuring the practical implementation of the draft convention and assessing the usefulness of an amendment. If the Commission concluded after discussing a report that an amendment was desirable, it would make appropriate proposals to the General Assembly, in the ambit of which a special meeting of Contracting States might be convened to adopt the amendment. If all references to Contracting States were deleted from the chapeau and the impression was given that amendments might be adopted by the Commission itself, the Sixth Committee would be unlikely to approve the text. Moreover, it was not standard practice to single out a particular United Nations body such as the Commission in the text of an international convention.

77. **Mr. Burman** (United States) said that his delegation had earlier indicated its support for the deletion of draft paragraph 3 in order to address issues such as those raised by the Secretariat. He pointed out that there was nothing in variant B of draft article 22 that undermined the right of Contracting Parties to decide among themselves, under the Vienna Convention on the Law of Treaties and customary international law, to make such amendments as they saw fit. It was a right not often exercised in the field of private international law, however, since it had been the practice for amendments to be considered by the body that had drafted the instrument. In the case of the draft convention, given that the number of Contracting States would initially be small, the member States of the Commission would be best placed to consider amendments.

78. **Mr. Ndiaye** (Observer for Senegal) said that it was important to establish who would be able to initiate an amendment procedure. The right to amend an instrument normally belonged to the States parties and it was extremely unusual to extend that right to others. Even if the Commission initiated the amendment procedure, the Contracting States, who might not all be members of the Commission, should take over from there. He had not been wholly convinced by the argument invoking budgetary implications.

79. **Mr. Khani Jooyabad** (Islamic Republic of Iran) expressed strong support for the comments made by the Secretariat and commended the willingness of the United States to amend variant B. He proposed deleting draft paragraph 2 and the phrase “participating in the

conference referred to in the preceding paragraph” in draft paragraph 3. Some further minor changes could then be made to that draft paragraph to make it clear that the Commission was not in a position to take decisions on behalf of Contracting States.

80. **Mr. Markus** (Switzerland) said that a distinction should be drawn between the process of monitoring the convention and proposing amendments, on the one hand, and the adoption and entry into force of amendments, on the other. Contracting States that were not member States of the Commission must be involved in the monitoring process and permitted, alongside member States of the Commission, to request the consideration of amendments. When it came to approving the text of an amendment, however, the Commission must be careful not to interfere with the standard United Nations procedure. On the other hand, he requested the Secretariat’s advice as to whether a mechanism could be established at Commission level, prior to involvement of the General Assembly, that differed from the Commission’s normal decision-making procedure and would simply allow for approval of the text. In that connection, he proposed retaining the requirement at the beginning of draft paragraph 3 of variant B that amendments should be approved by “at least a two-thirds majority of States participating in the conference”. On the other hand, no provision should be made for the adoption and entry into force of amendments.

81. **Mr. Burman** (United States) said that the explicit statement in draft paragraph 3 of the principle that no amendment could apply to any State unless it had been ratified by that State should be retained.

*The meeting rose at 12.30 p.m.*

**Summary record of the 805th meeting, held at the Vienna International Centre  
on Monday, 11 July 2005, at 2 p.m.**

[A/CN.9/SR.805]

*Chairman:* Mr. Chan (Singapore), (Vice-Chairman)

*The meeting was called to order at 2.15 p.m.*

**Finalization and adoption of a draft convention on the use of electronic communications in international contracts** (*continued*) (A/CN.9/571, 573, 577 and Add.1, 578 and Add.1-17)

*Article 22. Amendments (continued)*

*Variant B, paragraphs 2 and 3 (continued)*

1. **Mr. Burman** (United States of America) said that although his delegation still thought it would be preferable to delete draft article 22, he had conferred with other delegations and drafted three statements on which there seemed to be broad agreement. However, as they amounted to a confirmation of existing treaty law, it would perhaps be more pertinent to include them in the commentary. In that case, his delegation would reiterate its recommendation, which seemed to have the support of many delegations, that draft paragraph 3 be deleted.

2. The first statement clarified draft paragraph 2 and read: "Recommendations of the Commission may be considered in due course in accordance with otherwise applicable procedures of the United Nations." The second and third statements would replace draft paragraph 3. The second would read: "Amendments, if any, to the convention shall only apply to States that have ratified, accepted or approved such amendments." And the third would read: "Nothing in this article is intended to affect the rights of States Parties to amend the convention at any time as between themselves."

3. **Mr. Bellenger** (France) said that draft paragraph 3 should be retained, since there would otherwise be no provision for a review procedure in draft article 22. Stressing that under any review procedure it was for the Contracting States rather than for the Commission to propose amendments, he noted that draft paragraph 3 established a procedure that was both flexible and in line with established practice. He considered that draft paragraphs 1 and 2, on the other hand, should be deleted.

4. **Mr. Khani Jooyabad** (Islamic Republic of Iran) said that his delegation considered that draft article 22 should be deleted since the issues of monitoring of implementation, reporting and amendment were too controversial to discuss from all angles in the remaining time available. Normal procedures of international treaty law could be applied to deal with amendments. If the draft article was retained, he would support the French proposal to delete draft paragraphs 1 and 2.

5. **Mr. Velázquez** (Paraguay) expressed support for the retention of draft article 22. If the draft convention made no provision for amendment, the Vienna Convention on the Law of Treaties would be applicable and major difficulties would be likely to ensue. A possible solution would be to insert a phrase in draft paragraph 2 along the lines of: "At the request of the States Parties, the General Assembly shall periodically convene conferences to review this convention."

6. **Ms. Kamenkova** (Belarus) said that if the Commission were to delete draft paragraph 3, it would also be logical to delete draft paragraphs 1 and 2, since there was nothing to prevent the Commission from discussing the practical implementation of the convention during its normal proceedings. On the other hand, if the Commission decided to retain draft article 22, it could not keep the first two paragraphs and delete the third because the reference to possible modifications in draft paragraph 2 (c) would be left hanging in the air. Logic demanded that a flexible procedure for making such amendments should be set forth.

7. **Mr. Mitrović** (Serbia and Montenegro) expressed support for the proposal by the delegation of the United States and suggested replacing the title of the draft article, "Amendments", with "Assessment of the application of the convention".

8. **Mr. Ndiaye** (Observer for Senegal) proposed that draft paragraph 2 be replaced with the following text that gave Contracting Parties the initiative in convening review conferences but also provided for discussion of amendments by the Commission:



“At the request of [two thirds] [one third] of States Parties, draft amendments shall be discussed by the United Nations Commission on International Trade Law.”

9. Draft paragraph 3 would be amended to read:

“Any amendment to this Convention shall be approved by a two-thirds majority of States Parties, in accordance with United Nations practice.”

10. **Mr. Martens** (Germany) noted that the Commission was repeatedly coming to the conclusion that the text merely stated the obvious. He thought it best to delete draft paragraph 22. The convention could be amended, if necessary, by following the standard public international law procedure. While the Commission could discuss possible amendments to a convention, the final decision would always lie with the States parties.

11. **Mr. Burman** (United States of America) said that his delegation, which had never been fully convinced of the need for draft article 22, wished to withdraw its proposal.

12. **The Chairman** said that the Secretariat, on examining existing UNCITRAL instruments, had found that only the recent Convention on the Assignment of Receivables in International Trade contained an amendment provision. Nevertheless, the Secretariat had been advised by the Treaty Section of the United Nations Office of Legal Affairs that it would be appropriate to include an amendment provision in the draft convention, and many delegations seemed to support such a provision. He noted, however, that the Convention on the Limitation Period in the International Sale of Goods contained no amendment provision but had been amended through the convening of a diplomatic conference. Furthermore, the Commission would be reviewing the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) at its current session although that Convention made no provision for a regular review procedure.

13. **Mr. Al-Jazy** (Jordan) expressed support for the statement by the representative of Germany. The draft convention could be amended, if necessary, in accordance with the general principles of public international law.

14. **Mr. Khani Jooyabad** (Islamic Republic of Iran), noting that the United States delegation had withdrawn its proposed variant B and that variant A had already been rejected, urged the Commission to delete draft article 22.

15. **Mr. Yamamoto** (Japan) said that his delegation supported the retention of an amendment provision. In the light of the United States decision to withdraw its proposal, he suggested reverting to variant A, which provided a simple solution.

16. **Mr. Burman** (United States of America) said that his delegation would not under any circumstance accept variant A. He therefore hoped that the decision to reject it would not be overturned.

17. **The Chairman** said that it would not be overturned unless a substantial majority of Commission members so requested.

18. **Mr. Ndiaye** (Observer for Senegal) said that while his delegation had no objection to the deletion of draft article 22, he wished to hear from the Secretariat what the implications of such a decision would be.

19. **Mr. Estrella Faria** (Secretariat) said that, pursuant to the general rules applicable under the Vienna Convention on the Law of Treaties and customary international law, if Contracting States wished to formulate an amendment open for adoption by all Contracting States, those States would have to be notified, a special conference would have to be convened, and participating States would have to agree on the rules of procedure for the conference, including a procedure for voting on amendments and the majority required for adoption. The Vienna Convention on the Law of Treaties contemplated the possibility of two or more Contracting States agreeing on an amendment that would be applicable among themselves. However, such an agreement would not be open for signature and adoption by other Contracting States. All in all, if the issue was left open, the Commission would have a situation similar to that set out in variant A, without advance determination of the majority required for adoption of an amendment.

20. **Mr. Minihan** (Australia), **Mr. Bellenger** (France) and **Mr. Adensamer** (Austria) expressed support for the deletion of draft article 22.

21. **The Chairman** said that, if he heard no objection, he would take it that the Commission wished to delete article 22.

22. *It was so decided.*

*Article 23. Entry into force*

23. **Mr. Estrella Faria** (Secretariat) said that draft article 23 was a standard provision. The Commission should decide how many instruments of ratification would be required for the convention to enter into force.

24. **Mr. Burman** (United States of America) said that three ratifications was consistent with contemporary practice in most private-law conventions. It would allow Contracting States to enjoy the benefits as soon as possible of modernizing their basic rules of electronic commerce on a cross-border basis, thereby encouraging other States to accede to the convention.

25. **Mr. Khani Jooyabad** (Islamic Republic of Iran), pointed out that the United Nations Sales Convention required ten ratifications, which he considered to be the minimum requirement in order to ensure equitable representation. He proposed that 20 ratifications should be required in the case of the draft convention.

26. **Mr. Burman** (United States of America) said that a smaller group of States should not be prevented from enjoying the benefits of the convention if they so wished. It had taken eight years to obtain the ten ratifications stipulated in the United Nations Sales Convention. In eight years' time, the convention on electronic communications in international contracts would be so obsolete as to be worthless. His delegation therefore strongly urged the Commission to allow it to enter into force with the fewest possible ratifications.

27. **Mr. D'Allaire** (Canada) drew attention to the fact that the Convention on Choice of Court Agreements concluded at The Hague in June 2005 would enter into force after the deposit of only two ratification instruments. Ten was certainly excessive, given that the convention would apply only between Contracting States. Three ratifications was, in his view, more appropriate in the circumstances.

28. **The Chairman** noted that the Convention on the Assignment of Receivables in International Trade, the Convention on Independent Guarantees and Stand-by Letters of Credit and the Convention on the Liability of Operators of Transport Terminals in International Trade

prescribed five ratifications, while the New York Convention prescribed three.

29. **Mr. Sekolec** (Secretary of the Commission) said that it might be useful in deciding the question to take into account the context in which conventions were concluded. Where a convention was drafted to replace an earlier instrument, as in the case of the United Nations Sales Convention and the Convention on the Carriage of Goods by Sea (the Hamburg Rules), the number of ratifications required could be quite considerable, depending on the number of States that had been parties to the earlier instrument. Where a convention relied for its application on the circulation of rights or obligations, such as the Convention on International Bills of Exchange and International Promissory Notes and the Convention on the Assignment of Receivables in International Trade, two ratifications would be too few. The same applied to transport instruments. However, a convention that essentially recognized rights and obligations between two parties should work well, in the absence of other overriding considerations, if there were two States that strongly wished to enable their traders to enjoy its benefits.

30. **Mr. Velázquez** (Paraguay), **Mr. Sandoval** (Chile), **Mr. Pinzón Sánchez** (Colombia) and **Mr. Kim Chong-hoon** (Republic of Korea) expressed support for the proposal by the United States.

31. **Mr. Khani Jooyabad** (Islamic Republic of Iran) said that if only three ratifications were required for the convention to enter into force, any decision taken by a conference of the first three Contracting States would subsequently apply to all other Contracting States. He pointed out that in other branches of international law requirements for the entry into force of conventions ranging from 40 to 65 ratifications were considered normal.

32. **Mr. Burman** (United States of America) said that requiring a large number of ratifications for conventions in the area of private law would deny them any effect. Such conventions were effective when applicable between consensual contracting parties and the Commission should minimize impediments to their application.

33. **The Chairman** said he took it that the Commission agreed that three ratifications should be required for the entry into force of the draft convention.

34. *It was so decided.*

35. *The substance of draft article 23, as amended, was approved and the text was referred to the drafting group.*

*Article 24. Transitional rules*

36. **The Chairman** noted that the whole of draft article 24 was in square brackets.

37. **Mr. Estrella Faria** (Secretariat) said that it had been considered important to include transitional provisions clarifying the temporal application of the draft convention because of the various options open to Contracting States for making declarations and the fact that the convention would also apply to private contracts and transactions. However, the draft article had been added at a relatively late stage in the Working Group's deliberations and had not been discussed in depth.

38. **Mr. Field** (United States of America) said that, while his delegation recognized that it was extremely difficult to draft transitional rules covering every possible contingency, the article had correctly identified the most important issue, namely whether the draft convention covered contracts or communications concluded or effected prior to its entry into force.

39. Draft paragraph 2 should be amended to bring it into line with the amended text of article 18. He proposed the following wording:

"In Contracting States that make a declaration under article 18, paragraph 1 (a), this Convention applies only to electronic communications that are made after the date when the Convention enters into force in respect of the Contracting States referred to in article 18, paragraph 1 (a)."

40. His delegation considered that draft paragraphs 3 and 4 could be deleted. Draft paragraph 3 was superfluous because, according to article 19, paragraph 1, the convention would in any case apply only to contracts to which one of the listed conventions already applied. Draft paragraph 4 was, in his delegation's view, already covered by draft paragraph 5.

41. **Mr. D'Allaire** (Canada) asked whether the phrase "when the Convention enters into force" in draft paragraph 1 referred to the entry into force of the convention at the international level or its entry into force in a given Contracting State. The fact that the draft article did not refer to draft article 17 on domestic

territorial units or draft article 16 bis on regional economic integration organizations made its interpretation even more complicated.

42. Draft paragraph 3 should, in his view, refer to the entry into force both of the conventions listed in article 19, paragraph 1, and of the draft convention itself.

43. As the draft article did not cover all transitional scenarios, his delegation proposed that it be deleted. The law applicable in individual Contracting States could be applied to any transitional situations that arose. When ratifying and implementing the convention, States should take steps to ensure that such situations were covered in accordance with their obligations under the convention.

44. **Mr. Mitrović** (Serbia and Montenegro) noted that for some Contracting States the draft convention would enter into force under the regime established in draft article 1, while for other States that had made various kinds of declaration, it was unclear which regime would apply. His delegation therefore proposed deleting all but draft paragraph 1, inserting the words "for each respective State" after "when the Convention enters into force". That would also answer the Canadian delegation's query regarding draft paragraph 1.

45. **Mr. Burman** (United States of America) said that the convention could not be implemented if there was uncertainty as to whether it applied retroactively in respect of actions already taken by commercial parties. Draft paragraph 1 precluded such retroactive application. However, it failed to provide commercial parties with the predictability that they needed. Draft paragraph 5 was also required to address the question of the date on which declarations took effect. In addition, there should be a rule to ensure predictability with regard to draft article 18, paragraph 1 (a).

46. **Mr. Sandoval** (Chile) expressed support for the proposal to retain only paragraph 1 of draft article 24.

47. **Mr. Pinzón Sánchez** (Colombia) said that draft paragraph 1 was not really a transitional rule but complemented paragraphs 1 and 2 of draft article 23, which established both a rule for the general entry into force of the draft convention and a rule for its entry into force in respect of States that ratified, accepted, approved or acceded to it. He supported the proposal to retain only draft paragraph 1, as amended by the representative of Serbia and Montenegro.

48. **Mr. Burman** (United States of America) said that if draft paragraph 5 was deleted, the Commission would leave parties to speculate on whether a declaration that took effect after the convention entered into force applied retroactively. The purpose of the convention was to provide a greater level of predictability in the marketplace. Failure to do so would lead to disputes, arguments and uncertainty that could easily be avoided.

49. **Ms. Schmidt** (Germany), addressing the concern raised by the Canadian delegation, said that draft paragraph 1 was simply intended to prevent the entry into force of the convention with retroactive effect. To clarify its meaning, she proposed inserting the phrase “in accordance with article 23, paragraph 1” after “when the Convention enters into force” in draft paragraph 1.

50. **Mr. Olutujoye** (Nigeria) expressed support for retaining only paragraph 1 of draft article 24. However, he asked the Secretariat to explain the statement in footnote 13 to document A/CN.9/577 that the last version of the draft convention considered by the Working Group had contained only draft paragraph 1.

51. **Mr. Estrella Faria** (Secretariat) said that, at an earlier stage in the drafting process, the Working Group had been more optimistic that the draft convention would not contain the complicated system of declarations and counter-declarations contemplated in draft articles 18 and 19. As the final version of the draft text provided for a wide range of declarations, the additional paragraphs had been proposed.

52. A logical reading of draft paragraph 1 in the light of draft article 1 was that it referred to the entry into force of the convention in the Contracting State whose law governed the exchange of the electronic communication in question. If the forum State was a Contracting State, it might apply the convention to interpret its own laws, and would do so only as of the date when the convention entered into force in that State. However, if the rules of private international law of the forum State led to the application of the law of another Contracting State, it would have to apply the convention as of the date when it entered into force in the other State.

53. **Mr. Mitrović** (Serbia and Montenegro) said that he had been convinced by the United States delegation of the usefulness of retaining draft paragraph 5, in addition to draft paragraph 1, as draft paragraph 2.

*The meeting was suspended at 3.30 p.m. and resumed at 3.50 p.m.*

54. **Mr. Field** (United States of America) proposed that draft article 24 should consist of a single paragraph that would read:

“This Convention and any declaration applies only to electronic communications that are made after the date when the Convention or such declaration enters into force for each respective State.”

55. **Mr. Yang Lixin** (China) expressed support for the proposal by the delegation of the United States.

56. **Mr. D’Allaire** (Canada) said that his delegation also supported the United States proposal. The draft article would reaffirm the principle of non-retroactive application of the convention. However, his delegation strongly opposed the proposal by the German delegation to refer to draft article 23, paragraph 1, since it would create the potential for retroactivity. Once the convention entered into force internationally, it would subsequently be applicable to ratifying States as from the date of its entry into force at the international level.

57. **Ms. Schmidt** (Germany) said that her delegation now fully supported the United States proposal.

58. **Mr. Chong** (Singapore) said that his delegation also supported the United States proposal. However, he proposed that the commentary should clarify that the word “declaration” in the proposed text also applied to the withdrawal or modification of a declaration.

59. **Mr. Yamamoto** (Japan), **Mr. Sandoval** (Chile) and **Mr. Velázquez** (Paraguay) expressed support for the United States proposal.

60. **The Chairman** said he took it that the Commission wished to replace the text of draft article 24 with the single paragraph proposed by the United States delegation.

61. *It was so decided.*

62. **Mr. Field** (United States of America) proposed as a new title “Non-retroactivity”.

63. **Mr. D’Allaire** (Canada) said that the principle of prospective application was inherent in any international convention unless otherwise indicated. He proposed that the paragraph just approved should become paragraph 3 of draft article 23.

64. **Mr. Velázquez** (Paraguay) proposed the title “Applicability”.

65. **Mr. Burman** (United States of America) said that his delegation was willing to support that title.

66. **Mr. D’Allaire** (Canada) withdrew his proposal to transfer the remaining paragraph to draft article 23.

67. **Mr. Chong** (Singapore) pointed out that there might be some confusion as to the difference between “Applicability” and the title of draft article 1 “Scope of application”. He proposed as an alternative title “Time of application”.

68. **Mr. Adensamer** (Austria) and **Mr. Burman** (United States of America) expressed support for that proposal.

69. **The Chairman** said he took it that the Commission wished to replace the title of draft article 24 with “Time of application”.

70. *It was so decided.*

71. The substance of draft article 24, as amended, was approved and the text was referred to the drafting group.

#### *Article 25. Denunciations*

72. **Mr. Estrella Faria** (Secretariat) said that draft article 25 was a standard provision in UNCTRAL and other United Nations instruments.

73. **Mr. Burman** (United States of America) suggested that at some time in the future the Commission and other United Nations treaty drafting bodies should consider replacing the word “denunciation”, which had unfortunate connotations, with “withdrawal”.

74. **Ms. Schmidt** (Germany) proposed reducing the period for entry into effect of a denunciation from twelve months to six months, thereby aligning draft article 25 with draft article 23 on entry into force.

75. **The Chairman** said that, in the absence of any indication of support for that proposal, he took it that the Commission wished to approve article 25 as drafted.

76. *The substance of draft article 25 was approved and the text was referred to the drafting group.*

#### *Signature clause*

77. *The signature clause was approved and referred to the drafting group.*

#### *Preamble*

78. **Mr. Estrella Faria** (Secretariat) said that time constraints had prevented the Working Group from taking a firm position on the draft preamble. The wording drew on elements of the preambles to the UNCITRAL Model Law on Electronic Commerce, the United Nations Sales Convention and other UNCITRAL instruments. However, some delegations had suggested that it was somewhat too long compared, for instance, with the preamble to the United Nations Sales Convention, which was only about one third as long although the Convention contained roughly three times as many articles. The words “taking account of their interchangeability” in square brackets in the fifth preambular paragraph reflected a proposal made by a delegation at one of the Working Group sessions.

79. **Mr. Bellenger** (France) proposed shortening the draft preamble to just two paragraphs reflecting the objectives of the draft convention, which were to encourage the use of electronic communications in international trade and, to that end, to build confidence in electronic communications by ensuring legal certainty in electronic commerce. The two paragraphs would read:

*“Desiring to encourage the use of electronic communications in international trade,*

*Seeking to create the conditions required to build confidence in the use of electronic communications.”*

80. **Mr. Burman** (United States of America) said that, while his delegation understood the French delegation’s desire for simplicity, the objectives referred to were already reflected in the fourth preambular paragraph. The first three preambular paragraphs were standard clauses in United Nations instruments. His delegation therefore supported the text as it stood, subject to deletion of the word “may” before “help States” in the fourth preambular paragraph, which was unduly tentative. The adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts would certainly help States to gain access to modern trade routes.

81. To address the reservations that had been expressed regarding the phrase “taking account of their interchangeability” in the fifth preambular paragraph, he proposed replacing the words “their interchangeability” with “the principle of technological neutrality and functional equivalence”, which he had taken from paragraph 2 of Canada’s written comments (A/CN.9/578/Add.15).

82. **The Chairman** noted that the wording of the draft preamble was more like that of a General Assembly resolution endorsing a convention than a preamble to a United Nations convention.

83. **Mr. Burman** (United States of America) said that the preambles to other UNCITRAL conventions were of roughly the same length. What mattered was not the length of the draft preamble but whether it served any purpose and whether it was meaningful for countries at all stages of economic development.

84. **Mr. D’Allaire** (Canada) said that the object of the draft convention was to encourage the use of electronic communications and it was thus of little consequence if the preamble somewhat exceeded the scope of the draft convention. His delegation supported the draft preamble as amended by the United States, since it reflected the concerns of both developing and developed economies.

85. **Mr. Velázquez** (Paraguay) expressed support for the preamble as drafted, since it reflected the spirit of the draft convention and referred to a scope of application that was pertinent to countries at different stages of development.

86. **Mr. Sandoval** (Chile) said that his delegation supported the draft preamble as amended by the United States.

87. **The Chairman** said he took it that the Commission wished to approve the draft preamble with the amendments proposed by the United States to the fourth and fifth preambular paragraphs.

88. *The substance of the draft preamble, as amended, was approved and the text was referred to the drafting group.*

#### *Title of the convention*

89. **Mr. Mitrović** (Serbia and Montenegro) proposed the title “Convention on the Electronic Form of International Contracts”, which would probably be shortened in everyday usage to the “Electronic Form

Convention”. The key issue addressed in the draft convention was the form of electronic contracts, in other words their negotiation, formation and performance.

90. **The Chairman** said that, although the title as it stood captured precisely what the draft convention addressed, he wondered whether the Commission might not wish to agree on a more succinct title.

91. **Mr. Sandoval** (Chile) proposed the title “Convention on International Contracts Concluded by Electronic Means”. The word “concluded” covered, in his view, the whole process from formation to performance.

92. **Mr. Chong** (Singapore) expressed support for the title as drafted since it closely mirrored draft article 1, paragraph 1. The full title of the United Nations Sales Convention was also long but it was nonetheless appropriate. Parties could always invent an abridged title for everyday use.

93. **Mr. Gabriel** (United States of America) said he agreed that the title as drafted was appropriate. It could, however, be shortened by deleting the words “the use of”, which were superfluous. He proposed replacing the word “contracts” by “contracting”, since the draft convention did not deal with contracts per se.

94. **Ms. Kamenkova** (Belarus) said that her delegation supported the title as drafted, but had no objection to deleting “the use of”.

95. **Mr. Martens** (Germany), supported by **Mr. Bellenger** (France), advocated keeping the draft title as it stood. A long title was preferable for a short convention if it made clear which areas were and were not covered. Conversely, a short title was appropriate for an all-encompassing convention such as the Vienna Convention on the Law of Treaties.

96. **Mr. Yamamoto** (Japan), associating himself with the statements made by the delegations of Singapore and Germany, expressed support for the title as drafted.

97. **Mr. Kim Chong-hoon** (Republic of Korea) pointed out that draft article 1, paragraph 1, stated that the Convention applied to “the use of” electronic communications. He therefore supported the title as drafted.

98. **Mr. Tikhaze** (Russian Federation) said that his delegation had no objection to retaining the title as drafted.

99. **The Chairman** said he took it that the Commission wished to retain the title “Convention on the Use of Electronic Communications in International Contracts”.

100. *It was so decided.*

101. **Mr. Estrella Faria** (Secretariat), responding to an earlier query by the delegation of Japan, said that the terms “Contracting States” and “States Parties” had been given two different meanings in the draft convention in line with the Vienna Convention on the Law of Treaties. While “Contracting States” referred to States that had consented to be bound by a treaty that was not yet in force, “States Parties” denoted States that had consented to be bound by a treaty that was already in force. The distinction had become redundant in the text as approved. As States Parties were referred to only in paragraph 3 of former draft article 16 bis, which had now become draft article 17, he suggested deleting the words “State Party” or “States parties” in that provision, retaining only “Contracting State” or “Contracting States”.

102. **The Chairman** said he took it that the Commission wished to act on the Secretariat’s suggestion.

103. *It was so decided.*

#### *Explanatory notes*

104. **Mr. Estrella Faria** (Secretariat) asked whether the Commission wished to have “Explanatory notes” prepared and published by the UNCITRAL Secretariat under its own name and authority or an official commentary adopted by the Commission itself and issued under its auspices. Alternatively, a commentary could be prepared by the Secretariat and submitted to the Commission for approval. The Secretariat would, of course, follow any guidance and instructions given to it by the Commission and draw on the assistance of outside experts as required.

105. **Mr. Mitrović** (Serbia and Montenegro) proposed that explanatory notes should be produced by the Secretariat. Such notes would not, of course, be binding on States that had concluded a convention among themselves.

106. **Mr. Burman** (United States of America) suggested that the Secretariat submit its explanatory notes to the Commission at its thirty-ninth session in

2006, possibly at the same time as the signing ceremony that his delegation had proposed.

107. **The Chairman** said he took it that the Commission wished to request the Secretariat to prepare explanatory notes on the understanding that the Commission would take note thereof.

108. *It was so decided.*

*The meeting rose at 4.50 p.m.*

**Summary record of the 810th meeting, held at the Vienna International Centre  
on Friday, 15 July 2005, at 10 a.m.**

[A/CN.9/SR.810]

*Chairman:* Mr. Pinzón Sánchez (Colombia)

*The meeting was called to order at 10.25 a.m.*

**Finalization and adoption of a draft convention on the use of electronic communications in international contracts** (*continued*) (A/CN.9/XXXVIII/CRP.2/Add.4)

1. **The Chairman** invited the Commission to adopt the draft convention as set forth in the report of the drafting group (A/CN.9/XXXVIII/CRP.2/Add.4).

*Title*

2. *The draft title was adopted.*

*Preamble*

3. *The draft preamble was adopted.*

*Chapter I. Sphere of application*

*Articles 1 to 3*

4. *Draft articles 1 to 3 were adopted.*

*Chapter II. General provisions*

*Articles 4 to 7*

5. *Draft articles 4 to 7 were adopted.*

*Chapter III. Use of electronic communications in international contracts*

*Articles 8 to 14*

6. *Draft articles 8 to 14 were adopted.*

*Chapter IV. Final provisions*

*Articles 15 to 19*

7. *Draft articles 15 to 19 were adopted.*

8. *Article 20. Communications exchanged under other international conventions*

9. **Mr. Schöffisch** (Germany), supported by **Mr. Burman** (United States), proposed that, in the interests of consistency with the wording of draft article

1, the words “contract or agreement” should be replaced with the word “contract” wherever they appeared in paragraphs 1 to 4 of draft article 20.

10. **Mr. Estrella Faria** (Secretariat) said that the failure to replace the words “contract or agreement” with the word “contract” throughout draft article 20 in the English and Spanish versions of the text had been due to an oversight.

11. *Draft article 20, as amended, was adopted.*

*Articles 21 to 25*

12. *Draft articles 21 to 25 were adopted.*

13. *The draft convention as a whole, as amended, was adopted.*

*The discussion covered in the summary record ended at 11.05 a.m.*





### **III. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW\***

#### **NOTE BY THE SECRETARIAT**

**(A/CN.9/581) [Original: English]**

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- I. General
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## Annex

**UNCITRAL legal texts**

<i>Short title</i>	<i>Full title</i>
Hamburg Rules (1978)	United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) <sup>1</sup>
Limitation Convention (1974/1980)	Convention on the Limitation Period in the International Sale of Goods, 1974 (New York), <sup>2</sup> and Protocol amending the Convention on the Limitation Period in the International Sale of Goods, 1980 (Vienna) <sup>3</sup>
UNCITRAL Arbitral Proceedings Notes (1996)	UNCITRAL Notes on Organizing Arbitral Proceedings (1996) <sup>4</sup>
UNCITRAL Arbitration Rules (1976)	UNCITRAL Arbitration Rules (1976) <sup>5</sup>
UNCITRAL Bills and Notes Convention (1988)	United Nations Convention on International Bills of Exchange and International Promissory Notes (1988) <sup>6</sup>
UNCITRAL Conciliation Rules (1980)	UNCITRAL Conciliation Rules (1980) <sup>7</sup>
UNCITRAL Construction Contracts Guide (1987)	UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (1987) <sup>8</sup>
UNCITRAL Credit Transfer Model Law (1992)	UNCITRAL Model Law on International Credit Transfers (1992) <sup>9</sup>
UNCITRAL Electronic Funds Guide (1986)	UNCITRAL Legal Guide on Electronic Funds Transfers (1986) <sup>10</sup>
UNCITRAL Infrastructure Projects Guide (2001)	UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2001) <sup>11</sup>
UNCITRAL Insolvency Law Guide (2004)	UNCITRAL Legislative Guide on Insolvency Law (2004) <sup>12</sup>
UNCITRAL International Countertrade Guide (1992)	UNCITRAL Legal Guide on International Countertrade Transactions (1992) <sup>13</sup>
UNCITRAL Model Arbitration Law (1985)	UNCITRAL Model Law on International Commercial Arbitration (1985) <sup>14</sup>
UNCITRAL Model Conciliation Law (2002)	UNCITRAL Model Law on International Commercial Conciliation (2002) <sup>15</sup>
UNCITRAL Model Insolvency Law (1997)	UNCITRAL Model Law on Cross-Border Insolvency (1997) <sup>16</sup>
UNCITRAL Model Law on Electronic	UNCITRAL Model Law on Electronic

<i>Short title</i>	<i>Full title</i>
Commerce (1996)	Commerce (1996) <sup>17</sup>
UNCITRAL Model Law on Electronic Signatures (2001)	UNCITRAL Model Law on Electronic Signatures (2001) <sup>18</sup>
UNCITRAL Model Procurement Law (1994)	UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) <sup>19</sup>
UNCITRAL Model Provisions on Infrastructure Projects (2003)	UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003) <sup>20</sup>
United Nations Assignment Convention (2001)	United Nations Convention on the Assignment of Receivables in International Trade (2001) <sup>21</sup>
United Nations Guarantee and Stand-by Convention (1995)	United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995) <sup>22</sup>
United Nations Sales Convention (1980)	United Nations Convention on Contracts for the International Sale of Goods (1980) <sup>23</sup>
United Nations Terminal Operators Convention (1991)	United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991) <sup>24</sup>

### Notes

<sup>1</sup> United Nations publication, Sales No. E.95.V.14.

<sup>2</sup> *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974* (United Nations publication, Sales No. E.74.V.8), part I.

<sup>3</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>4</sup> *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, part II.

<sup>5</sup> United Nations publication, Sales No. E.93.V.6.

<sup>6</sup> United Nations publication, Sales No. E.95.V.16.

<sup>7</sup> United Nations publication, Sales No. E.81.V.6.

<sup>8</sup> United Nations publication, Sales No. E.87.V.10.

<sup>9</sup> United Nations publication, Sales No. E.99.V.11.

<sup>10</sup> United Nations publication, Sales No. E.87.V.9.

<sup>11</sup> United Nations publication, Sales No. E.01.V.4.

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<sup>12</sup> United Nations publication, Sales No. E.05.V.10.

<sup>13</sup> United Nations publication, Sales No. E.93.V.7.

<sup>14</sup> United Nations publication, Sales No. E.95.V.18.

<sup>15</sup> United Nations publication, Sales No. E.05.V.4.

<sup>16</sup> United Nations publication, Sales No. E.99.V.3.

<sup>17</sup> United Nations publication, Sales No. E.99.V.4.

<sup>18</sup> United Nations publication, Sales No. E.02.V.8.

<sup>19</sup> United Nations publication, Sales No. E.98.V.13.

<sup>20</sup> United Nations publication, Sales No. E.04.V.11.

<sup>21</sup> United Nations publication, Sales No. E.04.V.14.

<sup>22</sup> United Nations publication, Sales No. E.97.V.12.

<sup>23</sup> United Nations publication, Sales No. E.95.V.12.

<sup>24</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 OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Document Symbol	Title or description	Location in Present volume
<b>A. List of documents before the Commission at its thirty-eighth session</b>		
<i>1. General series</i>		
A/CN.9/567	Annotated provisional agenda and organization of work of the thirty-eighth session	Not reproduced
A/CN.9/568	Report of Working Group I (Procurement) on the work of its sixth session (Vienna, 30 August-3 September 2004)	Part two, chap. II, A
A/CN.9/569	Report of Working Group II (Arbitration and Conciliation) on the work of its forty-first session (Vienna, 13-17 September 2004)	Part two, chap. III, A
A/CN.9/570	Report of Working Group VI (Security Interests) on the work of its sixth session (Vienna, 27 September-1 October 2004)	Part two, chap. V, A
A/CN.9/571	Report of Working Group IV (Electronic Commerce) on the work of its forty-fourth session (Vienna, 11-22 October 2004)	Part two, chap. I, A
A/CN.9/572	Report of Working Group III (Transport Law) on the work of its fourteenth session (Vienna, 29 November-10 December 2004)	Part two, chap. IV, A
A/CN.9/573	Report of Working Group II (Arbitration and Conciliation) on the work of its forty-second session (New York, 10-14 January 2005)	Part two, chap. III, D
A/CN.9/574	Report of Working Group VI (Security Interests) on the work of its seventh session (New York, 24-28 January 2005)	Part two, chap. V, D
A/CN.9/575	Report of Working Group I (Procurement) on the work of its seventh session (New York, 4-8 April 2005)	Part two, chap. II, D
A/CN.9/576	Report of Working Group III (Transport Law) on the work of its fifteenth session (New York, 18-28 April 2005)	Part two, chap. IV, F
A/CN.9/577 and Add.1	Note by the Secretariat on the draft Convention on the Use of Electronic Communications in International Contracts	Part two, chap. I, F
A/CN.9/578 and Add.1-17	Note by the Secretariat on the draft Convention on the Use of Electronic Communications in International Contracts: comments received from Member States and international organizations	Part two, chap. I, G
A/CN.9/579	Note by the Secretariat on current work by other international organizations in the area of electronic commerce	Part two, chap. X, C
A/CN.9/580 and Add.1-2	Note by the Secretariat on insolvency law: developments in insolvency law: adoption of the UNCITRAL Model Law on Cross-Border Insolvency; use of cross-border protocols and	Part two, chap. IX, B

Document Symbol	Title or description	Location in Present volume
	court-to-court communication guidelines; and case law on interpretation of “centre of main interests” and “establishment” in the European Union	
A/CN.9/581	Note by the Secretariat on a bibliography of recent writings related to the work of UNCITRAL	Part three, chap. IV
A/CN.9/582 and Add.1-7	Note by the Secretariat on insolvency law: possible future work in the area of insolvency law	Part two, chap. X, B
A/CN.9/583	Note by the Secretariat on the status of conventions and model laws	Part two, chap. IX, A
A/CN.9/584	Note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law	Part two, chap. X, A
A/CN.9/585	Note by the Secretariat on the interim report on the survey relating to the legislative implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards	Part two, chap. VI
A/CN.9/586	Note by the Secretariat on technical assistance	Part two, chap. VIII
<b>2. Restricted series</b>		
A/CN.9/XXXVIII/CRP.1 and Add.1-29	Draft report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session	Not reproduced
A/CN.9/XXXVIII/CRP.2 and Add.1-4	Report of the Drafting Group: draft convention on the use of electronic communications in international contracts	Not reproduced
<b>3. Information series</b>		
A/CN.9/XXXVIII/INF.1	List of participants	Not reproduced
<b>B. List of documents before the Working Group on Electronic Commerce at its forty-fourth session</b>		
<b>1. Working papers</b>		
A/CN.9/WG.IV/WP.109	Provisional agenda	Not reproduced
A/CN.9/WG.IV/WP.110	Working paper submitted to the Working Group on Electronic Commerce at its forty-fourth session: Electronic Contracting: provisions for a draft convention	Part two, chap. I, B

A/CN.9/WG.IV/WP.111	Working paper submitted to the Working Group on Electronic Commerce at its forty-fourth session: Electronic Contracting: provisions for a draft convention	Part two, chap. I, C
A/CN.9/WG.IV/WP.112	Working paper submitted to the Working Group on Electronic Commerce at its forty-fourth session: Electronic Contracting: provisions for a draft convention	Part two, chap. I, D
A/CN.9/WG.IV/WP.113	Working paper submitted to the Working Group on Electronic Commerce at its forty-fourth session: ICC e-Terms 2004, ICC Guide to electronic contracting	Part two, chap. I, E

## ***2. Restricted series***

A/CN.9/WG.IV/XLIV/ CRP.1 and Add.1-12	Draft report of the Working Group on Electronic Commerce on the work of its forty-fourth session	Not reproduced
A/CN.9/WG.IV/XLIV/ CRP.2 and Add.1-3	Report of the Drafting Group: Electronic Contracting: Provisions for a draft convention	Not reproduced
A/CN.9/WG.IV/XLIV/ CRP.3	Electronic Contracting: Provisions for a draft convention	Not reproduced
A/CN.9/WG.IV/XLIV/ CRP.4	Electronic Contracting: Provisions for a draft convention	Not reproduced
A/CN.9/WG.IV/XLIV/ CRP.5	Electronic Contracting: Provisions for a draft convention	Not reproduced
A/CN.9/WG.IV/XLIV/ CRP.6	Electronic Contracting: Provisions for a draft convention	Not reproduced

## ***3. Information series***

A/CN.9/WG.IV/INF.1	List of participants	Not reproduced
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# **C. List of documents before the Working Group on Procurement at its sixth session**

## ***1. Working papers***

A/CN.9/WG.I/WP.30	Provisional agenda	Not reproduced
A/CN.9/WG.I/WP.31	Working paper submitted to the Working Group on Procurement at its sixth session: recent developments in the area of public procurement	Part two, chap. II, B
A/CN.9/WG.I/WP.32	Working paper submitted to the Working Group on Procurement at its sixth session: recent developments in the area of public procurement	Part two, chap. II, C

*2. Restricted series*

A/CN.9/WG.I/VI/CRP.1 and Add.1-9	Draft report of the Working Group on Procurement on the work of its sixth session	Not reproduced
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*3. Information series*

A/CN.9/WG.I/VI/INF.1	List of participants	Not reproduced
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**D. List of documents before the Working Group on Procurement at its seventh session***1. Working papers*

A/CN.9/WG.I/WP.33	Provisional agenda	Not reproduced
A/CN.9/WG.I/WP.34 and Add.1-2	Working paper submitted to the Working Group on Procurement at its seventh session: possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services	Part two, chap. II, E
A/CN.9/WG.I/WP.35 and Add.1	Working paper submitted to the Working Group on Procurement at its seventh session: possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services	Part two, chap. II, F
A/CN.9/WG.I/WP.36	Working paper submitted to the Working Group on Procurement at its seventh session: possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services	Part two, chap. II, G

*2. Restricted series*

A/CN.9/WG.I/VII/CRP.1 and Add.1-5	Draft report of the Working Group on Procurement on the work of its seventh session	Not reproduced
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*3. Information series*

A/CN.9/WG.I/VII/INF.1	List of participants	Not reproduced
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**E. List of documents before the Working Group on International Commercial Arbitration and Conciliation at its forty-first session***1. Working papers*

A/CN.9/WG.II/WP.130	Provisional agenda	Not reproduced
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A/CN.9/WG.II/WP.131	Working paper submitted to the Working Group on Arbitration at its forty-first session: settlement of commercial disputes	Part two, chap. III, B
A/CN.9/WG.II/WP.132	Working paper submitted to the Working Group on Arbitration at its forty-first session: inclusion of a reference to the 1958 New York Convention	Part two, chap. III, C

### *2. Restricted series*

A/CN.9/WG.II/XLI/CRP.1 and Add.1-4	Draft report of the Working Group on Arbitration on the work of its forty-first session	Not reproduced
A/CN.9/WG.II/XLI/CRP.2	Proposal on draft article 17	Not reproduced

### *3. Information series*

A/CN.9/WG.II/XLI/INF.1	List of participants	Not reproduced
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## **F. List of documents before the Working Group on International Commercial Arbitration and Conciliation at its forty-second session**

### *1. Working papers*

A/CN.9/WG.II/WP.133	Provisional agenda	Not reproduced
A/CN.9/WG.II/WP.134	Working paper submitted to the Working Group on Arbitration at its forty-second session: settlement of commercial disputes	Part two, chap. III, E

### *2. Restricted series*

A/CN.9/WG.II/XLII/CRP.1 and Add.1-4	Draft report of the Working Group on Arbitration on the work of its forty-second session	Not reproduced
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### *3. Information series*

A/CN.9/WG.II/XLII/INF.1	List of participants	Not reproduced
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## **G. List of documents before the Working Group on Transport Law at its fourteenth session**

### *1. Working papers*

A/CN.9/WG.III/WP.38	Provisional agenda	Not reproduced
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A/CN.9/WG.III/WP.39	Working paper submitted to the Working Group on Transport Law at its fourteenth session: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]	Part two, chap. IV, B
A/CN.9/WG.III/WP.40	Working paper submitted to the Working Group on Transport Law at its fourteenth session: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]	Part two, chap. IV, C
A/CN.9/WG.III/WP.41	Working paper submitted to the Working Group on Transport Law at its fourteenth session: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]	Part two, chap. IV, D
A/CN.9/WG.III/WP.42	Working paper submitted to the Working Group on Transport Law at its fourteenth session: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]	Part two, chap. IV, E

## ***2. Restricted series***

A/CN.9/WG.III/XIV/CR P.1 and Add.1-13	Draft report of the Working Group on Transport Law on the work of its fourteenth session	Not reproduced
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## ***3. Information series***

A/CN.9/WG.III/XIV/INF.1	List of participants	Not reproduced
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# **H. List of documents before the Working Group on Transport Law at its fifteenth session**

## ***1. Working papers***

A/CN.9/WG.III/WP.43	Provisional agenda	Not reproduced
A/CN.9/WG.III/WP.44	Working paper submitted to the Working Group on Transport Law at its fifteenth session: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]	Part two, chap. IV, G
A/CN.9/WG.III/WP.45	Working paper submitted to the Working Group on Transport Law at its fifteenth session: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]	Part two, chap. IV, H
A/CN.9/WG.III/WP.46	Working paper submitted to the Working Group on Transport Law at its fifteenth session: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]	Part two, chap. IV, I
A/CN.9/WG.III/WP.47	Working paper submitted to the Working Group on Transport Law at its fifteenth session: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]	Part two, chap. IV, J

**2. Restricted series**

A/CN.9/WG.III/XV/CRP.1 and Add.1-15	Draft report of the Working Group on Transport Law on the work of its fifteenth session	Not reproduced
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**3. Information series**

A/CN.9/WG.III/XV/INF.1	List of participants	Not reproduced
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**I. List of documents before the Working Group on Security Interests at its sixth session****1. Working papers**

A/CN.9/WG.VI/WP.12	Provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.13 and Add.1	Working paper submitted to the Working Group on Security Interests at its sixth session: draft legislative guide on secured transactions	Part two, chap. V, B
A/CN.9/WG.VI/WP.14 and Add.1-2 and Add.4	Working paper submitted to the Working Group on Security Interests at its sixth session: draft legislative guide on secured transactions	Part two, chap. V, C

**2. Restricted series**

A/CN.9/WG.VI/VI/CRP.1 and Add.1-5	Draft report of the Working Group on Security Interests on the work of its sixth session	Not reproduced
A/CN.9/WG.VI/VI/CRP.2	Recommendations of the draft legislative guide on secured transactions	Not reproduced
A/CN.9/WG.VI/VI/CRP.3	Report of the drafting group	Not reproduced

**3. Information series**

A/CN.9/WG.VI/VI/INF.1	List of participants	Not reproduced
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**J. List of documents before the Working Group on Security Interests at its seventh session****1. Working papers**

A/CN.9/WG.VI/WP.15	Provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.16 and Add.1	Working paper submitted to the Working Group on Security Interests at its seventh session: draft legislative guide on secured transactions	Part two, chap. V, E



A/CN.9/WG.VI/WP.17 and Add.1	Working paper submitted to the Working Group on Security Interests at its seventh session: draft legislative guide on secured transactions	Part two, chap. V, F
A/CN.9/WG.VI/WP.18 and Add.1	Working paper submitted to the Working Group on Security Interests at its seventh session: draft legislative guide on secured transactions	Part two, chap. V, G
A/CN.9/WG.VI/WP.19	Working paper submitted to the Working Group on Security Interests at its seventh session: draft legislative guide on secured transactions	Part two, chap. V, H

### ***2. Restricted series***

A/CN.9/WG.VI/VII/CRP.1 and Add.1-4	Draft report of the Working Group on Security Interests on the work of its seventh session	Not reproduced
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### ***3. Information series***

A/CN.9/WG.VI/VII/INF.1	List of participants	Not reproduced
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## **V. LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW REPRODUCED IN PREVIOUS VOLUMES OF THE *YEARBOOK***

The present list indicates the particular volume, year, part, chapter and page where documents relating to the work of the United Nations Commission on International Trade Law were reproduced in previous volumes of the *Yearbook*; documents that do not appear in the list here were not reproduced in the *Yearbook*. The documents are divided into the following categories:

1. Reports on the annual sessions of the Commission
2. Resolutions of the General Assembly
3. Reports of the Sixth Committee
4. Extracts from the reports of the Trade and Development Board, United Nations Conference on Trade and Development
5. Documents submitted to the Commission (including reports of the meetings of Working Groups)
6. Documents submitted to the Working Groups:
  - (a) Working Group I:  
Time-Limits and Limitation (Prescription), (1969 to 1971); Privately Financed Infrastructure Projects  
(2001 to 2003); Procurement (as of 2004)
  - (b) Working Group II:  
International Sale of Goods (1968 to 1978); International Contract Practices  
(1981 to 2000);  
International Commercial Arbitration and Conciliation (as of 2000)
  - (c) Working Group III:  
International Legislation on Shipping (1970 to 1975); Transport Law (as of 2002)\*\*
  - (d) Working Group IV:  
International Negotiable Instruments (1973 to 1987); International Payments  
(1988 to 1992);  
Electronic Data Interchange (1992 to 1996); Electronic Commerce (as of 1997)
  - (e) Working Group V:  
New International Economic Order (1981 to 1994); Insolvency Law (1995 to 1999);  
Insolvency Law (as of 2001)\*

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\* For its 23rd session (Vienna, 11-22 December 2000), this Working Group was named Working Group on International Contract Practices (see the report of the Commission on its 33rd session A/55/17, para.186).

- (f) Working Group VI:  
Security Interests (as of 2002)\*\*
7. Summary records of discussions in the Commission
  8. Texts adopted by Conferences of Plenipotentiaries
  9. Bibliographies of writings relating to the work of the Commission.

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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
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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

\*\* At its 35th session, the Commission adopted one-week sessions, creating six working groups.

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
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
A/58/17 (thirty-sixth session)	Volume XXXIV: 2003	Part one, A	3
A/59/17 (thirty-seventh session)	Volume XXXV: 2004	Part one, A	3

## 2. Resolutions of the General Assembly

2102 (XX)	Volume I: 1968-1970	Part one, II, A	18
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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
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34/143	Volume XI: 1980	Part one, I, C	4
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35/166	Volume XI: 1980	Part three, III	166
35/51	Volume XI: 1980	Part one, II, D	31
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