

**United Nations  
Commission on  
International  
Trade Law**

**YEARBOOK**

**Volume XXVI: 1995**



**UNITED NATIONS**  
**New York, 1996**

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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.

A/CN.9/SER.A/1995

UNITED NATIONS PUBLICATION

Sales No. E.96.V.8

ISBN 92-1-133510-8

ISSN 0251-4265



## INTRODUCTION

This is the twenty-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 twenty-eighth session, which was held in Vienna, 2-26 May 1995, 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 twenty-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 before the Working Groups.

Part three contains the Draft United Nations Convention on Independent Guarantees and Stand-by Letters of Credit and Draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and related Means of Communications, a bibliography of recent writings related to the Commission's work, a list of documents before the twenty-eighth session and a list of documents relating to the work of the Commission reproduced in the previous volumes of the *Yearbook*.

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<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:

Volume	Years covered	United Nations publication Sales No.
I	1968-1970	E.71.V.1
II	1971	E.72.V.4
III	1972	E.73.V.6
III Suppl.	1972	E.73.V.9
IV	1973	E.74.V.3
V	1974	E.75.V.2
VI	1975	E.76.V.5
VII	1976	E.77.V.1
VIII	1977	E.78.V.7
IX	1978	E.80.V.8
X	1979	E.81.V.2
XI	1980	E.81.V.8
XII	1981	E.82.V.6
XIII	1982	E.84.V.5
XIV	1983	E.85.V.3
XV	1984	E.86.V.2
XVI	1985	E.87.V.4
XVII	1986	E.88.V.4
XVIII	1987	E.89.V.4
XIX	1988	E.89.V.8
XX	1989	E.90.V.9
XXI	1990	E.91.V.6
XXII	1991	E.93.V.2
XXIII	1992	E.94.V.7
XXIV	1993	E.94.V.16
XXV	1994	E.95.V.20

## THE TWENTY-EIGHTH SESSION (1995)

### A. Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session (Vienna, 2-26 May 1995) (A/50/17) [Original: English]\*

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\*Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17) (hereinafter referred to as "Report").

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## INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's twenty-eighth session, held at Vienna from 2 to 26 May 1995.

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

### I. ORGANIZATION OF THE SESSION

#### A. Opening of the session

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its twenty-eighth session on 2 May 1995. The session was opened by Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel.

#### B. Membership and attendance

4. The General Assembly, by 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 General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 4 November 1991 and on 28 November 1994, 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 (2001), Argentina (1998), Australia (2001), Austria (1998), Botswana (2001), Brazil (2001), Bulgaria (2001), Cameroon (2001), Chile (1998), China (2001), Ecuador (1998), Egypt (2001), Finland (2001), France (2001), Germany (2001), Hungary (1998), India (1998), Iran (Islamic Republic of) (1998), Italy (1998), Japan (2001), Kenya (1998), Mexico (2001), Nigeria (2001), Poland (1998), Russian Federation (2001), Saudi Arabia (1998), Singapore (2001), Slovakia (1998), Spain (1998), Sudan (1998), Thailand (1998), Uganda (1998), United Kingdom of Great Britain and Northern Ireland

<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, 19 were elected at its forty-sixth session on 4 November 1991 (decision 46/309) and 17 were elected by the Assembly at its forty-ninth session on 28 November 1994 (decision 49/315). Pursuant to resolution 31/99 of 15 December 1976, the term of those members elected by the Assembly at its forty-sixth session will expire on the last day prior to the opening of the thirty-first session of the Commission, in 1998, while the term of those members elected at the forty-ninth session will expire on the last day prior to the opening of the thirty-fourth regular annual session of the Commission, in 2001.

(2001), United Republic of Tanzania (1998), United States of America (1998) and Uruguay (1998).

5. With the exception of Botswana, Cameroon, Egypt, Kenya, Slovakia and the United Republic of Tanzania, all members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Angola, Belarus, Belgium, Bosnia and Herzegovina, Canada, Colombia, Croatia, Czech Republic, Denmark, Gabon, Greece, Holy See, Indonesia, Iraq, Jordan, Kuwait, Monaco, Morocco, Myanmar, Netherlands, Pakistan, Paraguay, Peru, Portugal, Republic of Korea, Romania, Swaziland, Sweden, Switzerland, Tunisia, Turkey, Ukraine, Venezuela and Yemen.

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

(a) *United Nations bodies*: United Nations Industrial Development Organization (UNIDO);

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Committee (AALCC); Hague Conference on Private International Law; International Institute for the Unification of Private Law (UNIDROIT); League of Arab States;

(c) *Other international organizations*: Arab Association for International Arbitration (AAAI); Banking Federation of the European Union; Cairo Regional Centre for International Commercial Arbitration; Grupo Latinoamericano de Abogados para el Derecho del Comercio Internacional (GRULACI); Inter-American Commercial Arbitration Commission (IACAC); International Association of Insolvency Practitioners (INSOL); International Chamber of Commerce (ICC); International Council for Commercial Arbitration (ICCA); Tribunal Internacional de Conciliación y de Arbitraje del Mercosur (TICAMER); Union internationale des avocats (UIA).

### C. Election of officers<sup>2</sup>

8. The Commission elected the following officers:

*Chairman*: Mr. Goh Phai Cheng (Singapore)  
*Vice-Chairmen*: Mr. Gavan Griffith, Q.C. (Australia)  
 Mr. José María Abascal Zamora (Mexico)  
 Mr. Tadeusz Szurski (Poland)  
*Rapporteur*: Mr. Joseph Fred Bossa (Uganda)

<sup>2</sup>The election of the Chairman took place at the 547th meeting, on 2 May 1995, the election of the Vice-Chairmen at the 571st meeting, on 18 May 1995, and at the 574th meeting, on 19 May 1995; the election of the Rapporteur took place at the 566th meeting, on 15 May 1995. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and the Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), section II, paragraph 1, will be represented on the bureau of the Commission (see the report of the United Nations Commission on International Trade Law on the work of its first session, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216)*, para. 14 (*Yearbook of the United Nations Commission on International Trade Law*, vol. I: 1968-1970 (United Nations publication, Sales No. E.71.V.1, part two, I, A)).

### D. Agenda

9. The agenda of the session, as adopted by the Commission at its 547th meeting, on 2 May 1995, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Draft Convention on Independent Guarantees and Stand-by Letters of Credit.
5. Electronic data interchange: draft Model Law.
6. International commercial arbitration: draft Notes on Organizing Arbitral Proceedings.
7. Receivables financing: assignment of receivables.
8. Possible future work: cross-border insolvency; build-operate-transfer projects; monitoring of implementation of 1958 New York Convention.
9. Case-law on UNCITRAL texts (CLOUT).
10. Training and assistance.
11. Status and promotion of UNCITRAL legal texts.
12. General Assembly resolutions on the work of the Commission.
13. Other business.
14. Date and place of future meetings.
15. Adoption of the report of the Commission.

### E. Adoption of the report

10. At its 580th, 581st and 582nd meetings, on 24, 25 and 26 May 1995, the Commission adopted the present report by consensus.

## II. DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

### A. Introduction

11. Pursuant to a decision taken by the Commission at its twenty-first session in 1988,<sup>3</sup> the Working Group on International Contract Practices devoted its twelfth session to a review of the draft Uniform Rules on Guarantees being prepared by the International Chamber of Commerce (ICC) and to an examination of the desirability and feasibility of any future work relating to greater uniformity at the statutory law level in respect of guarantees and stand-by letters of credit. The Working Group recommended that work be initiated on the preparation of a uniform law, whether in the form of a model law or of a convention.

12. That recommendation was accepted by the Commission at its twenty-second session in 1989.<sup>4</sup> The Working Group devoted its thirteenth to twenty-third sessions to the preparation of a uniform law (for the reports of those

<sup>3</sup>*Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17)*, para. 25.

<sup>4</sup>*Ibid.*, *Forty-fourth Session, Supplement No. 17 (A/44/17)*, para. 244.

sessions, see A/CN.9/330, A/CN.9/342, A/CN.9/345, A/CN.9/358, A/CN.9/361, A/CN.9/372, A/CN.9/374, A/CN.9/388, A/CN.9/391, A/CN.9/405 and A/CN.9/408). That work was carried out on the basis of background working papers prepared by the Secretariat on possible issues to be included in the uniform law. Those background papers included: A/CN.9/WG.II/WP.63 (tentative considerations on the preparation of a uniform law); A/CN.9/WG.II/WP.65 (substantive scope of application, party autonomy and its limits, rules of interpretation); A/CN.9/WG.II/WP.68 (amendment, transfer, expiry and obligations of the guarantor); and A/CN.9/WG.II/WP.70 and A/CN.9/WG.II/WP.71 (fraud and other objections to payment, injunctions and other court measures, conflict of laws and jurisdiction). The draft articles of the uniform law, which the Working Group decided should, as a working assumption, be in the form of a draft Convention, were submitted by the Secretariat in documents A/CN.9/WG.II/WP.67, A/CN.9/WG.II/WP.73 and Add.1, A/CN.9/WG.II/WP.76 and Add.1, A/CN.9/WG.II/WP.80 and A/CN.9/WG.II/WP.83. The Working Group also had before it a proposal by the United States of America relating to rules for stand-by letters of credit (A/CN.9/WG.II/WP.77). The text of the draft articles of the Convention as presented to the Commission by the Working Group was contained in the annex to document A/CN.9/408.

13. The Commission elected Mr. Jacques Gauthier (Canada), in his personal capacity, as chairman of the Committee of the Whole for the discussion of the draft Convention.

## B. Consideration of draft articles

### Chapter I. Scope of application

#### Article 1. Scope of application

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

"(1) This Convention applies to an international undertaking referred to in article 2:

(a) If the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State, or

(b) If the rules of private international law lead to the application of the law of a Contracting State, unless the undertaking excludes the application of the Convention.

"(2) This Convention applies also to an international letter of credit other than a stand-by letter of credit if it expressly states that it is subject to this Convention.

"(3) The provisions of articles 21 and 22 apply to international undertakings as defined in article 2 irrespective of whether or not in any given case the Convention applies pursuant to paragraph (1) of this article."

15. The Commission exchanged views as to whether the draft text before it should be adopted in the form of a convention or in the form of a model law. In support of adopting a model law, it was stated that it would provide States with adequate flexibility to enable them to decide which

provisions were acceptable to be incorporated into national law. It was also stated that one of the main reasons for which the Working Group had proceeded on the basis of a convention was that provisions regarding jurisdiction would be better implemented in a convention and that, since the Working Group had decided not to maintain provisions on jurisdiction, the text should be adopted as a model law.

16. Wide support, however, was expressed for maintaining the recommendation of the Working Group to adopt the draft text in the form of a convention. In support of that view it was stated that only through a convention would it be possible to establish an adequate level of uniformity and harmonization necessary to enable the smooth operation of independent guarantees and stand-by letters of credit in an international setting. As to the question of flexibility, it was pointed out, the draft text already included a fairly flexible regime by providing means of opting out of both the convention as a whole and individual provisions thereof. After deliberation the Commission agreed to adopt the draft text as a convention.

#### Paragraph (1)

##### Subparagraph (a)

17. A proposal was made to amend subparagraph (1)(a) so as to take account of those instances where the guarantor/issuer might have more than one place of business. In support of that proposal it was stated that, as currently drafted, the provision did not account for cases where the undertaking was not issued at a place of business of the guarantor/issuer. Accordingly, it was proposed to amend the subparagraph to read as follows:

"(a) If the place of business of the guarantor/issuer is in a contracting State or if the guarantor/issuer has more than one place of business, the place of business from which the issuance of the undertaking is directed, is in a contracting State, or ..."

18. Insufficient support, however, was expressed for the proposal. It was generally felt that the words "at which the undertaking is issued" in the present formulation of subparagraph (a) would adequately cater to such instances.

19. A question was raised as to whether the effect of article 1 was that parties were left only with the option of opting in or out of the Convention as a whole rather than also having the choice of modifying or excluding individual provisions. It was proposed that the draft Convention should contain a provision similar to article 6 of the United Nations Convention on Contracts for the International Sale of Goods ("the United Nations Sales Convention") allowing parties to opt out of the Convention in part or in whole. In response, it was pointed out that the current provision was directed solely to the question of whether the draft Convention as a whole could be excluded, and that those instances where the parties could opt out or derogate from particular provisions were indicated in various articles by usage of words such as "unless otherwise stipulated in the undertaking..."

20. A further question was raised as to the legal implications for parties that opted out of the draft Convention but had their place of business in a State that had implemented

the Convention as national law. It was suggested that in such a case, opting out of the Convention might thus be of no practical significance. In response, it was pointed out that the draft Convention could not deal with the question of what the legal consequence would be if parties chose to exclude the Convention, in particular since that would depend on the situation obtaining in each contracting State.

21. A proposal was made to add at the end of paragraph (1) words along the lines of "or, as concerns the relationship between the guarantor/issuer and the principal/applicant, unless those parties exclude the application of the Convention". The intent of the proposal was to ensure that the principal/applicant would not be deprived of the protection of the Convention through an agreement between the guarantor/issuer and the beneficiary, an effect on third parties which, it was said, was incompatible with some legal systems. There was, however, insufficient support for the proposal.

22. A proposal to change the reference to undertaking in the *chapeau* of paragraph (1) to plural by replacing the words "an international undertaking" by the words "international undertakings" was referred to the drafting group.

#### Subparagraph (b)

23. The view was expressed that subparagraph (b) could be deleted, on the ground that it would not add substantially to the possible bases for applicability of the draft Convention. Underlying that view was the assumption that applicability on the basis of the rules of private international law would invariably lead to the use of the same connecting factor already referred to in subparagraph (a), other than in those cases in which it could serve to recognize a choice by the parties of the draft Convention as the applicable law. It was said that for such cases it would be preferable simply to include a clause in the draft Convention expressly recognizing the right of parties to opt into the draft Convention. It was also stated that the provision might simply be stating what courts would do anyway, with or without such a provision, and might therefore be unnecessary.

24. The prevailing view, however, was that there was a wider potential scope for subparagraph (b) beyond the case of opting in, and that it should therefore be retained, and that retention would also provide consistency with the approach followed in the United Nations Sales Convention. Admittedly, however, the realm of subparagraph (b) in the draft Convention was narrowed by the fact that the text already contained specific conflict-of-laws rules in articles 21 and 22. Furthermore, the Commission noted the view that the status of subparagraph (b) might be reviewed in relation to a final clause dealing with reservations to the draft Convention.

25. Subject to the above decisions, the Commission approved the substance of paragraph (1) and referred it to the drafting group.

#### Paragraph (2)

26. A view was expressed that paragraph (2), which was intended to recognize a right of parties to a commercial letter of credit to opt into the draft Convention, should be deleted

because it would raise the spectre of possible interference or inconsistency with existing legal standards and practices as reflected in the Uniform Customs and Practice for Documentary Credits (UCP), formulated by the International Chamber of Commerce. The concern was also expressed that the formulation of the provision was not sufficiently clear as to which types of instruments were the intended target of the opting-in facility, and that, at any rate, it was not necessary for the draft Convention to recognize expressly a right to elect application of the draft Convention for commercial letters of credit as such a right would generally be recognized.

27. The general view in the Commission, however, was that a provision along the lines of paragraph (2) should be retained. It was noted that the right of parties to commercial letters of credit to opt into the draft Convention was not itself at issue, as no objections to that were raised. That would therefore obviate the main element of potential controversy and leave only the questions of whether it would be helpful to recognize expressly that right and how such a provision might be formulated.

28. As regards the concern about generating potential inconsistency with standards and practices embodied in UCP, it was noted that one of the main purposes of the draft Convention was to support application by the parties of contractual rules such as UCP. In that connection, it was recalled that throughout the process of developing the draft Convention, which involved individuals who had themselves been involved in the preparation of UCP, a foremost guiding principle was to preserve consistency with, and respect for, UCP in its sphere of applicability. The Commission noted that evidence of the deference of the draft Convention to the contractual autonomy of the parties was found in the fact that the text was replete with references to such freedom to diverge from various of its provisions, and that, were any inconsistencies to be perceived, they could easily be overcome in that manner should parties be so inclined.

29. Furthermore, it was noted that the possibility of inconsistency with contractual rules was minimized since the main purpose of the draft Convention was to deal with issues that fell outside the possible scope of contractual rules, and with respect to which a lack of uniformity constituted a serious practical hinderance for the international practice of independent guarantees and stand-by letters of credit (e.g., questions such as international uniformity as to the point of establishment of the undertaking and measures that courts could be empowered to take to deal with the problem of fraudulent or abusive demands for payment). The Commission further noted that, to the extent that it might be felt that the draft Convention could conceivably give rise to any practices divergent from UCP, it needed to be borne in mind that the possibility of divergent practices was expressly provided for in UCP itself, since one of the cardinal principles of UCP, which applied by contractual agreement, was that the parties could exclude or modify any of its provisions.

30. Having agreed that the opting-in clause for commercial letters of credit should be retained, the Commission turned its attention to the concern that had been raised as to whether there would be sufficient clarity as to the type of instruments intended to be covered by the opting-in clause. It was

recalled that the current formulation, which was intended to cover in particular commercial letters of credit without specifically naming such instruments, resulted from a recognition that the terms "commercial letter of credit" and "stand-by letter of credit" were not universally used. Accordingly, the Commission accepted and referred to the drafting group a suggestion to utilize a formulation along the lines of "international letters of credit other than an undertaking as defined in article 2".

#### Paragraph (3)

31. The Commission affirmed the substance of paragraph (3), the intent of which was that the provisions of articles 21 and 22 would, standing alone, apply in any situation in which a choice would have to be made between the laws of different States in order to determine the law applicable to an undertaking, whether or not in the end it would be determined that it was the draft Convention that would apply. It was pointed out that the provision was thus intended to provide a binding rule of private international law to be used in determining the applicable law, and that its focus was therefore not limited to subparagraph (b) of paragraph (1). At the same time, the view was widely shared that the existing formulation was not sufficiently clear. It was pointed out, for example, that uncertainty might arise not only as to the formulation itself, but also from the position of the provision in relation to the provision in paragraph (1). As to the question whether different meanings might be attributed to the word "international" as it appeared in paragraph (3), in article 4, and in articles 21 and 22, the view was expressed that the Convention should not give it different meanings, but should apply the meaning given in article 4 to all cases. The Commission referred paragraph (3) to the drafting group with a view to addressing the concerns that had been raised.

#### Article 2. Undertaking

32. The text of the draft article as considered by the Commission was as follows:

"(1) For the purposes of this Convention, an undertaking is an independent commitment, usually referred to as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person.

"(2) The undertaking may be given:

(a) At the request or on the instruction of the customer ("principal/applicant") of the guarantor/issuer;

(b) On the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal/applicant") of that instructing party; or

(c) On behalf of the guarantor/issuer itself.

"(3) Payment may be stipulated in the undertaking to be made in any form, including:

(a) Payment in a specified currency or unit of account;

(b) Acceptance of a bill of exchange (draft);

(c) Payment on a deferred basis;

(d) Supply of a specified item of value.

"(4) The undertaking may stipulate that the guarantor/issuer itself is the beneficiary when acting in favour of another person."

#### Paragraph (1)

33. The Commission noted that the word "other" in the formulation "or upon presentation of other documents" was meant to indicate that a demand had to be in documentary form in order to be within the scope of the Convention. It was suggested that another approach to dealing with undertakings allowing an oral demand would be to invalidate oral demands by a provision in the Convention stating that oral demands were invalid. It was noted in that respect that, were such undertakings to be included in the scope of the draft Convention, according to article 15, a demand had to be in a form set out in article 7(2), which would have the effect of ruling out oral demands. Preference was expressed, however, for maintaining the present formulation, the consequence of which was to leave undertakings providing for oral demands out of the scope of application of the Convention.

34. A question was raised as to whether the words "upon simple demand or upon presentation of other documents" might not lead to the misinterpretation that the draft Convention only dealt with instances of a simple demand and a demand by way of presentation of other documents, but did not cover instances where a demand would be accompanied by other specified documents. The Commission agreed that the intention was to cover a demand accompanied by other documents and referred the matter to the drafting group, to make that intention clearer.

35. A suggestion was made that it should be made clear that an undertaking could only be issued by a guarantor/issuer that had the legal capacity to do so under the law to which the guarantor/issuer was subject. It was pointed out that if such a requirement were added, it would have to be carefully formulated so as not inadvertently to provide guarantor/issuers with a defence under the draft Convention of *ultra vires*. A note of caution was raised, however, against including such a requirement in the draft Convention, in particular in the provisions dealing with the scope of application, as it might lead to parties having to investigate the capacity of the guarantor/issuer in order to establish whether a particular undertaking was within the scope of the draft Convention. After deliberation, the Commission decided to maintain the current formulation, in which the draft Convention did not deal with the question of the legal capacity of parties to an undertaking.

36. A proposal was made for the deletion of the words "usually referred to as an independent guarantee or as stand-by letter of credit", on the grounds that it was a formulation

that was alien to some legal systems and might lead to confusion as to exactly which types of instruments the draft Convention was intended to cover. In response, it was pointed out that the intention underlying the formulation was to help clarify that commercial letters of credit and other instruments of an independent and promissory nature were not covered by the definition of "undertaking" in article 2. It was further noted that it was due to the difficulties in arriving at a generally agreeable definition of the terms "independent guarantee" and "stand-by letter of credit" that had led to the usage of the words "usually referred to as". Various suggestions of a drafting nature were made with the intention of alleviating the concerns raised regarding the words "usually referred to". Among the suggestions made in that regard were to replace the words "usually referred to as" with words such as "commonly known as", "known in practice" or "in the ordinary course of business known as". After deliberation, the Commission agreed to replace the words "usually referred to" by the words "known in international practice".

#### *Paragraphs (2), (3) and (4)*

37. The Commission found the substance of paragraphs (2), (3) and (4) to be generally acceptable.

38. Subject to the above decisions, the Commission found the substance of article 2 to be generally acceptable and referred it to the drafting group.

#### *Article 3. Independence of undertaking*

39. The text of the draft article as considered by the Commission was as follows:

"For the purposes of this Convention, an undertaking is independent where the guarantor/issuer's obligation to the beneficiary is not subject to the existence or validity of an underlying transaction, or to any other undertaking (including stand-by letters of credit or independent guarantees to which confirmations or counter-guarantees relate), or to any term or condition not appearing in the undertaking, or to any future, uncertain act or event except presentation of documents or another such act or event within a guarantor/issuer's sphere of operations."

40. A concern was raised that there was a possible inconsistency between article 3, which provided, as a basic element of independence, that the undertaking was not subject to the validity of the underlying transaction, and article 19(2)(b), which provided that one of the instances in which a demand had no conceivable basis was that the underlying obligation had been declared invalid by a court. It was suggested that such an inconsistency could be cured by providing that article 3 was subject to the provisions of article 19(2)(b). In response, it was pointed out that the two provisions were not inconsistent since article 3 was aimed at defining the concept of independence for purposes of establishing those instruments that were within the scope of application of the draft Convention and at differentiating such undertakings from accessory instruments, which directly depended on the existence and validity of the underlying obligation; by contrast, article 19(2)(b) was aimed at invalidating, for reasons of fraud, certain of those undertakings

that were governed by the draft Convention. It was suggested, however, that the provision would be clearer if the words "not subject to" were replaced by the words "not dependent upon". That suggestion was accepted and referred to the drafting group.

41. Subject to the above decisions, the Commission found the substance of draft article 3 to be generally acceptable and referred it to the drafting group.

#### *Article 4. Internationality of undertaking*

42. The text of the draft article as considered by the Commission was as follows:

"(1) An undertaking is international if the places of business, as specified in the undertaking, of any two of the following persons are in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer.

"(2) For the purposes of the preceding paragraph:

(a) If the undertaking lists more than one place of business for a given person, the relevant place of business is that which has the closest relationship to the undertaking;

(b) If the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant for determining the international character of the undertaking."

43. A proposal was made to delete paragraph (2)(b) and to replace the words "... as specified in the undertaking ..." in paragraph (1) by a formulation along the following lines:

"(1) An undertaking is international if the places of business of any two of the following persons are in different States and if those places are specified in the undertaking: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer.

"(2) If the undertaking lists more than one place of business for a given person, the relevant place of business is that which has the closest relationship to the undertaking."

44. The intent of the proposed revision was to provide a rule for the case in which one or more of the places of business were not indicated expressly in the undertaking, and to thus track more closely the more objective approach in article 1(2) of the United Nations Sales Convention. The proposal was also intended to provide greater clarity in the case in which the undertaking specified an objectively wrong place of business. It was said that the current text would enable parties to opt into the Convention by listing an incorrect place of business and that only a straightforward opting in should be countenanced. The proposal would also remove the reference to the habitual residence of parties that did not have "places of business" as such.

45. The above proposal, however, did not receive sufficient support. It was generally felt that the current text, according to which internationality would be determined on



the basis of the information contained on the face of the undertaking instrument, was better suited for the documentary character and context of the transactions covered by the draft Convention. It was pointed out that the types of transactions covered by the draft Convention required the guarantor/issuer to look only at the face of the undertaking and in that way differed from the transactions covered by the United Nations Sales Convention. It was said to be therefore appropriate for the text to utilize an approach along the lines followed in the United Nations Convention on International Bills of Exchange and International Promissory Notes, which also focused on the information contained within the four corners of the instrument. Moreover, the above proposal was too complicated in that it required ascertaining both the actual place of business and the one listed and, in case of inconsistency between the two, led to the non-application of the Convention.

46. The Commission then turned to several questions relating to the categories of parties listed in paragraph (1) whose places of business were relevant to the determination of internationality of the undertaking. In response to a question as to why it was necessary to list the confirmer in article 4 when, under article 6, the confirmer was included within the term "guarantor/issuer", the Commission recalled the basis of and affirmed the decision by the Working Group. A reference to the confirmer had been included by the Working Group, while no such reference was considered appropriate as regards the place of business of the counter-guarantor. The Working Group had noted that, in the typical case of confirmation, the guarantor/issuer and the beneficiary would be in different countries, and the confirmer would be in the same country as the beneficiary. By contrast, the guarantor/issuer of a guarantee supported by a counter-guarantee could typically be in the same country as the beneficiary, to the effect that that domestic guarantee would be transformed into an international undertaking subject to the draft Convention by virtue of the addition to paragraph (1) of a reference to the place of business of the counter-guarantor (A/CN.9/405, para. 92).

47. It was also pointed out in the discussion that the terminological system established in article 6 and used in the draft Convention provided for the general use of the term "guarantor/issuer", with the effect that provisions referring to the guarantor/issuer might, depending upon the context of a given transaction, apply separately and individually to a counter-guarantor or a confirmer. At the same time, that general terminological approach did not mean that, in particular for the purposes of article 4, the places of business of both the guarantor/issuer and a confirmer could not be considered for the purposes of internationality in a single situation.

48. A proposal was made to add to the categories of parties listed in paragraph (1) for the purposes of determining internationality references also to the places of business both of transferees of undertakings and of assignees of proceeds of undertakings. It was suggested that such an addition would increase the extent of uniformity of law achieved by the draft Convention and would provide greater legal certainty, in particular for undertakings such as "direct pay stand-by letters of credit", in which there might be a multiplicity of assignees in diverse countries. Views in support of such an

extension included that it would be acceptable to have such an extension for cases in which there would be, for example, an indication in the undertaking of assignability, or the issuance of a separate undertaking to implement payment to the third party. The prevailing view, however, was that it would not be appropriate to expand the categories referred to in paragraph (1) as proposed. A concern underlying that decision was that adding mention of transferees and assignees to paragraph (1) would expose parties to an undertaking to the risk that the contractual basis of the undertaking would be altered merely by virtue of a transfer or an assignment of proceeds. It was noted that the result intended by the proposal would already obtain under the current text in the frequent cases where the transfer was effected by the issuance of a new undertaking.

49. After deliberation, the Commission found the substance of draft article 4 to be generally acceptable and referred it to the drafting group.

## Chapter II. Interpretation

### Article 5. Principles of interpretation

50. The text of the draft article as considered by the Commission was as follows:

"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 the international practice of independent guarantees and stand-by letters of credit."

51. The Commission found the substance of draft article 5 to be generally acceptable and referred it to the drafting group.

### Article 6. Definitions

52. The text of the draft article as considered by the Commission was as follows:

"For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "Undertaking" includes "counter-guarantee" and "confirmation of an undertaking";

(b) "Guarantor/issuer" includes "counter-guarantor" and "confirmer";

(c) "Counter-guarantee" means an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment under that other undertaking has been demanded from, or made by, the person issuing that other undertaking;

(d) "Counter-guarantor" means the person issuing a counter-guarantee;

(e) "Confirmation" of an undertaking means an undertaking added to that of the guarantor/issuer, and

authorized by the guarantor/issuer, providing the beneficiary with the option of demanding payment from the confirmer instead of from the guarantor/issuer, upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the confirmed undertaking, without prejudice to the beneficiary's right to demand payment from the guarantor/issuer;

(f) "Confirmer" means the person confirming an undertaking;

(g) "Document" means a communication made in a form that provides a complete record thereof."

53. The Commission found the substance of the draft article 6 to be generally acceptable, noting that the clarification suggested for article 2, relating to the words "upon simple demand or upon presentation of other documents", would be considered by the drafting group with respect as well to subparagraphs (c) and (e).

54. Subject to the above decision, the Commission found the substance of draft article 6 to be generally acceptable.

### *Chapter III. Form and content of undertaking*

#### *Article 7. Issuance, form and irrevocability of undertaking*

55. The text of the draft article as considered by the Commission was as follows:

"(1) Issuance of an undertaking occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer concerned.

"(2) An undertaking may be issued in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary.

"(3) From the time of issuance of an undertaking, a demand for payment may be made in accordance with the terms and conditions of the undertaking, unless the undertaking stipulates a different time.

"(4) An undertaking is irrevocable upon issuance, unless it stipulates that it is revocable."

56. A question was raised as to whether paragraphs (1) and (2) were mandatory in the sense that the parties could neither agree on other times of issuance nor agree to establish oral undertakings. In response, it was pointed out that paragraph (1) only provided a definition of issuance. It was noted that it was important to set the time of issuance as a definite point in time as it established the time from which the guarantor/issuer was bound by the undertaking. With regard to paragraph (2), it was pointed out that it reflected the principle agreed on in the Working Group that the draft Convention would not cover oral undertakings.

57. A proposal was made to provide in paragraph (1) that issuance only occurred when the undertaking was directed by the guarantor/issuer to the beneficiary by a voluntary act

so as to rule out instances where the undertaking might leave the sphere of control of the guarantor/issuer without a positive expression of the wish to be bound by the undertaking, for example, in cases of theft. However, it was pointed out that, under the current formulation in the draft Convention, any issuance of the undertaking that was unauthorized by the guarantor/issuer could be a case of fraud that would be adequately dealt with under the provisions of article 19.

58. A suggestion was made that the current definition of "issuance" in paragraph (1) left a gap in the draft Convention. To illustrate such a gap, a hypothetical case was cited of a bank in country A instructing a bank in country B to issue an undertaking at a set point of time. It was stated that, in such a situation, even if both countries were contracting States, such an undertaking would not fall within the Convention as the place of business at which the undertaking would have been issued would not be that of the bank in country A. It was pointed out, however, that such a case illustrated that, in the application of a general rule on issuance, one might have to assess the nature of inter-bank relationships in determining when the undertaking actually left the sphere of control of the guarantor/issuer. After deliberation, the Commission decided to maintain the substance of article 7 along the current lines.

#### *Article 8. Amendment*

59. The text of the draft article as considered by the Commission was as follows:

"(1) An undertaking may not be amended except in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph (1) of article 7.

"(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, an undertaking is amended upon issuance of the amendment if:

(a) The amendment has previously been authorized by the beneficiary; or

(b) If the amendment consists solely of an extension of the validity period of the undertaking;

if any amendment does not fall within subparagraphs (a) and (b) of this paragraph, the undertaking is amended only when the guarantor/issuer receives a notice of acceptance of the amendment by the beneficiary in a form referred to in paragraph (1) of article 7.

"(3) An amendment of an undertaking has no effect on the rights and obligations of the principal/applicant (or an instructing party) or of a confirmer of the undertaking unless such person consents to the amendment."

#### *Paragraph (1)*

60. Noting that the reference to paragraph (1) of article 7 would be corrected to refer to paragraph (2) of that article, the Commission found the substance of paragraph (1) to be generally acceptable and referred it to the drafting group.

### Paragraph (2)

61. A proposal was made to delete paragraph (2) on the grounds that it focused on the relationship between the guarantor/issuer and the beneficiary and, unlike UCP provisions dealing with amendment, did not require the consent of the confirmer, although it was realized that paragraph (3) referred to the implications of an amendment for the position of a confirmer. Thus, it was said, that would possibly lead to inconsistent effects of the two texts. The prevailing view, however, was that it was useful to retain a provision addressing the questions raised in paragraph (2), and that it would not be out of line with UCP. There was insufficient support expressed for a proposal to include in the text a definition of the notion of "issuance" of an amendment, as that was not understood to raise necessarily matters at substantial variance with the notion of issuance of an undertaking.

62. A view was expressed that paragraph (2) was worded in such a way that it might affect revocable as well as irrevocable undertakings, while article 8 of UCP allowed the issuer to amend its revocable undertaking at any time before the beneficiary made a demand thereunder. However, after deliberation, the Commission found that the existing approach was satisfactory on that point, and it was unnecessary to provide further specificity as regards the question of amendment of revocable credits. It was pointed out, for example, that a distinction could be drawn between the question of revocation and the question of the procedure for, and the time of effectiveness of, amendments. It was further pointed out that the matter could be considered adequately dealt with by way of interpretation of the clause at the beginning of paragraph (2) referring to the contractual freedom of the parties to opt out of the provision.

63. As regards the precise content of paragraph (2), the Commission was generally of the view that it should retain admissibility of the concept of preauthorization of amendments by the beneficiary, referred to in subparagraph (a). It was also agreed that, contrary to a proposal that was made, preauthorization should not be made subject to a form requirement in accordance with article 7(2). However, several proposals were made with a view to refining the formulation of that concept. One such proposal was to refer not to amendments that were preauthorized, but to refer instead to amendments that were "requested" by the beneficiary, so as to reflect that in many instances it was a request from the beneficiary that actually gave rise to the amendment. There was some hesitation, however, to refer to the notion of "request", as it was pointed out that it might give rise to uncertainty at the operational level, in particular in the case of undertakings in which amendments were authorized in advance and not actually requested as such. That might be the case, for example, when the amount of the undertaking was increased or decreased automatically, and, by drawing, the beneficiary consented to the increase or decrease in the amount, with the condition of such consent reflected in the prospectus or other documents relating to a bond issue for which the undertaking serves as a payment instrument.

64. The Commission considered further the objections that had been raised in the Working Group to the inclusion of subparagraph (b), which provided for the effectiveness upon issuance, without the beneficiary's consent, of amendments

consisting solely of an extension of the validity period of the undertaking. Those objections centred around the case of the "variable-interest-rate financial stand-by letter of credit", which, if extended, might deprive the beneficiary of electing a more advantageous fixed interest rate at the end of the initial validity period, although in such a case the extension of the validity period was not truly the sole effect of the amendment. A concern was expressed, however, that without a provision along the lines of subparagraph (b) there might be uncertainty in some cases as to whether the beneficiary could rely on a notification from the guarantor/issuer of an extension, since it was often the case in practice that the beneficiary would not respond to such a notification, but would merely eventually make a demand for payment within the extended time frame. It was suggested that, were subparagraph (b) deleted, that concern might be met by using a formulation in subparagraph (a) along the lines of "previously authorized or otherwise consented to by the beneficiary". After deliberation, the Commission took the view that subparagraph (b) should be deleted in view of the potential difficulty that it raised for stand-by letter of credit practice.

65. Consequent to the exchange of views that had taken place concerning the formulation of paragraph (2), it was proposed that the provision might usefully be limited to stating the proposition that, unless otherwise agreed, an undertaking was amended when consented to. It was suggested that such a more limited and simplified provision would have the advantage of avoiding an overly precise statement of the time of effectiveness of an amendment and would therefore be more suited to being applied in a myriad of possibly differing circumstances that would arise in practice in individual cases, and in which it might be difficult to apply a more precise rule concerning time when amendments take effect. The Commission declined, however, to accept such an approach, as it was felt that the basic approach in the existing text would provide a substantially greater contribution to uniformity of law. It was therefore decided to retain paragraph (2) in its current form, with the deletion, however, of subparagraph (b).

66. The Commission referred to the drafting group a suggestion that it be made clearer that the provision at the beginning of paragraph (2) recognizing party autonomy extended also to the latter portion of the paragraph, which stated the general rule that amendments that were not preauthorized took effect upon acceptance.

### Paragraph (3)

67. The Commission found the substance of paragraph (3) and, subject to the above decisions, the remainder of draft article 8, to be generally acceptable and referred the article to the drafting group.

### Article 9. Transfer of beneficiary's right to demand payment

68. The text of the draft article as considered by the Commission was as follows:

"(1) The beneficiary's right to demand payment under the undertaking may be transferred only if so, and to

the extent and in the manner, authorized in the undertaking.

"(2) If an undertaking is designated as transferable without specifying whether or not the consent of the guarantor/issuer or another authorized person is required for the actual transfer, neither the guarantor/issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it."

69. A question was raised as to the intended meaning of the words "to the extent and in the manner authorized in the undertaking". It was pointed out in response that, in the case of transfer of an undertaking, there was not only the issue of the basic authority to transfer, but also the question of what percentage of the undertaking was subject to transfer and questions of procedure, such as whether the transfer should involve the issuance of a second instrument containing certain modifications. It was noted at the same time that the drafting group could usefully attempt a formulation that would more clearly distinguish those different elements of authorization.

70. The attention of the Commission was drawn to the question of whether, in the case of the insolvency of the beneficiary, the right to demand payment under the undertaking would be considered a part of the insolvency estate, such that it could be included in the assets available to satisfy creditors. It was agreed that the matter was beyond the scope of the draft Convention.

71. After deliberation, the Commission found the substance of the draft article to be generally acceptable and referred it to the drafting group.

#### *Article 10. Assignment of proceeds*

72. The text of the draft article as considered by the Commission was as follows:

"(1) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the undertaking.

"(2) If the guarantor/issuer or another person obliged to effect payment has received a notice of the beneficiary in a form referred to in paragraph (1) of article 7 of the beneficiary's irrevocable assignment, payment to the assignee discharges the obligor, to the extent of its payment, from its liability under the undertaking."

73. The Commission affirmed the decision of the Working Group not to impose any particular form requirement on a waiver by the beneficiary of its right under paragraph (1) to assign the proceeds.

74. The Commission noted that the formulation "notice of the beneficiary" in paragraph (2) was meant to indicate that only the beneficiary, from the viewpoint of practice, could be an effective source or originator of a notice to the guarantor/issuer of the assignment. A question was raised, how-

ever, as to why that should be so since under the general law of assignment of various legal systems, the assignee could give effective notice of the assignment to the debtor, based on the notion that it was the assignee who was the party with an interest in getting paid pursuant to the assignment. In response, it was pointed out that it was important that the beneficiary be the party to author (though not necessarily deliver) the notice as it was the right of the beneficiary to payment that was being assigned. It was further pointed out that in the international transactions covered by the draft Convention, which differed from other commercial contexts, it was particularly important that, since only the beneficiary named in the undertaking could make a demand for payment or make an irrevocable assignment, the beneficiary should author the notice of the assignment in order for it to be reliable. It was also pointed out that article 10 did not aim to regulate all matters related to assignments and that paragraph (2) was limited to the notice of the assignment, which would result in discharge of the obligor upon payment to the assignee. A suggestion was made that a solution might be to state that the notice of the assignment could be issued by the assignee with the consent or authorization of the beneficiary. It was stated, however, that emphasis in the provision should be on the beneficiary as the author of the notice.

75. It was suggested that the formulation "notice of the beneficiary" was ambiguous and could lead to misinterpretation as to who should be the source of the notice. Accordingly, it was decided that it be indicated that the notice should originate from the beneficiary, while not suggesting that what was required was actual physical delivery by the beneficiary.

76. The Commission decided against adding the term "irrevocable" to the title of the draft article, as it was felt that it would not be in line with the fact that paragraph (1) constituted a general recognition of the beneficiary's right to assign proceeds, whether or not the assignment was irrevocable. At the same time, it was noted that in actual practice revocable assignments of proceeds were of limited practical value.

77. Subject to the above decisions, the Commission found the substance of article 10 to be generally acceptable and referred it to the drafting group.

#### *Article 11. Cessation of right to demand*

78. The text of the draft article as considered by the Commission was as follows:

"(1) The right of the beneficiary to demand payment under the undertaking ceases when:

(a) The guarantor/issuer has received a statement of the beneficiary of release from liability in a form referred to in paragraph (1) of article 7;

(b) The beneficiary and the guarantor/issuer have agreed on the termination of the undertaking in a form referred to in paragraph (1) of article 7;

(c) The amount available under the undertaking has been paid, unless the undertaking provides for the

automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking;

(d) The validity period of the undertaking expires in accordance with the provisions of article 12.

"(2) The undertaking may stipulate, or the guarantor/issuer and the beneficiary may agree elsewhere, that return of the document embodying the undertaking to the guarantor/issuer, or a procedure functionally equivalent to the return of the document in the case of the issuance of the undertaking in non-paper form, is required for the cessation of the right to demand payment, either alone or in conjunction with one of the events referred to in subparagraphs (a) and (b) of paragraph (1) of this article. However, in no case shall retention of any such document by the beneficiary after the right to demand payment ceases in accordance with subparagraphs (c) or (d) of paragraph (1) of this article preserve any rights of the beneficiary under the undertaking."

#### Paragraph (1)

##### Subparagraph (a)

79. The Commission found the substance of subparagraph (a) to be generally acceptable, noting that the reference to paragraph (1) of article 7 would be corrected to refer to paragraph (2) of that article.

##### Subparagraph (b)

80. A proposal was made to amend subparagraph (b) so as to allow for the choice of the parties on the form in which termination of the undertaking could be made. It was pointed out that, since article 8(1) provided parties with the opportunity to go so far as to stipulate the possibility of oral amendments, parties should be provided with a similar opportunity with regard to terminations. The Commission accepted the proposal and referred it to the drafting group.

##### Subparagraph (c)

81. A proposal was made to delete the words "unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking", since, as it constituted a reference to a case in which it could not be considered that the "amount available" had fully been paid, the exemption was not necessary. It was pointed out, however, that the rationale for referring to such automatically renewable undertakings was to indicate clearly that, even in those instances when the nominal value of the undertaking had been fully drawn, the undertaking remained valid pending the renewal of the amount. On that understanding, the Commission decided to retain the current formulation of subparagraph (c).

##### Subparagraph (d)

82. The Commission found the substance of subparagraph (d) to be generally acceptable.

#### Paragraph (2)

83. A concern was expressed that the current formulation of paragraph (2), permitting the parties to agree that only the return of the documents embodying the undertaking could trigger cessation of the right to demand payment, might lead to the undesirable effect that, even where the beneficiary subsequently issued a statement of release to the guarantor/issuer, such a statement of release would be of no effect unless it were accompanied by a return of the documents. It was suggested that a better formulation would be that occurrence of any of the events referred to in subparagraphs (a) to (d) of paragraph (1) would extinguish the right to demand payment, even if the beneficiary retained the document embodying the undertaking.

84. Various suggestions were made to remedy the above-mentioned concern. One such suggestion was to reformulate the first sentence of paragraph (2) so as to delete the words "either alone or in conjunction with the events referred to in subparagraphs (a) or (b) of paragraph (1) of this article", and to delete from the second sentence the words "subparagraphs (c) or (d) of". However, it was pointed out that it might be important to maintain the difference between the events referred to in subparagraphs (a) and (b) of paragraph (1), which depended on actions taken by the beneficiary, while those referred to in subparagraphs (c) and (d) did not. Another proposal was to delete paragraph (2) and to insert a subparagraph (e) in paragraph (1) which would state that, if so stipulated in the undertaking, return of the documents embodying the undertaking would cease the right to demand payment but that retention of the documents after occurrence of the events in subparagraphs (a) to (d) would not preserve any rights of the beneficiary. Yet another proposal along the same lines was to maintain paragraph (2), but to delete the words "subparagraphs (c) or (d) of" from the second sentence. The suggestion was also made that, in order to defer to contractual freedom of the parties, it might be provided that the undertaking could stipulate that return of the documents was absolutely necessary to trigger cessation of the right to demand, despite the occurrence of the events referred to in subparagraphs (a) or (b) of paragraph (1). None of the above proposals, however, attracted wide support.

85. After deliberation, the prevailing view in the Commission was to retain the text along its current lines. In affirming the existing approach, the Commission noted that it was important to indicate clearly instances when possession of the documents did not preserve the rights of the beneficiary so as to avoid suggesting that undertakings under the draft Convention could conceivably have attributes of negotiability, and to avoid the possibility of fraudulent circulation of undertakings under which the right to payment had ceased. It was also recalled that such an approach would better clarify the situation in those legal systems where mere possession of the documents might still be taken as sufficient proof of legitimacy of a beneficiary's claim.

#### Article 12. Expiry

86. The text of the draft article as considered by the Commission was as follows:

"The validity period of the undertaking expires:

(a) At the expiry date, which may be a specified calendar date or the last day of a fixed period of time

stipulated in the undertaking, provided that, if the expiry date is not a business day at the place of business of the guarantor/issuer at which the undertaking is issued, or of another person or at another place stipulated in the undertaking for presentation of the demand for payment, expiry occurs on the first business day which follows;

(b) If expiry depends according to the undertaking on the occurrence of an act or event not within the guarantor/issuer's sphere of operations, when the guarantor/issuer receives confirmation that the act or event has occurred by presentation of the document specified for that purpose in the undertaking or, if no such document is specified, of a certification by the beneficiary of the occurrence of the act or event;

(c) If the undertaking does not state an expiry date, or if the act or event on which expiry is stated to depend has not yet been established by presentation of the required document, when six years have elapsed from the date of issuance of the undertaking."

#### *Subparagraph (a)*

87. The Commission found the substance of subparagraph (a) to be generally acceptable.

#### *Subparagraph (b)*

88. A suggestion to replace the word "confirmation" with a more suitable word was accepted and referred to the drafting group on the basis that the term "confirmation" had a particular defined meaning in the draft Convention which was not the meaning intended in subparagraph (b).

89. A question was raised as to why subparagraph (b) made reference to "an act or event not within the guarantor/issuer's sphere of operations". In response, it was pointed out that, although subparagraph (b) was intended to rule out non-documentary conditions in general, the words in question were meant to permit the taking into account by the guarantor/issuer of events that were within its direct and immediate sphere of operation and thus did not require it to engage in any outside investigations, for example, checking that an advance payment had been made at its own counters.

#### *Subparagraph (c)*

90. A concern was expressed that the current formulation of subparagraph (c) could be misinterpreted as covering the case in which the undertaking stipulated an expiry date and an expiry event. A suggestion was made to add the words "and an expiry date has not been stated in addition", after the reference to the non-occurrence of the expiry event, so as to clarify the matter. The matter was referred to the drafting group. However, it was pointed out that subparagraph (c) would in any case, in view of its opening proviso, not be applicable where an expiry date was stipulated, and that the situation could be understood to be subject to the general rule of the six-year limit, without the suggested addition. It was also noted that the understanding in the Working Group had been that, if the undertaking stipulated both an expiry time and the occurrence of an event, the first to occur of the two would trigger expiry.

## *Chapter IV. Rights, obligations and defences*

### *Article 13. Determination of rights and obligations*

91. The text of the draft article as considered by the Commission was as follows:

"(1) Subject to the provisions of this Convention, the rights and obligations of the guarantor/issuer and the beneficiary are determined by the terms and conditions set forth in the undertaking, including any rules, general conditions or usages specifically referred to therein.

"(2) In interpreting terms and conditions of the undertaking and in settling questions that are not addressed by the terms and conditions of the undertaking or by the provisions of this Convention, regard shall be had to generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice."

#### *Paragraph (1)*

92. A question was raised as to why paragraph (1) did not mention the rights and obligations of the principal/applicant, whose rights and duties were referred to or implicated in some of the provisions in the draft Convention. In response, it was pointed out that article 13 was intended to regulate only the rights and obligations arising out of the undertaking, which were primarily the rights and obligations of the guarantor/issuer and of the beneficiary. A proposal was made to add the words "arising out of the undertaking" between the words "beneficiary" and "are", so as to clarify the scope of article 13. Although a view was expressed that such additional words were not necessary from a drafting standpoint, the Commission decided to accept the change in the formulation in the expectation that it would increase the clarity of paragraph (1).

93. A concern was expressed that the words "subject to the provisions of this Convention" were not clear and might be taken to mean that the undertaking would be subject only to the mandatory provisions of the Convention, or that all the provisions of the draft Convention were intended to be mandatory, or at least all those that did not expressly provide for party autonomy. In response, it was stated that the words "subject to the provisions of this Convention" were meant to indicate that the rights and obligations of the parties would be subject to the mandatory provisions of the Convention, to the terms and conditions of the undertaking and to all non-mandatory provisions of the Convention which were not excluded or modified by the parties. It was further pointed out that that formulation was not intended to address the issue of which provisions were mandatory and which were not as that was an issue that was addressed in each specific article.

94. Various suggestions of a drafting nature were made with the intention of avoiding possible misinterpretations, in particular because of the usage of the words "subject to". Among the suggestions made was to use formulations such as "rights and obligations arising out of the undertaking are determined by this Convention", or "except where provided for in this Convention". After deliberation the Commission decided that a clearer formulation would be achieved by



deleting the words "subject to the provisions of this Convention" and adding the words "and by the provisions of this Convention" at the end of paragraph (1). The Commission requested the drafting group to implement its decisions, as above, with respect to paragraph (1).

#### *Paragraph (2)*

95. A suggestion was made that the current formulation of paragraph (2) might lead to the misinterpretation that, even where the parties expressly excluded certain usages, a court or arbitral tribunal could nevertheless, by construction, apply such usages. It was suggested that addition of words along the lines of "unless the application of such usages is specifically excluded by the parties" would make the text clearer. Objections were expressed, however, to the proposal. It was pointed out that, in effect, it was likely that any such express stipulation by the parties would be part of the terms and conditions of the undertaking and would therefore not be ignored by a court or an arbitral tribunal. It was further pointed out that paragraph (2) represented a balanced compromise agreed on in the Working Group, which balance might be upset by the suggested addition, in particular since, even with the parties' express stipulation in the undertaking against recourse to certain usages, a court or arbitral tribunal might still wish to refer to such usages in order to rely on a basic concept or principle to resolve a fundamental issue not provided for in the undertaking. After deliberation, the Commission decided to maintain paragraph (2) along the current lines.

96. After deliberation, the Commission found the substance of article 13, subject to the above decisions, to be generally acceptable and referred it to the drafting group.

#### *Article 14. Standard of conduct and liability of guarantor/issuer*

97. The text of the draft article as considered by the Commission was as follows:

"(1) In discharging its obligations under the undertaking and this Convention, the guarantor/issuer shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit.

"(2) A guarantor/issuer may not be exempted from liability for its failure to act in good faith or for any grossly negligent conduct."

#### *Paragraph (1)*

98. The Commission found the substance of paragraph (1) to be generally acceptable.

#### *Paragraph (2)*

99. A question was raised as to whether the liability of the guarantor/issuer referred to in paragraph (2) was in relation only to the beneficiary or also to the principal/applicant. In response, it was stated that paragraph (2) should be read together with paragraph (1), which would indicate that the

liability was owed for failure to perform obligations arising out of the undertaking or out of the Convention; while those obligations were essentially owed to the beneficiary, there were some that were owed to the principal/applicant.

100. A proposal was made to delete the word "grossly" in paragraph (2). In support of the proposal it was stated that the guarantor/issuer should be liable not only for gross negligence but also for simple negligence. In response, it was pointed out that the provision was not aimed at providing the guarantor/issuer with exemption from liability for negligence, but to provide a limit to the extent to which the parties could contract out of liability for negligence. It was recalled in that connection that there were certain commercial situations in which the parties would freely agree to a lower standard of care in the examination of demands for payment, and that the provision was meant to take account of such practices. On that understanding, the Commission decided to retain the current formulation of paragraph (2).

101. After deliberation, the Commission found the substance of article 14 to be generally acceptable and referred it to the drafting group.

#### *Article 15. Demand*

102. The text of the draft article as considered by the Commission was as follows:

"Any demand for payment under the undertaking shall be made in a form referred to in paragraph (1) of article 7 and in conformity with the terms and conditions of the undertaking. In particular, any certification or other document required by the undertaking shall be presented, within the time that a demand for payment may be made to the guarantor/issuer at the place where the undertaking was issued, unless another person or another place has been stipulated in the undertaking. If no certification or other document is required, the beneficiary, when demanding payment, is deemed to impliedly certify that the demand is not in bad faith or otherwise improper."

103. The Commission noted that the reference in the first sentence to paragraph (1) of article 7 would be corrected to refer to paragraph (2) of that article.

104. The Commission agreed that the second sentence, which authorized parties to the undertaking to depart from the general rule that any of the documents required to be presented in order to obtain payment should be presented to the guarantor/issuer at the place where the undertaking was issued, should also allow them to stipulate in the undertaking another solution on the issue of time and, for example, agree that mere dispatch, rather than also receipt, of such documents needed to take place prior to the expiry of the validity period.

105. It was proposed that the last sentence of article 15, which established an implied certification by the beneficiary making a demand for payment under a simple demand undertaking that the demand was not fraudulent or abusive in accordance with the provisions in article 19, should be

expanded to provide for such a presumption also in cases of undertakings in which the demand for payment was to be accompanied by documents.

106. The Commission agreed to the proposed modifications of the text and, subject to those decisions, found the substance of draft article 15 to be generally acceptable and referred it to the drafting group.

*Article 16. Examination of demand and accompanying documents*

107. The text of the draft article as considered by the Commission was as follows:

"(1) The guarantor/issuer shall examine the demand and any other, accompanying documents in accordance with the standard of conduct referred to in paragraph (1) of article 14. In determining whether documents are in facial conformity with the terms and conditions of the undertaking, and are consistent with one another, the guarantor/issuer shall have due regard to the applicable international standard of independent guarantee or stand-by letter of credit practice.

"(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer shall have reasonable time, but not more than seven business days, in which to examine the demand and any other, accompanying documents and to decide whether or not to pay, and if the decision is not to pay, to issue notice thereof to the beneficiary. Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, such notice shall be made by teletransmission or, if that is not possible, by other expeditious means and shall indicate the reason for the decision not to pay."

*Paragraph (1)*

108. The Commission found the text of paragraph (1) to be generally acceptable.

*Paragraph (2)*

109. A proposal was made to clarify the point when the seven business days referred to in paragraph (2) began to count. It was proposed that the seven days should begin to be counted from the day of presentation of the demand. However, the Commission agreed to a proposal that the seven days should begin to count from the day after presentation on the understanding that such a rule would conform to current practice in that respect, as reflected in UCP.

110. Another proposal made with regard to the seven-business-day period was that it should be reduced to either three or five business days. In support of the proposal it was stated that, unlike the practice with regard to commercial letters of credit, examination of documents for independent guarantees and stand-by letters of credit did not require such a long period of time. However, the proposal did not gain sufficient support. It was noted that the rule in paragraph (2) was that the guarantor/issuer should examine the documents within a reasonable time, with the seven-day period established as the

outer limit, and that the rule was in conformity with UCP rule.

111. Yet another proposal made with regard to the seven-business-day period was that paragraph (2) should expressly provide that each party who would be examining the documents could avail itself of such a period. In support of the proposal, it was stated that such a rule would be in conformity with practice obtaining in that respect as reflected in article 13(c) of UCP, which provided for seven days for each examining bank. Some hesitation was expressed, however, to amend the current text in that respect. In deciding to maintain the current formulation, the Commission noted that, in light of the definition of "guarantor/issuer" in article 6(b) as including "counter-guarantor" and "confirmer", the term "guarantor/issuer" in paragraph (2) should be read to mean also either the counter-guarantor or the confirmer depending on the context. It was also noted that the question of whether a bank "nominated" to examine documents was acting as an agent of the guarantor/issuer would be relevant to the question of how many such seven-day periods would be involved.

*Article 17. Payment of demand*

112. The text of the draft article as considered by the Commission was as follows:

"(1) Subject to article 19 the guarantor/issuer shall pay against a demand made in accordance with the provisions of article 14. Following a determination that a demand for payment so conforms, payment shall be made promptly, unless the undertaking stipulates payment on a deferred basis, in which case payment shall be made at the stipulated time.

"(2) Any payment against a demand that is not in accordance with the provisions of article 14 does not prejudice the rights of the principal/applicant."

113. The Commission noted that the references to article 14 would be corrected to refer to article 15. Also, the Commission requested the drafting group to determine the extent to which the title could refer simply to "payment" in all language versions.

*Paragraph (1)*

114. A suggestion was made that the phrase "subject to article 19" at the beginning of paragraph (1) seemed to give prominence to the exemption of non-payment pursuant to article 19 at the expense of the main import of article 17, which was that, upon presentation of a conforming demand in accordance with article 15, payment had to be made. It was proposed that the words "subject to article 19" should be deleted. A question was also raised as to the interplay between the implied certification of good faith upon presentation provided for in article 15 and the provisions of article 19, where the fraud had to be manifest and clear.

115. Preference was expressed, however, for maintaining the current text without changes. It was pointed out in that regard that it was important to maintain the difference between the implied certification of good faith in article 15 and



the provisions of article 19, by which such implication of good faith would be vitiated if the fraud was manifest and clear.

#### *Paragraph (2)*

116. The Commission found the substance of paragraph (2) to be generally acceptable and referred it to the drafting group.

#### *Article 18. Set-off*

117. The text of the draft article as considered by the Commission was as follows:

"Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer may discharge the payment obligation under the undertaking by availing itself of a right of set-off, except with any claim assigned to it by the principal/applicant."

118. A suggestion was made that the reference to "any claim" was too wide as article 18 should only exempt from set-off those claims arising from the underlying transaction. It was also suggested that the words "assigned to it by the principal/applicant" were overly restrictive, as they failed to cover those instances where the assignment of the claim to the guarantor/issuer might be arranged through third parties. It was suggested that a better formulation might be to characterize those claims that were exempt from set-off by using a formulation such as "except any claims arising out of the underlying transaction".

119. Various other suggestions were made with a view to better clarifying the text in that regard. A proposal to delete the words "to it", so as to preclude circumvention by way of indirect assignment, was objected to on the basis that it would leave the provision too vague regarding to whom the assignment was being made. Another proposal aimed at the same objective was to state that any assignment originating from the guarantor/issuer was exempt from set-off. None of those proposals, however, received sufficient support. In deciding to maintain the current formulation, the Commission noted that expanding the provision in the manner suggested would put the guarantor/issuer in the untenable position of having to investigate to a potentially excessive degree the source of assignments used for purposes of set-off. As to the types of claims that could be exempt from set-off, it was pointed out that the intention of article 18 was to exempt from set-off not just those claims arising from the underlying transaction, but also any other claims that the principal/applicant might assign to the guarantor/issuer.

120. A question was raised as to whether the right of set-off could be exercised at any time by the guarantor/issuer and, if so, whether that implied that the guarantor/issuer could be released from the undertaking before even a conforming demand was made. In response, it was pointed out that, as provided for in article 18, set-off was only a means of payment which could only be exercised once a demand had been made in accordance with the terms and conditions of the undertaking.

121. A proposal was made to provide that set-off could only be exercised by the guarantor/issuer with the consent of the beneficiary on the basis that, in some instances, a set-off might negatively prejudice the rights of the beneficiary in particular with regard to changing exchange rates or differing rates of interest. The proposal did not, however, gain sufficient support.

122. A proposal to add the words "or instructing party" to the end of article 18 was accepted by the Commission as a useful clarification to the text.

123. Subject to the above decisions, the Commission found the substance of article 18 generally acceptable and referred it to the drafting group.

#### *Article 19. [Obligation not to make payment]*

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

"[(1)(a) If, in the view of the guarantor/issuer, it is manifest and clear that:

- (i) Any document is not genuine or has been falsified;
- (ii) No payment is due on the basis asserted in the demand and the supporting documents; or
- (iii) Judging by the type and purpose of the undertaking, the demand has no conceivable basis,

and for that reason payment would not be in good faith, payment shall not be made to the beneficiary.

(b) In such event, [where the principal/applicant brings to the attention of the guarantor/issuer the presence of one of the elements in subparagraph (a),] the principal/applicant shall [ , unless otherwise stipulated in the undertaking or agreed elsewhere by the guarantor/issuer and the beneficiary]:

- (i) Indemnify the guarantor/issuer against any claim or liability resulting from non-payment, and,
- (ii) If requested by the guarantor/issuer, apply for a judicial or arbitral determination that non-payment is justified.]

"(2) For the purposes of paragraph (1)(a)(iii) of this article, the following are types of situations in which a demand has no conceivable basis:

(a) The contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;

(b) The underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;

(c) The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) Fulfillment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary."

125. The view was expressed that the title would be more indicative of the subject dealt with in the draft article if it referred directly to fraudulent or abusive calls. It was also noted that grounds existed for non-payment beyond those dealt with in the draft article, including embargoes and *force majeure*, so that a more general expression such as "non-payment" might also be considered. It was noted in response, that the Working Group had found it preferable to avoid using terms such as "fraud" or "abuse", in view of divergent understandings and degrees of familiarity with such expressions, and that at any rate the question of the title would have to await a final determination of the content and approach of draft article 19.

126. The Commission then exchanged views on the approach reflected in the draft version of article 19. The primary question posed in that exchange of views was whether the provisions should be framed in terms of a duty of the guarantor/issuer in cases of improper demand, or whether in such cases the guarantor/issuer should merely have a right to withhold payment. It was noted that the approach in the current draft reflected an approach imposing a duty on the guarantor/issuer not to make payment in cases of a manifestly and clearly improper demand, where such payment would be in bad faith, coupled with an obligation on the part of the principal/applicant to indemnify the guarantor/issuer for liability resulting from non-payment and to obtain a court or arbitral order blocking payment if requested to do so.

127. Various reservations were expressed as regards the approach reflected in the current text. Particular emphasis was placed on the notion that the undertaking was the guarantor/issuer's own commitment, involving its reputation as a reliable paymaster in international trade, and that it would therefore be more appropriate not to impose a duty to dishonour a demand for payment in the circumstances referred to in the draft article. A better approach, it was suggested, would be to leave intact in such cases the discretion of the guarantor/issuer, without thereby compelling the principal/applicant to reimburse the guarantor/issuer for a payment against an improper demand. An objection to the reference in paragraph (1)(a)(iii) to there being "no conceivable basis for the demand" was said to be illustrative of the concern that the approach based on a duty would compromise the independence of the undertaking by placing the guarantor/issuer in the position of investigating the circumstances of the underlying transaction.

128. A discretionary approach was said to be more in line with the essence of the role of the guarantor/issuer in the context of the type of independent undertakings covered by the draft Convention, which was to assess the facial conformity of documentary demands for payment with the terms and conditions of the undertaking. An approach imposing a duty not to pay in cases of improper demand, it was said, would be unacceptable to guarantor/issuers, as it would in effect require them to police the behaviour of the parties to underlying commercial transactions. It was suggested that the price structure of the business of independent guarantees and stand-by letter of credit practice would not accommodate the increase in the risk to be borne by guarantor/issuers that imposition of a duty not to pay would entail, and that other mechanisms were available to commercial parties to address the risk of such cases, in particular commercial insurance.

129. In support of a duty not to pay in cases of improper demand, it was said that such an approach would be more in line with the basic obligation under the draft Convention to act in good faith. In addition, particular importance was attributed to a concern that basing draft article 19 on the notion of a right not to pay would render article 20 unworkable in a variety of jurisdictions in which provisional court measures would not be available to block improper demands if the guarantor/issuer were not under a duty to dishonour an improper demand. It was also stated that an approach based on a duty would be workable because, as evidenced in the current draft, it could be circumscribed tightly and sensitive to the position of the guarantor/issuer by references such as "manifest and clear", "in the view of the guarantor/issuer", and "good faith", as well as by the protection afforded to the guarantor/issuer by the provision requiring a principal/applicant alleging fraud to indemnify the guarantor/issuer and to apply for a court order if requested to do so. A further consideration was that an approach based on a duty not to pay would be in harmony with the notion that, if in fact there was impropriety, the guarantor/issuer should ultimately not be held to the payment obligation and should rather not pay.

130. The exchange of views in the Commission revealed a considerable interest in the suggestion that the differing considerations raised as to the question of the duty versus right not to pay might be considered to be adequately taken into account by some sort of reference to the different relationships of the guarantor/issuer involved. Such an approach would recognize that, from the standpoint of its relationship with beneficiary, the guarantor/issuer could be considered to have a right not to pay. At the same time, that would not prejudice the possibility that, from the standpoint of its contractual relationship with the principal/applicant, the guarantor/issuer could be considered to have a duty not to pay an improper demand, with the effect that payment against such a demand could deprive the guarantor/issuer of its right to claim reimbursement from the principal/applicant. A suggestion of a similar type was to provide simply that in the circumstances of impropriety of the demand no payment was due the beneficiary.

131. Apart from the basic question of whether to phrase article 19 in terms of a duty or of a right not to pay, various views were expressed as to specific elements of the current formulation of the draft. Sympathy was expressed for the view that the words "in the view of the guarantor/issuer" could be dispensed with, since it would be desirable to inject into the provision a somewhat greater degree of objectivity, with the effect of a point of reference based on the conduct of a "reasonable guarantor/issuer". It was suggested in the same vein that reference could be made to a standard based on international banking practice.

132. A concern about the expression "if shown facts" was that it might raise the spectre of investigation of facts by the guarantor/issuer, and could be viewed as unclear or imprecise as to whether it referred to both of two possible scenarios: when what was manifest and clear was inferred from documentary examination, and when it was concluded on the basis of additional information presented to or in the possession of the guarantor/issuer.

133. A number of interventions were directed to the deletion of paragraph (1)(b), providing for an obligation on the part of the principal/applicant to indemnify the guarantor/issuer, on the grounds that it was a matter that could adequately be dealt with at the contractual level.

134. The view was expressed that an express rule should be provided for counter-guarantees in the case of an improper demand under the guarantee to which the counter-guarantee relates. The effect of the proposed rule would be that fraud in the demand would not automatically render the demand under the counter-guarantee fraudulent, and that a call under the counter-guarantee would be deemed improper only if there was complicity between the beneficiary making the call and the guarantor.

135. From the above discussion, a number of different possible approaches were distilled, reflecting various combinations of the considerations and views that had been expressed. One, minimalist, approach would be to state simply grounds for non-payment. Such an approach did not attract wide support, as the Commission felt that it would not achieve a satisfactory degree of uniformity since it would leave open a number of important questions. Another approach, essentially based on the existing text, would be framed in terms of a duty to dishonour, linked to an indemnification obligation on the part of the principal/applicant, though not necessarily containing a reference to the principal/applicant applying for a court order at the behest of the principal/applicant. A third possible approach would be based on discretion, whether expressed in terms of a right to pay or a right to dishonour, with references to the guarantor/issuer acting in good faith and possibly to standards of international practice of independent guarantees and stand-by letters of credit.

136. A fourth possible approach would combine elements of both the duty approach and the discretion approach, based on the degree to which the impropriety was "manifest and clear" or merely "highly probable", including also a statement to the effect that the action of the guarantor/issuer would not prejudice the rights of the principal/applicant or the beneficiary to pursue court measures to challenge or block the action of the guarantor/issuer. Such a combined duty and discretion approach, however, did not attract sufficient support, in particular since it was not perceived as being capable of providing a sufficient degree of certainty for the position of the guarantor/issuer.

137. Of the above possible approaches, the prevailing view in the Commission was in favour of an approach based on the right of the guarantor/issuer to withhold payment. At the same time, it was generally felt that the provision should be formulated in such a way as to make clear that it was a right "as against the beneficiary", so as not to preclude that, as against the principal/applicant, the guarantor/issuer could be considered to have a duty not to pay against an improper demand.

138. At the same time, in order to address the concern that framing article 19 in terms of a right of the guarantor/issuer to refuse payment would constitute an obstacle in some jurisdictions to the issuance of provisional court measures, the Commission agreed to include a provision in article 19 in-

tended to help overcome that problem in those jurisdictions. The provision would expressly state that, in the circumstances of impropriety referred to in article 19, the principal/applicant had a right to provisional court measures in accordance with article 20. It was not felt to be necessary, however, to refer in that context to rights of the beneficiary not being prejudiced by the guarantor/issuer, since that was not a question within the scope of article 19. In particular, it was noted that the beneficiary was not precluded by article 19 from pursuing an action for wrongful dishonour of the demand for payment.

139. A proposal was made to delete the notion of "manifest and clear" in article 19 as the guarantor/issuer would in fact have a duty not to pay if there would actually be fraud. It was affirmed, however, that the article would retain the reference to the impropriety being "manifest and clear" to the guarantor/issuer. Those words were generally felt to be necessary to preserve the independent character of the obligations of the guarantor/issuer to the beneficiary. Reflecting the discussion that had taken place, it was further agreed that the words "in the view of the guarantor/issuer" could be dispensed with and that it should be made clear that the right of the guarantor/issuer being referred to was "as against the beneficiary." The Commission further agreed that the existing paragraph (2) would be retained along its current line and it did not adopt a suggestion that article 19 should deal with the position of innocent third parties. It was also agreed that the provisions in paragraph (1)(b), concerning an obligation of the principal/applicant to indemnify the guarantor/issuer and to apply for a court order if requested to do so, which had been added by the Working Group as part of an approach framed in terms of a duty, would now be omitted.

140. On the basis of the above understanding, the Commission referred article 19 to the drafting group, including the question of whether to use the expression "withhold payment" in place of "refuse payment". It had been suggested that the word "withhold" might be more appropriate, in that it would better convey the possibility that a decision by the guarantor/issuer might be later revised by the guarantor/issuer itself or by a court.

## *Chapter V. Provisional court measures*

### *Article 20. Provisional court measures*

141. The text of the draft article as considered by the Commission was as follows:

"(1) Where, on an application by the principal/applicant or the instructing party, it is shown that there is a high probability that, with regard to a demand made, or expected to be made, by the beneficiary, one of the elements referred to in paragraph (1) of article 19 is present, the court, on the basis of immediately available strong evidence, may issue a provisional order to the effect that the beneficiary does not receive payment or that the amount of the undertaking held by the guarantor/issuer or the proceeds of the undertaking paid to the beneficiary are blocked, taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious harm.

"(2) The court, when issuing a provisional order referred to in paragraph (1) of this article, may require the person applying therefor to furnish such form of security as the court deems appropriate.

"(3) The court may not issue a provisional order of the kind referred to in paragraph (1) of this article based on any objection to payment other than those referred to in paragraph (1)(a)(i), (ii), or (iii) of article 19, or use of the undertaking for a criminal purpose."

142. Suggestions were made for the deletion of article 20. One reason given was that the law on provisional relief by courts was well settled in national laws and that the Convention should not interfere with that area of law. Furthermore, draft article 20 addressed a limited number of points concerning provisional relief, and the provisions on those points might not mesh harmoniously with the rest of the provisions in the applicable national law on provisional relief. Another reason given in favour of deletion was that, in the particular area of independent guarantees and stand-by letters of credit, provisional relief was inappropriate in the sense that courts either should not interfere with the payment obligation of the guarantor/issuer or, in justified cases, should terminate that payment obligation by a definitive decision.

143. As an alternative to deleting draft article 20, it was suggested that, instead of approaching the matter by the formulation "... the court ... may issue a provisional order ...", the provision should be based on a formulation along the lines of "the principal/applicant may request the court ...". The purpose of the modification was to avoid the risk of interfering with the prerogatives of the court.

144. The Commission did not adopt the suggestions to delete the draft article or to change its approach. It was considered important to establish the right of access to the court by the principal/applicant when that was necessary to prevent the beneficiary from receiving payment in the cases specified in draft article 19. It was also considered important that the right of court access, which with variations existed in many jurisdictions, should be clearly circumscribed so as to avoid undue interference of courts in payments under independent guarantees or stand-by letters of credit. At the same time, the provision did not attempt to deal in detail with procedural questions, which were left to the national law. Furthermore, as repeatedly stated during the preparatory work, one of the main purposes of the draft Convention was to harmonize the law in the area of fraud without thereby compromising the independent nature of the undertaking; that purpose could only be achieved by addressing provisional court relief. Moreover, the provision had added utility because the approach adopted by the Commission with regard to draft article 19 (see paragraphs 137 and 138 above) now referred to the right of the principal/applicant to provisional court measures. It was noted that a previous draft article on insolvency of the principal/applicant and on any other circumstance that might affect the ability or obligation of the principal/applicant to reimburse the guarantor/issuer, was deleted because it was understood that insolvency of the principal/applicant or those other circumstances would not be grounds for an injunction or otherwise for refusing payment (draft article 17 (1 *ter*) (A/CN.9/WG.II/WP.80 and A/CN.9/391, para. 127).

#### Paragraph (1)

145. The expression "high probability" was criticized as opening too broad an avenue for the issuance of provisional court measures, thus potentially compromising the independent nature of the undertaking and possibly inciting principal/applicants to attempt to delay payment. A suggestion was made to underpin the independent nature of the undertaking by replacing that expression by a requirement that the basis for issuing a provisional court measure had to be "manifest and clear". In that context, a view was expressed that the standard of proof set out in current paragraph (1) was not consistent with article 19 as in some instances the guarantor/issuer would have a duty to pay although the court could issue a provisional order to block payment. Suggestions were also made to replace the expression "strong evidence" by an expression such as "irrefutable evidence". It was said that courts were able, also in proceedings concerning provisional relief, to judge whether the principal/applicant established irrefutably that the demand for payment was manifestly and clearly improper. Similarly, it was suggested to replace the reference to "serious harm" by a reference to "irreparable harm".

146. In support of the existing text, it was said that the use of differing standards in articles 19 and 20 was justified since the positions and functions of a guarantor/issuer examining a demand, on the one hand, and a court determining whether to issue provisional measures, on the other hand, were different. It was also said that the suggested modifications would raise the requirements for provisional court measures to an excessive degree and thus render it virtually impossible to obtain provisional relief, which would prejudice legitimate interests of the principal/applicant. Furthermore, as requests for provisional relief were often considered by courts without, or after only a limited, hearing of the party against whom the provisional court measure was directed, it was not realistic to require "irrefutable evidence". Moreover, the suggested modifications did not take proper account of the difference between court proceedings aiming at a definitive resolution of the dispute, which required clear evidence of fraud, and court proceedings concerning provisional relief, which required a somewhat lesser standard of proof that the demand was improper.

147. Another proposal was to delete the qualifier "strong" before the word "evidence" so as to leave the question of the standard of proof to the law outside the Convention.

148. Noting that the formulation reflected in the paragraph was aimed at being applied in a variety of jurisdictions, the Commission decided to leave it unchanged.

149. The Commission agreed that the words "elements referred to in paragraph (1) of article 19" were to be understood as a reference to the instances covered in subparagraphs (a), (b) and (c) and not also to the requirement as regards the guarantor/issuer, expressed in the *chapeau* of paragraph (1), that those instances be manifest and clear. The drafting group was requested to find a formulation that would express that understanding more clearly.

150. A concern was expressed that article 20 might be interpreted as providing a basis for blocking reimbursement

by the guarantor/issuer to confirming or nominated banks that had made payment in good faith. It was pointed out in response that inter-bank reimbursement arrangements fell outside the scope of the Convention and that the article was limited to dealing with the blocking of payment to the beneficiary. In order to clarify that, it was agreed to reformulate paragraph (1) along the following lines: "... the court ... may issue a provisional order to the effect that the beneficiary does not receive payment, including an order that the guarantor/issuer hold the amount of the undertaking, or a provisional order blocking the proceeds of the undertaking paid to the beneficiary, taking into account ...".

#### *Paragraph (2)*

151. One suggestion was to delete paragraph (2) and leave the matter of providing security as a condition for provisional relief to the applicable law other than the Convention. Another suggestion was that providing security should be a condition for granting a provisional court measure. The Commission retained the substance of the paragraph unchanged, considering that it was important to allow the court to require security and give it discretion in considering whether in a given case security should be required.

#### *Paragraph (3)*

152. A proposal was made to delete paragraph (3) as the paragraph was considered too restrictive. However, the proposal did not attract sufficient support.

153. A view was expressed that the paragraph was not intended to prevent the principal/applicant from seeking provisional court measures with respect to its contractual rights against the guarantor/issuer in accordance with the national law. The matter was not further discussed.

#### *Counter-guarantees*

154. A suggestion was made to make it clear that, in the case of a counter-guarantee, article 20 would not provide a basis for blocking payment by the counter-guarantor to the guarantor who had paid the demand in good faith. The Commission agreed to express that by way of a provision in paragraph (2) of article 19 to the effect that a provisional court measure could be obtained to block payment under the counter-guarantee only when the guarantor had made payment in bad faith.

155. A suggestion was made to state clearly in the draft Convention the principle that provisional court measures affecting the beneficiary who demanded payment under a guarantee did not automatically extend to the counter-guarantee related to that guarantee; similarly, it was suggested to state that provisional court measures affecting the guarantor in whose favour a counter-guarantee had been issued did not automatically extend to the guarantee in favour of the ultimate beneficiary. The Commission did not consider it necessary to include such statements in the draft Convention, since, as had been affirmed by the Working Groups at successive sessions, it followed from articles 3 and 6 that a counter-guarantee was an undertaking independent of the guarantee to which the counter-guarantee related.

## *Chapter VI. Conflict of laws*

### *Article 21. Choice of applicable law*

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

"The undertaking is governed by the law the choice of which is:

(a) Stipulated in the undertaking or demonstrated by the terms and conditions of the undertaking; or

(b) Agreed elsewhere by the guarantor/issuer and the beneficiary."

157. The view was expressed that the words "or demonstrated by the terms and conditions of the undertaking" in subparagraph (a) derogated from the position found under a number of private international law conventions which state that a choice of law by the parties had to be expressly stated and not deduced as a hypothetical will of the parties. A proposal was made to delete those words so as to provide that a choice of law by the parties had to be expressly made in the undertaking.

158. The proposal did not, however, attract sufficient support. It was pointed out that the current formulation of subparagraph (a) represented a compromise developed by the Working Group that reflected current trends with regard to choice of law clauses in commercial law texts. It was further pointed out that subparagraph (a) could not be interpreted as giving effect to the hypothetical will of the parties as it specifically referred to the terms and conditions of the undertaking.

159. The suggestion was made that, as currently formulated, in particular when read together with paragraph (1) of article 1, article 21 implied that the guarantor/issuer and the beneficiary could agree on a choice of law that would then affect the principal/applicant without its consent, or they could exclude from the undertaking even those provisions in the Convention that were meant to provide some protection to the principal/applicant. It was proposed that the words "or, as concerns the relationship between the guarantor/issuer and the principal/applicant, unless those parties exclude the application of the Convention" should be added to the end of paragraph (1) of article 1 so as to ensure that the beneficiary and the guarantor/issuer could not exclude, as regards the relationship of the guarantor/issuer and the principal/applicant, those provisions that related to that relationship, without the agreement of the principal/applicant and the guarantor/issuer.

160. After deliberation, the prevailing view in the Commission was for the retention of paragraph (1) of article 1 and also article 21 along the current lines. The Commission noted that the general approach of the draft Convention was to cover the relationship between the guarantor/issuer and the beneficiary and that, while there were a few provisions that applied to the relationship between the principal/applicant and the guarantor/issuer, there were some provisions meant for the protection of the principal/applicant relating in particular to the principle of good faith. It was further pointed out that the addition of the suggested words in an article related to the scope of application would unduly complicate

the provision, which was one that should be easily determinable as it related to the issue of whether or not the Convention was applicable to a particular undertaking.

#### *Article 22. Determination of applicable law*

161. The text of the draft article as considered by the Commission was as follows:

"Failing a choice of law in accordance with article 21, the undertaking is governed by the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued."

162. The suggestion was made that article 22 did not cater for instances when the guarantor/issuer might not be a commercial enterprise with a place of business but a private individual with only a place of residence, a possibility that was contemplated by article 4. A proposal was made to state that, in such instances, the undertaking would be governed by the law of the place where the guarantor/issuer had its habitual residence. The Commission agreed that it was an issue that needed to be clarified also for a number of other provisions, and requested the drafting group to determine whether it would be feasible to include a general provision covering instances where the guarantor/issuer had a habitual place of residence rather than a place of business.

163. Subject to the above decision, the Commission found the substance of article 22 to be generally acceptable and referred it to the drafting group.

### *Chapter VII. Final clauses*

#### *Article A. Depositary*

164. The text of the draft article as considered by the Commission was as follows:

"The Secretary-General of the United Nations is the depositary of this Convention."

165. The Commission found the text of article A to be acceptable.

#### *Article B. Signature, ratification, acceptance, approval, accession*

166. The text of the draft article as considered by the Commission was as follows:

"(1) This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until ....[the date two years from the date of adoption]."

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

"(3) This Convention is open to 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."

167. The question was posed whether to consider providing for a period of signature for the draft Convention that would stretch for three years from the date of its adoption. It was decided, however, to remain with the two-year period suggested in the draft placed before the Commission.

#### *Article C. Application to territorial units*

168. The text of the draft article as considered by the Commission was as follows:

"(1) If a 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 one or more of them, and may at any time substitute another declaration for its earlier declaration."

"(2) These declarations are to state expressly the territorial units to which the Convention extends."

"(3) If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the place of business of the guarantor/issuer or of the beneficiary is located in a territorial unit to which the Convention does not extend, this place of business is considered not to be in a Contracting State."

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

169. The Commission noted that the formulation of the draft article might be affected by the manner in which the question of possible references to habitual residence was dealt with elsewhere in the draft Convention. The substance of the draft article was otherwise found to be generally acceptable.

#### *Article D. Effect of declaration*

170. The text of the draft article as considered by the Commission was as follows:

"(1) Declarations made under article [C] at the time of signature are subject to confirmation upon ratification, acceptance or approval."

"(2) Declarations and confirmations of declarations 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 which makes a declaration under article [C] may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary."

171. The Commission found the substance of article D to be generally acceptable.

#### *Article E. Reservations*

172. The text of the draft article as considered by the Commission was as follows:

"No reservations may be made to this Convention."

173. Differing views were expressed as to whether the draft Convention should countenance a right on the part of States becoming parties to the draft Convention to make reservations. One view was that such a right should be recognized with regard to particular provisions on which divergent views had been expressed during the preparation of the draft Convention or which were perceived by some as perhaps not being sufficiently clear. Reference was made in that regard to article 20, concerning provisional court measures, and to article 1(2), which, without defining "international letter of credit", obliged Contracting States to apply the Convention to such letters of credit whenever parties to such letters of credit so wished. Another proposal was that States should simply be accorded the right to pick and choose those provisions against which they would lodge reservations.

174. In support of permitting reservations it was suggested that, with such a facility, the draft Convention would generate wider acceptability and adherence. In the discussion the question was also raised whether a reservation might be permitted enabling States to endow the draft Convention with a mandatory character beyond what was contemplated in the text.

175. After deliberation, the prevailing view was that the draft Convention should not permit reservations. In support of that decision, it was noted that the current text represented the culmination of years of work on a carefully crafted package of provisions that represented a compromise intended to balance the interests of various parties involved in undertakings of the type covered, and designed to take into account various perspectives and traditions represented by different practices and legal traditions. It was suggested that permitting reservations would undermine the degree of uniformity that the draft Convention was intended to achieve, and would rather give rise to a situation in which the actual effect of the draft Convention would be subject to substantial uncertainty. It was also pointed out that throughout the preparation of the current text, including at the current session of the Commission, solutions had been reached without there being any insistence that any of those solutions should be subject to a right of reservations. It was stated, in response, that the right to make reservations had been demanded. As regards article 20, it was noted that the provision had a key role to play in giving meaning to the compromise positions that had been worked out with respect to the question of how to deal with exceptional cases of im-

proper demands. It was further noted that that provision merely established a minimum standard for the availability of such measures, and for dealing with the uncertainty that might otherwise exist in some legal systems as to whether such measures would in fact be available for the cases dealt with by the draft Convention. Lastly, it was pointed out that the possible need for reservations was diminished by the flexibility inherent in the draft Convention, illustrated in particular by the fact that the parties to an undertaking would remain free to opt out of the draft Convention in its entirety, or to exclude or modify many of its individual provisions.

#### *Article F. Entry into force*

176. The text of the draft article as considered by the Commission was as follows:

"(1) This Convention enters into force on the first day of the month following the expiration of one year from the date of the deposit of the [fifth] instrument of ratification, acceptance, approval or accession.

"(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the [fifth] instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.

"(3) This Convention applies only to undertakings issued on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (a) or the Contracting State referred to in subparagraph (b) of paragraph (1) of article 1."

177. The Commission agreed that the number of instruments of ratification, acceptance, approval or accession to be required for entry into force of the draft Convention should be set at five. It was felt that such a figure would be more appropriate in the light of the objective of promoting uniformity of law, than would be a lower figure. In accordance with that decision, the substance of article F was found to be generally acceptable.

#### *Article G. Denunciation*

178. The text of the draft article as considered by the Commission was as follows:

"(1) A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

"(2) The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary."

179. The Commission affirmed the use of the term "denunciation" as appropriate since it was in line with terminology traditionally used in international treaties.

180. It was observed that the Vienna Convention on the Law of Treaties used the term "Contracting State" to refer to States that had consented to be bound by a treaty, whether or not the treaty had entered into force, and that the use of the term in article G might raise the question of whether article G would apply to a withdrawal by a State prior to the entry into force of the draft Convention for that State. In response, it was noted that the current formulation reflected that used in other Conventions prepared by the Commission.

181. After deliberation, the Commission found the substance of the draft article to be generally acceptable.

### C. Consideration of report of drafting group

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

182. The Commission considered a text prepared by the drafting group intended to clarify the provision on independent applicability of articles 21 and 22 (see paragraph 31 above), which read as follows and which it was proposed might be relocated to the position immediately following paragraph (1):

"(1 *bis*) In any situation involving a choice between the laws of different States, the law applicable to undertakings as defined in article 2 shall be established in accordance with articles 21 and 22, whether or not the Convention applies pursuant to paragraph (1) of this article."

183. As an alternative to having in article 1 the above text, which did not attract sufficiently wide support, it was proposed to deal with the matter in chapter VI, with a provision along the lines of "the provisions of articles 21 and 22 apply independently of paragraph (1) of article 1". It was suggested that such a formulation, and its new location, would be simpler and display more evidently that what was involved was a conflict-of-laws rule for the courts of States parties to the draft Convention, rather than a rule as to the specific cases in which the draft Convention was to apply, the latter being the subject dealt with in paragraph (1).

184. The prevailing view, however, was that the principle of the applicability of articles 21 and 22 independently of paragraph (1) should be addressed in paragraph (3) of article 1, so that the reader of the text would at the outset have a complete indication of the applicability of the various parts of the draft Convention. It was agreed that the provision should read as follows:

"(3) The provisions of articles 21 and 22 apply to international undertakings referred to in article 2 independently of paragraph (1) of this article".

185. The Commission decided not to accept a suggestion to delete the word "international", which was said to be an unnecessary restriction on a conflict-of-laws rule. That suggestion met with some hesitation in the Commission about the possibility of articles 21 and 22 being applied to undertakings of a domestic nature, for example, when the parties to such a domestic undertaking sought to exclude the application of the domestic law.

186. Interest was expressed in a proposal to replace in the new version of paragraph (3) the words "as referred to in article 2" by words along the lines of "as defined in this Convention". The intent of the proposal was to clarify that, for the purposes of applying articles 21 and 22, the definitions in articles 4 and 6 would be taken into account, even if, according to paragraph (1) of article 1, the Convention would not apply. It was felt that such clarification was not necessary.

187. The Commission also exchanged views as to whether paragraph (1) of article 1 should refer to issuance of an undertaking from the "habitual residence" of the guarantor/issuer, so as to expressly bring within the scope of the draft Convention undertakings so issued. It was pointed out in that connection that such a possibility was already suggested in article 4(2)(b), which provided that a habitual residence listed on the face of an undertaking could be relevant for the purposes of determining internationality. It was also recalled that a proposal had been made earlier in the discussion and referred to the drafting group to add a reference in article 22 to the possibility that an undertaking would be issued from a habitual residence (see paragraph 162 above).

188. Considerable hesitation was expressed, however, to refer at the outset of the draft Convention, in article 1, to issuance from a "habitual residence", as that might appear to give undue prominence to such issuances which, in practice, were not a prominent feature of the business of independent guarantees and stand-by letters of credit. An alternative proposal was made to have a general provision along the lines of: "the term 'place of business' refers to habitual residence if the guarantor/issuer concerned does not have a place of business." That drew the observation that such a provision would possibly not obviate the need to have the reference to "habitual residence" in article 4(2)(b).

189. After deliberation, the Commission decided that, with the exception of article 4(2)(b), it would not be necessary to refer in article 1 or in a general provision to the habitual residence of a party. It was understood at the same time that the decision was not intended to preclude the possibility that undertakings issued from a habitual residence would fall within the draft Convention.

#### *Article 2. Definitions*

190. A proposal was made to add a cross-reference to article 15 so as to make it clear in article 2 that the draft Convention did not deal with undertakings that provided for oral demands for payment. The Commission decided, however, to maintain article 2 without any changes on the basis that the reference to "other documents" made it clear that a demand had to be in documentary form, on the understanding that article 2 was merely intended as a scope-of-application provision with the details of the other elements to be found in the substantive portions of the text.

#### *Article 6. Definitions*

191. The Commission agreed to reformulate subparagraph (f) along the following lines: "confirmer" means the



person adding a confirmation to an undertaking". It did not support a suggestion that the definition refer to "issuance" of a confirmation.

#### Article 12. *Expiry*

192. The Commission decided, in subparagraph (b), to replace the words "... when the guarantor/issuer is informed that the act or event has occurred ..." by the words "... when the guarantor/issuer is advised that the act or event has occurred ...".

193. The Commission decided to accept the addition in subparagraph (c) of the words "and an expiry date has not been stated in addition" to the reference to non-occurrence of an expiry event. That addition, which had been referred to the drafting group, was intended to make it clear that the provision did not cover the case in which an undertaking referred to both an expiry event and an expiry date (see paragraph 90 above).

#### Article 16. *Examination of demand and accompanying documents*

194. The Commission agreed that it would be sufficient in paragraphs (1) and (2) to utilize the expression "any accompanying documents", rather than "any other, accompanying documents", when referring to the possibility that a demand, which under the draft Convention would itself have to be in documentary form, might be required to be accompanied by documents.

#### Article 19. *Exception to payment obligation*

195. The Commission accepted the proposal of the drafting group to formulate the title as reflected above.

196. The question was posed to the Commission by the drafting group whether to refer in paragraph (3) to the principal/applicant having a right to "obtain" or rather to "seek" a provisional court order in accordance with article 20. It was decided that the intent of the provision that a substantive right was being affirmed would be better conveyed by a formulation utilizing the words "... the principal/applicant is entitled to provisional court measures in accordance with article 20".

197. The Commission declined to accept a proposal to delete the reference at the beginning of paragraph (3) linking availability of such court measures to the instances set out in subparagraphs (a), (b) and (c) of paragraph (1) of article 19. It affirmed that the reference was useful to make it clear that the entitlement of the principal/applicant recognized in paragraph (3) was limited to those instances and thus could not exceed under the draft Convention what would be available under article 20, which was itself limited to the instances referred to in subparagraphs (a), (b) and (c) of paragraph (1) of article 19. The proposal to delete the reference in paragraph (3) to paragraph (1) had been offered with a view to avoiding the risk of a misinterpretation that the reference in paragraph (3) to paragraph (1), which included in its *cha-*

*peau* the manifest-and-clear test, could engender a conflict with the "high probability" test referred to in article 20 (1). In order to limit the possibility of such a misinterpretation, the Commission decided to formulate the reference as precisely as possible to the instances referred to in the subparagraphs of paragraph (1) themselves, so as to avoid suggesting that the reference was also to the manifest-and-clear test in the *chapeau* of paragraph (1).

#### Article 22. *Determination of applicable law*

198. In line with the deliberations that had taken place in connection with the report of the drafting group on article 1 (see paragraphs 187-189 above), the Commission decided not to include in article 22 a reference to habitual residence.

#### D. *Procedure for adopting the draft Convention as a convention*

199. After completing its work on the draft Convention, the Commission considered the procedures that might be followed for the adoption of the text as a convention. The Commission supported a proposal to recommend that the General Assembly adopt the draft Convention in its current form and open it for signature. In support of that proposal, it was stated that the draft Convention would make a significant contribution to the practice of independent bank guarantees and stand-by letters of credit. It was further stated that the expense of convening a diplomatic conference would not be justified since the text was the result of many years of work at the end of which balanced solutions had been arrived at that successfully merged in a single text concepts and procedures from independent guarantee and stand-by letter of credit practice and from different legal systems, and thus did not require extended consideration of substance.

200. The Commission expressed its appreciation to the Working Group on International Contract Practices for having produced a draft Convention of such high quality. The Commission also expressed its appreciation to Jacques Gauthier (Canada), who served as Chairman of the Working Group during the preparation of the draft Convention.

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

201. At its 564th meeting on 12 May 1995, the Commission adopted by consensus the following decision:

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

*Recalling* that at its twenty-second session in 1989 it decided to prepare uniform legislation on independent guarantees and stand-by letters of credit, and that it entrusted the Working Group on International Contract Practices with the preparation of a draft,

*Noting* that the Working Group devoted eleven sessions, held from 1990 to 1995, to the preparation of the draft Convention on Independent Guarantees and Stand-by Letters of Credit,

Having considered the draft Convention at its 547th to 564th meetings, held during its twenty-eighth session, in 1995,

*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 twenty-eighth session of the Commission, either as member or as observer, with a full opportunity to speak and make proposals,

1. *Submits* to the General Assembly the draft Convention on Independent Guarantees and Stand-by Letters of Credit, as set forth in annex I to the present report;

2. *Recommends* that the General Assembly consider the draft Convention with a view to concluding at the fiftieth session of the General Assembly, on the basis of the draft Convention approved by the Commission, a United Nations Convention on Independent Guarantees and Stand-by Letters of Credit.”

### III. DRAFT UNCITRAL MODEL LAW ON LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE AND RELATED MEANS OF COMMUNICATION

#### A. Introduction

202. At its twenty-fourth session in 1991, the Commission agreed that the legal issues of electronic data interchange (EDI) would become increasingly important as the use of EDI developed, and that the Commission should undertake work in that field. The Commission agreed that the matter needed detailed consideration by a Working Group.<sup>5</sup>

203. Pursuant to that decision, the Working Group on International Payments devoted its twenty-fourth session (January-February 1992) to identifying and discussing the legal issues arising from the increased use of EDI. At its twenty-fifth session (1992), the Commission considered the report of the Working Group (A/CN.9/360). In line with the suggestions of the Working Group, the Commission agreed that there existed a need to investigate further the legal issues of EDI and to develop practical rules in that field. After discussion, the Commission endorsed the recommendation contained in the report of the Working Group (A/CN.9/360, paras. 129-133) and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange.<sup>6</sup>

204. The Working Group on Electronic Data Interchange devoted its twenty-fifth to twenty-eighth sessions to the preparation of draft model statutory provisions (for the reports of those sessions, see A/CN.9/373, A/CN.9/387, A/CN.9/390 and A/CN.9/406), which it approved in the form of a draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication at the close of its twenty-eighth session (October 1994). The work of the Working Group was carried out on the basis of

background working papers prepared by the Secretariat on possible issues to be included in the Model Law. Those background papers included A/CN.9/WG.IV/WP.53 (Possible issues to be included in the programme of future work on the legal aspects of EDI) and A/CN.9/WG.IV/WP.55 (Outline of possible uniform rules on the legal aspects of electronic data interchange). The draft articles of the Model Law were submitted by the Secretariat in documents A/CN.9/WG.IV/WP.57, A/CN.9/WG.IV/WP.60 and A/CN.9/WG.IV/WP.62. The Working Group also had before it a proposal by the United Kingdom of Great Britain and Northern Ireland relating to the possible contents of the draft Model Law (A/CN.9/WG.IV/WP.58).

205. With a view to providing guidance to legislatures that might consider enacting the Model Law, the Working Group agreed that a draft guide to enactment of the Model Law should be prepared by the Secretariat. The draft Guide to Enactment of the Model Law prepared by the Secretariat (A/CN.9/WG.IV/WP.64) was considered by the Working Group at its twenty-ninth session (February-March 1995). After discussion, the Working Group requested the Secretariat to prepare a revised version of the draft Guide reflecting the decisions made by the Working Group and taking into account the various views, suggestions and concerns that had been expressed at its twenty-ninth session. At that session, the Working Group also considered proposals by the International Chamber of Commerce (A/CN.9/WG.IV/WP.65) and the United Kingdom (A/CN.9/WG.IV/WP.66) relating to the possible inclusion in the draft Model Law of additional provisions to the effect of ensuring that certain terms and conditions that might be incorporated in a data message by means of a mere reference would be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of the data message (for the report of the twenty-ninth session of the Working Group, see A/CN.9/407).

206. The text of the draft Model Law as approved by the Working Group at its twenty-eighth session was sent to all Governments and to interested international organizations for comment. The comments received were reproduced in document A/CN.9/409 and Add.1-4.

207. The text of the draft articles of the Model Law as presented to the Commission by the Working Group was contained in the annex to document A/CN.9/406.

#### B. Consideration of draft articles

##### *Title of draft Model Law*

208. The title of the draft Model Law as considered by the Commission was as follows: “Draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication”. It was recalled that the Working Group had decided to cover EDI and related means of communication, as indicated in subparagraph (a) of article 2 of the draft Model Law. It was also recalled that, in order to reflect its decision not to deal with all legal aspects of electronic communications, the Working Group had decided that use of the words “legal aspects” was preferable to the use of the words “the legal aspects”.

<sup>5</sup>Ibid., Forty-sixth Session, Supplement No. 17 (A/46/17), paras. 314-317.

<sup>6</sup>Ibid., Forty-seventh Session, Supplement No. 17 (A/47/17), paras. 140-148.

209. There was agreement in the Commission that the title of the draft Model Law in general was too long, and did not describe the content of the draft Model Law with sufficient clarity. As to the particular words used in the title, a number of concerns were expressed. One concern was that the words "model law on legal aspects" were redundant and too vague for the title of a legislative text. Alternatively, those words were said to create the mistaken impression that the text dealt with all the legal issues that might be related to the use of EDI. Another concern was that the words "Electronic Data Interchange" were not sufficiently clear. It was said that the word "data" was particularly narrow and unclear to be included in a legal text, since it could be understood as a reference to any information in a computer or as a reference to information fields in EDI messages. Another concern was that the words "related means of communication" could be understood to refer to a broad scope of activities that the draft Model Law was not intended to cover. Yet another concern was that the word "communication" was felt to be too narrow, and appeared to be inconsistent with the decision of the Working Group to cover data messages that were created and stored but not communicated.

210. Various proposals were made aimed at addressing those concerns, while reflecting the common understanding that the title should be short, user-friendly and descriptive of the actual scope of the draft Model Law. Those proposals included: "Model Law on EDI", "Model Law on Electronic Commerce", "Model Law on Electronic Communications" and "Model Law on Electronic Means of Communication".

211. None of those proposals attracted sufficient support. In opposition, it was pointed out that: the first proposal was too narrow and unclear since the draft Model Law was intended to cover activities that went beyond EDI, as was clearly indicated in subparagraph (a) of article 2 of the draft Model Law; the second proposal raised questions relating to the scope of application of the draft Model Law, since it appeared as restricting the scope of the draft Model Law to commercial activities, while the intention was to allow enacting States to apply the draft Model Law to a wider range of activities in which modern communication technologies were being used; in addition, the second proposal was said to be inconsistent with the provisions of the draft Model Law, since it focused on the content of data messages and not on the procedure of creating, storing or communicating data messages; the third proposed wording could be misunderstood in some countries as addressing regulatory rules of communications, e.g., in the field of broadcasting; and the fourth proposal, which was made in order to address the latter objection, was similarly unclear.

212. After discussion, the Commission postponed its final decision with respect to the title of the Model Law. It was agreed that the issue would need to be reverted to after the Commission had completed its review of draft articles 1 and 2.

### *Chapter I. General provisions*

#### *Footnote to chapter I*

213. The text of the footnote to chapter I as considered by the Commission was as follows:

"\*This Law does not override any rule of law intended for the protection of consumers."

214. The Commission found the substance of the footnote to be generally acceptable.

### *Article 1. Sphere of application*

215. The text of the draft article as considered by the Commission was as follows:

#### *"Sphere of application\*\**

"This Law forms part of commercial\*\*\* law. It applies to any kind of information in the form of a data message.

\*\*\*The Commission suggests the following text for States that might wish to limit the applicability of this Law to international data messages:

"This Law applies to a data message as defined in paragraph (1) of article 2 where the data message relates to international commerce.

\*\*\*\*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 cooperation; carriage of goods or passengers by air, sea, rail or road."

216. Divergent views were expressed as to whether the draft Model Law should be limited in scope to address only situations where EDI and related means of communication were used in the context of "commercial" or other "trade-related" relationships. One view was that any reference to "commerce" or "trade" should be avoided. In support of that view, it was stated that such a reference might raise difficulties, since certain common law countries, as well as certain civil law countries, did not have a discrete body of commercial law, and it was not easy or usual in such countries to distinguish between the legal rules that applied to "trade" transactions and those that applied more generally. Other examples were given of countries where notions such as "trade" and "commerce" were not commonly used in legal texts and might raise questions as to their definitions. It was also stated that the focus of the draft Model Law should not be on any specific category of transactions, e.g., commercial transactions in the context of which various computer-based techniques might be used, but rather that it should be on those techniques themselves, whose common feature was that they were not paper-based. It was further stated that, should the draft Model Law apply only to commercial transactions, such a limitation in scope would be inconsistent with the broad formulation of draft articles 5 to 9, which were intended to provide alternative ways of complying with existing requirements of national law. It was suggested that the scope of the draft Model Law should cover the full scope of such national requirements, not all of which were intended to apply only in a commercial context.

217. The contrary view, which was widely supported, was that the draft Model Law should somehow be limited in scope to data created, stored or exchanged in the context of commercial relationships. It was stated that such a limitation

would appropriately reflect the general mandate of the Commission with respect to international trade law. It was also stated that the draft Model Law had been prepared against the background of trade relationships and might not be appropriate for other kinds of relationships. It was recalled that the same concern had been expressed during the preparation of the draft Model Law by the Working Group (A/CN.9/406, paras. 81-83; A/CN.9/390, paras. 23-26), and that the Working Group had decided that the focus of the text should not be on the relationships between EDI users and public authorities (A/CN.9/390, para. 21). It was also recalled, however, that no decision had been made to render the draft Model Law inapplicable to such relationships.

218. After discussion, the Commission decided that the draft Model Law should somehow be limited in scope to the commercial area. It was also decided that nothing in the draft Model Law should prevent an implementing State from extending the scope of the draft Model Law to cover uses of EDI and related means of communication outside the commercial sphere, and that the option thus given to implementing States should be clearly expressed in the draft Model Law. As to how the limitation to the commercial area and the option given to implementing States should be formulated, it was generally felt that the current formulation of draft article 1 was inappropriate. In particular, the reference to "commercial law" was found to be inadequate. A term of art in certain countries, the notion of "commercial law" might be meaningless in other countries. Furthermore, where the notion of "commercial law" was already in use in national legislation, it might be subject to a variety of definitions and might be interpreted differently according to the country in which the notion was used. It was generally felt that the reference to "commercial law", while providing a degree of flexibility to certain implementing States, might introduce considerable uncertainty and run counter to harmonization of international trade law. Wording along the following lines was proposed as a substitute for draft article 1: "This law applies to any kind of information in the form of a data message used in the context of commercial activities". It was also proposed that a footnote to draft article 1 should expressly allow implementing States to extend the scope of the draft Model Law to other types of situations if they so wished. After discussion, the proposal was adopted by the Commission and referred to the drafting group.

#### *Footnotes to article 1*

219. The Commission found the substance of the two footnotes to be generally acceptable.

#### *Article 3. Interpretation*

220. The text of draft article 3 as considered by the Commission was as follows:

"(1) In the interpretation of this Law, regard is to be had to its international source and to the need to promote uniformity in its application and the observance of good faith.

"(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

#### *Paragraph (1)*

221. The Commission considered the question whether paragraph (1) should be changed in order to refer to the purpose of the draft Model Law to facilitate the use of electronic data interchange and analogous means of communication in commercial transactions.

222. In support of that proposal, it was pointed out that including in paragraph (1) a statement as to the purpose of the draft Model Law to facilitate the use of EDI would be seen as encouraging the use of communication technologies. It was added that that result could not be attained if such a statement were to be included in the Guide to Enactment or in a preamble to the draft Model Law. In opposition to the proposal, it was stated that a reference to the purpose of the draft Model Law in paragraph (1) could lead to inconsistency since good faith might lead to an interpretation of the draft Model Law that did not necessarily facilitate the use of EDI. In addition, it was said that a statement regarding the purpose of the draft Model Law in paragraph (1) could be seen as mandating the use of electronic communications, while the intention was merely to remove obstacles in the use of such communications. After discussion, the Commission adopted the substance of paragraph (1) unchanged.

#### *Paragraph (2)*

223. The suggestion was made that the work of other international organizations in the field of EDI should be recognized by adding at the end of paragraph (2) language along the following lines: "there can also be taken into account rules formulated by international organizations for use in an electronic environment and, where appropriate, usages of trade and system rules". In support of the proposal, it was stated that EDI would be facilitated if courts were allowed to consider usages and other rules of practice in filling gaps possibly left by the Model Law. In addition, it was pointed out that it would be consistent with the practice followed in contemporary international legal instruments to include such a rule aimed at the harmonization or uniform interpretation of national laws.

224. The suggestion, however, did not attract sufficient support. A number of concerns were expressed. One concern was that a reference to rules of international organizations in general would introduce some uncertainty into the draft Model Law since the term "rules" would include contractual rules and the term "organizations" would include private organizations often representing special interests, such as interests of intermediaries. Another concern was that, in the context of a model law that would be enacted as domestic law, it would not be appropriate to subject gap-filling to international rules of practice and usages. After deliberation, the Commission adopted the substance of paragraph (2) unchanged.

### *Chapter II. Application of legal requirements to data messages*

#### *Article 4. Legal recognition of data messages*

225. The text of draft article 4 as considered by the Commission was as follows:

"Information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message."

226. The view was expressed that draft article 4 was superfluous since the principle of non-discrimination against data messages was already embodied in draft articles 5 to 8, and adding a general rule could only create confusion as to the purpose of those draft articles. It was suggested that, should a general statement along the lines of draft article 4 be regarded as necessary, it should be explained in the Guide to Enactment of the Model Law that article 4 stated the fundamental principle of non-discrimination, and was not intended to override articles 5 to 8 of the Model Law. However, the prevailing view was that a general provision stating the fundamental principle that data records should not be discriminated against was essential. It was widely felt that such a principle should find general application and that its scope should not be limited to evidence or other matters covered in draft articles 5 to 8. There was wide support for the proposal to explain the purpose of draft article 4 in the Guide to Enactment of the Model Law.

227. As to the precise formulation of draft article 4, a number of concerns were raised. One concern was that in its current formulation draft article 4 could be misinterpreted as suggesting that data messages were inherently unreliable. In order to alleviate that concern, the suggestion was made that draft article 4 should be cast in a positive way. Another concern was that draft article 4 did not make it clear that requirements for particular formalities were not affected where the inevitable and automatic consequence of using a data message was that the requirement was not satisfied. Yet another concern was that draft article 4 was based on the misconception that information had legal effectiveness, while it was data messages to which legal effectiveness was attributed. In order to address those concerns, the suggestion was made that draft article 4 should be amended along the following lines: "The use of a data message to record or communicate information shall not affect the legal consequences of the record or communication or of what is recorded or communicated, provided that no particular requirement applies which the use of a data message does not satisfy." The suggestion did not gain sufficient support. After deliberation, the Commission adopted the substance of draft article 4 unchanged.

#### Article 5. Writing

228. The text of the draft article as considered by the Commission was as follows:

"(1) Where a rule of law requires information to be in writing or to be presented in writing, or provides for certain consequences if it is not, a data message satisfies that rule if the information contained therein is accessible so as to be usable for subsequent reference.

"(2) The provisions of this article do not apply to the following: [...]"

#### Paragraph (1)

##### General remarks

229. A concern was expressed that paragraph (1) might create some uncertainty since it contained notions (e.g., "rule of law" and "accessible so as to be usable for subsequent reference") the meanings of which were not clear. It was suggested that well-known notions, such as "preservation of a record of the information" and "reproduction in tangible form", would be preferable. It was proposed that paragraph (1) should be redrafted along the following lines: "Writing" means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form". It was stated that such wording would be more in line with article 1.10 (Definitions) of the UNIDROIT Principles of International Commercial Contracts and existing international conventions such as the 1988 Convention on International Factoring prepared by the International Institute for the Unification of Private Law (UNIDROIT). While the view was shared that the notion of a record of the information being preserved might be useful in the context of providing background information in the Guide to Enactment of the Model Law, there was agreement that the terms used in paragraph (1) were widely known and understood in the field of EDI and related means of communications, and that the Commission should not shy away from using such terms.

230. In the context of the general discussion, a proposal was made that a reference to the accuracy and reliability of the information contained in a data message should be introduced as an element of the functional equivalent of "writing". Formulations that were suggested for use as additional conditions included "integrity" or "reliability" and "faithfulness" of the data message in reflecting what was actually exchanged. That proposal did not attract sufficient support. It was recalled that the Working Group had discussed the matter extensively, and that it had been recognized that the question of integrity or reliability was a matter that went mainly to the evidential value or weight of the data message, a matter dealt with in draft article 8 and beyond the scope of draft article 5, which was limited to defining what might be considered the equivalent of a piece of paper in an electronic environment (see A/CN.9/406, para. 97 and A/CN.9/390, paras. 91 and 92).

##### "Where a rule of law requires"

231. A concern was expressed that the reference to "a rule of law" in the opening words of draft article 5 (and in other articles of the draft Model Law) might be unclear, particularly as to whether the notion of "rule of law" was intended to encompass, beyond the requirements contained in statutory law, those legal requirements that might result from trade usages or practice, from judge-made law and from contractual stipulations.

232. With respect to legal requirements that might be derived from trade usages or practice, it was recalled that the Working Group had decided to delete the reference to such sources of law, which appeared in an earlier version of paragraph (1), on the grounds that: requirements derived from trade usages or practice would, in most instances, be

regarded as contractual in nature and be subject to contrary agreement of the parties; and that exclusion of such requirements would not preclude enacting States from taking account of the particular needs of practice, as well as of differences in circumstances and understanding in different countries (see A/CN.9/390, para. 94). The Commission was generally in agreement with that decision of the Working Group. In that connection, a suggestion that the opening words of paragraph (1) should be replaced with the words "Where there is a requirement that" did not receive support, since it was regarded as opening too broadly the scope of article 5.

233. With respect to legal requirements that might be derived from judge-made law, it was generally felt that such requirements should be within the scope of article 5. Although in certain jurisdictions such requirements would normally be regarded as directly or indirectly derived from statutory rules, and would thus be covered by a general reference to the notion of "rule of law", it was pointed out that in certain legal systems the words "a rule of law" might be interpreted as meaning statutory rules only, and not judge-made rules. After discussion, it was agreed that, while there was no need to include a specific reference to judge-made law in the text of the Model Law, it should be made clear in the Guide to Enactment of the Model Law that such requirements were intended to be covered under the general reference to the notion of "rule of law".

234. With respect to legal requirements that might result from contractual stipulations, a view was that, since such requirements might be regarded as indirectly stemming from general principles of law under which contracts were binding as between the parties, they might be covered under the general notion of "rule of law". That interpretation did not receive support. It was generally felt that the words "a rule of law" clearly indicated that only statutory and case-law requirements of a writing were covered (see A/CN.9/360, para. 34). The view was expressed that the inclusion of contractual requirements in the scope of draft article 5 (or any other provision contained in chapter II) would defeat the purpose of draft article 10. It was recalled that an earlier version of draft article 10 had not been adopted by the Working Group for the reason that it defined too broadly the sphere of party autonomy under the Model Law. It was also recalled that the Model Law might, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. It was further recalled that such well-established rules were normally of a mandatory nature since they generally reflected decisions of public policy. At least in respect of the provisions contained in chapter II, the draft Model Law should be regarded as stating the minimum acceptable form requirement and should, for that reason, be regarded as mandatory, unless expressly stated otherwise. The Model Law should not be misinterpreted as allowing parties to derogate from mandatory rules adopted for reasons of public policy (see A/CN.9/406, paras. 88 and 89).

235. The Commission decided that the scope of article 5 (as well as that of other articles contained in chapter II of the Model Law) should be confined to rules of statutory and case law. Contractual stipulations should thus generally be regarded as outside the scope of the notion of "rule of law"

under the Model Law. It was also decided that article 10 should not be misinterpreted as restricting the freedom of parties to derogate from the provisions contained in chapter II, insofar as such contractual freedom might exist under applicable rules of national law. It was agreed that the matter might need to be further considered in the context of the discussion of draft article 10 (see paragraphs 272-273 below).

236. In that connection, it was suggested that further discussion might be needed as to whether the Model Law should provide a rule of interpretation for situations where contracts, especially those concluded prior to the entry into force of the Model Law, might create obligations to produce certain information "in writing", for example where parties had agreed that an amendment of their agreement or any notice should be in writing, without specifying the exact meaning of "writing". Various views were expressed as to what might constitute an appropriate rule to deal with such a situation. Under one view, providing that a data message would satisfy any such requirement of a writing would be in keeping with a general purpose of the Model Law, which was to facilitate the use of electronic means of communication. The contrary view was that providing that, in the absence of an agreement as to what might constitute "writing", an electronic communication would satisfy any contractual requirement of a writing might run counter to the will and interest of certain parties and might be unacceptable under the Model Law, since it was generally admitted that the Model Law should not impose the use of electronic means of communications. The Commission decided that the question might need to be further considered at a later stage.

237. A further concern that was expressed in connection with the use of the notion of "rule of law" in paragraph (1) was that the current wording might not allow for a distinction to be drawn according to the various purposes for which a requirement that certain information be presented in writing might be established. It was suggested that the scope of draft article 5 should be restricted to cover only the situations where a writing was required for evidentiary purposes, as opposed to situations where the written form was intended to play a warning function and should for that reason be maintained notwithstanding the provision contained in draft article 5. That suggestion did not attract sufficient support. It was stated that, whatever the purpose of any given requirement of a writing might be, enacting States would remain free to exclude certain situations from the scope of draft article 5 by listing those situations under paragraph (2).

#### *"accessible"*

238. A suggestion was made to clarify the meaning of the term "accessible" by including in draft article 2 a definition along the following lines: "accessible means available in a form in which it is capable of being displayed". The suggestion was objected to on the grounds that the meaning of the term "accessible" was sufficiently clear. It was recalled that the notion of "display" had not been adopted by the Working Group as an element of the definition of "writing", since it had been recognized that information in a data message might be capable of being processed by a machine but not of being displayed. The Commission was agreed that the notion of "accessibility" should be clarified in the Guide to Enactment of the Model Law. It was also agreed that the matter might



need to be reconsidered in the context of the discussion of draft article 7, which relied on the notion of the information being "displayed to the person to whom it is to be presented", with a view to ensuring consistency with the formulation of draft articles 5 and 6 (see paragraph 252 below).

*"a data message satisfies"*

239. A concern was expressed that the words "a data message satisfies" could have the unintended effect that, in case a transaction was concluded orally and was only subsequently recorded in a data message, the subsequent data message could satisfy the writing requirement retrospectively. It was explained that when an oral transaction was subsequently put into writing, the written document could only be relied on as satisfying the requirement that the transaction had to be in writing as from the date that the written document was generated. In order to alleviate that concern, the suggestion was made to insert after the words "a data message" the words "generated at the relevant time", or, alternatively, to substitute the words "can satisfy" for the word "satisfies". That suggestion was objected to on the grounds that article 5 was not intended to deal with the question of the time as of which the requirement for a writing was satisfied, and that attempting to address that matter might create more problems than it might solve. The Commission was agreed that the matter might need to be discussed in the Guide to Enactment of the Model Law.

240. After discussion, the Commission found the substance of paragraph (1) to be generally acceptable.

*Paragraph (2)*

241. The Commission found the substance of paragraph (2) to be generally acceptable.

*Article 6. Signature*

242. The text of the draft article as considered by the Commission was as follows:

"(1) Where a rule of law requires a signature, or provides for certain consequences in the absence of a signature, that rule shall be satisfied in relation to a data message if:

(a) A method is used to identify the originator of the data message and to indicate the originator's approval of the information contained therein; 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 agreement between the originator and the addressee of the data message.

"(2) The provisions of this article do not apply to the following: [...]"

*Paragraph (1)*

*Opening words and subparagraph (a)*

243. A concern was expressed that, in their current formulation, the *chapeau* of paragraph (1) and subparagraph (a)

did not address cases in which it was important to identify not the originator itself but the person acting on behalf of the originator, such as the director of a company acting on behalf of the company. It was stated that subparagraph (a), applied in combination with the definition of the originator contained in article 2, led to the identification of the originator as principal but not to the identification of the person who actually signed as an agent. In order to address that concern, the suggestion was made to change the *chapeau* of paragraph (1) and subparagraph (a) along the following lines:

"(1) Where a rule of law requires the signature of any person, or provides for certain consequences in the absence of a signature, that rule shall be satisfied in relation to a data message if:

(a) A method is used to identify that person in the data message as the originator or a person acting on its behalf, and to indicate that person's approval of the information contained therein; and"

244. While some support was expressed for that suggestion, the prevailing view was that the attempt to address in the draft Model Law agency matters beyond what was already envisaged in the definition of "originator" in draft article 2 might create more problems than it might solve. It was felt that, in view of the wide differences existing among the various legal systems regarding the issue of agency, the matter might be better left to applicable rules of national law.

*Subparagraph (b)*

245. While subparagraph (b) was found to be generally acceptable, a concern was expressed that there was some uncertainty as to the criteria to be used when assessing the reliability of the method used to identify the originator. The suggestion was made to add the following criteria to the list contained in the draft Guide to Enactment of the Model Law: "(i) the relative bargaining positions of the originator and the addressee in their choice of identification; (ii) the importance and the value of the information in the data message; (iii) the availability of alternative methods of identification and the cost of implementation; (iv) the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the data message was communicated; and (v) the state of science and technology at the time the method was agreed upon."

246. While there was general agreement that criteria (ii) to (iv) were useful and should be mentioned in the Guide to Enactment of the Model Law, criteria (i) and (v) were objected to. It was stated that an attempt to measure the reliability of the method used to identify the originator on the basis of the bargaining positions of the parties would introduce some uncertainty, and could create problems of a commercial nature. As to the state of the science and technology, it was pointed out that its inclusion was not appropriate, since parties might not always choose to use state-of-the-art technology for cost or other reasons.

247. After deliberation, the Commission found the substance of paragraph (1) to be generally acceptable.

*Paragraph (2)*

248. The Commission found the substance of paragraph (2) to be generally acceptable.

*Article 7. Original*

249. The text of the draft article as considered by the Commission was as follows:

"(1) Where a rule of law requires information to be presented in its original form, or provides for certain consequences if it is not, a data message satisfies that rule if:

(a) That information is displayed to the person to whom it is to be presented; and

(b) There exists a reliable assurance as to the integrity of the information between the time when it was first composed in its final form, as a data message or otherwise, and the time when it is displayed.

"(2) Where any question is raised as to whether subparagraph (b) of paragraph (1) of this article is satisfied:

(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 composed and in the light of all the relevant circumstances.

"(3) The provisions of this article do not apply to the following: [...]."

*Paragraph (1)*

250. A concern was expressed with respect to the provision contained in subparagraph (a) that, in order to satisfy a requirement that information be presented in its original form, the information should be "displayed to the person to whom it is to be presented". It was stated that such a reference to "display" ignored the reality that in many EDI systems the processing of data messages was automated with little or no human intervention. In such a situation, the data message might not be displayed to any person at all, and there would be no need for such a "display" requirement. A related concern was that a requirement to display information might raise the question whether the raw information (usually in the form of unintelligible machine language) or the processed and intelligible information in the form of the final data message should be displayed. It was suggested that the requirement that information should be displayed should be deleted.

251. A further concern was expressed that, if the purpose of subparagraph (a) was to make it clear that the display of information through an electronic device might be substituted for the presentation of information in paper documents required by law, then it would be more appropriate to use the same terminology as in draft article 5, where, in addressing the question of presentation of information in an EDI

environment, the expression "accessible" was used instead of "display".

252. With a view to accommodating the above-mentioned concerns, it was stated that paragraph (1) was intended to deal with two distinct situations. One situation was one in which a rule of law required information to be "retained" in its original form. In that situation, there might be no need for the machine-readable information to be displayed. Another situation was one in which a rule of law required information to be "presented" in its original form, for example, in the context of judicial proceedings. In that situation, it would be essential that the information be capable of being displayed, for example, to a judge. It was proposed that paragraph (1) should be redrafted to address the two situations more specifically. It was also proposed that, in order to bring article 7 in line with article 5, the requirement that the information should be "displayed" should be replaced by a requirement that the information be "capable of being displayed". Wording along the following lines was proposed as a substitute for paragraph (1):

"(1) Where a rule of law requires information to be presented or retained in its original form, or provides for certain consequences if it is not, a data message satisfies that rule if:

(a) There exists a reliable assurance as to the integrity of the information from the time when it was first composed in its final form, as a data message or otherwise; and

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

253. After discussion, the proposal was adopted by the Commission. As a matter of drafting, the Commission reaffirmed the decision taken by the Working Group at its twenty-eighth session to replace the word "composed" by the word "generated" (A/CN.9/406, para. 162), to ensure consistency with other provisions of the draft Model Law. The Commission also adopted a proposal that the notion of "display" should be further explained in the Guide to Enactment of the Model Law to assist readers in understanding the context in which it was used in the draft Model Law.

*Paragraph (2)*

254. A concern was expressed that the words "it was first composed in its final form" might create problems with regard to the application of paragraph (2). In an EDI environment, the same information could be recorded in different forms at one time, as well as at different times. In such an environment, a question might arise as to what "its final form" meant. It was generally felt that the Guide to Enactment of the Model Law should address the point by illustrating how that subparagraph would operate in practice. After discussion, the Commission found the substance of paragraph (2) to be generally acceptable.

*Paragraph (3)*

255. The Commission found the substance of paragraph (3) to be generally acceptable.



*Article 8. Admissibility and evidential value of data messages*

256. The text of the draft article as considered by the Commission was as follows:

"(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to prevent the admission of a data message in evidence:

(a) On the grounds that it is a data message; or,

(b) If it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

"(2) Information presented in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.

"(3) Subject to any other rule of law, where subparagraph (b) of paragraph (1) of article 7 is satisfied in relation to information in the form of a data message, the information shall not be accorded any less weight in any legal proceedings on the grounds that it is not presented in its original form."

*Title*

257. It was suggested that, in the title of draft article 8, the word "value" should be replaced by the word "weight", which was said to be more appropriate for the concept referred to in the draft article. After discussion, the Commission adopted that suggestion.

*Paragraph (1)*

258. The Commission found the text of paragraph (1) to be generally acceptable. Various proposals of a drafting nature were made, namely, that the word "admission" be replaced by the word "admissibility", and that the word "grounds" be replaced by the words "sole ground". After discussion, those proposals were adopted by the Commission and referred to the drafting group.

259. A proposal that the words "in writing, signed or" be inserted after the word "not" did not receive sufficient support.

*Paragraph (2)*

*First sentence*

260. A proposal was made that the first sentence of the paragraph should be deleted. In support of the proposal, it was stated that the words "Information presented in the form of a data message shall be given due evidential weight" might be misconstrued as providing a directive or otherwise restricting the freedom of courts as to how evidence should be evaluated. Another view was that the sentence was unnecessary as it merely stated the obvious. In response, it was pointed out that the sentence was necessary, as a policy

statement, to emphasize in the context of evidentiary requirements the principle embodied in draft article 4, namely that data messages should not be discriminated against. It was generally felt that courts needed to be made aware that information presented in the form of data messages should be admitted as evidence. After discussion, the Commission found the substance of the first sentence to be generally acceptable. As a matter of drafting, it was agreed that the word "presented" should be deleted.

*Second sentence*

261. A proposal was made that the word "processed" should be inserted after the word "stored". In support of the proposal, it was stated that data messages were not only generated, stored and communicated, but that they were also processed. In response, it was stated that the concepts of messages being "generated" and "stored" sufficiently addressed the issue of the processing of data messages where processing was relevant. After discussion, the Commission did not adopt the proposal.

262. As a matter of drafting, it was suggested that the word "stored" should be replaced by the word "retained". Such a replacement, it was stated, would align paragraph (2) with other articles of the draft Model Law in which the word "retained" had been used. In response, it was pointed out that in certain parts of the draft Model Law, the notion of "retention" was used in a generic sense, e.g., in the context of legal requirements that information be "retained", while in other parts of the draft Model Law the notion of "storage" was used in a more technical sense, e.g., in the context of computer data being stored after processing. Rather than to adopt a general policy of alignment with regard to the words "store" and "retain", it was decided that it would be better to decide on the appropriate term after examining the context in which the word was used. The drafting group was requested to implement that decision. After discussion, the Commission found the substance of the second sentence to be generally acceptable.

*Paragraph (3)*

263. Various views were expressed with respect to paragraph (3). One view was that the opening words "Subject to any other rule of law" should be deleted, since paragraph (3) should establish a substitute for other "rules of law" that might be interpreted as discriminating against data messages. Another view was that the words "any less weight" should be replaced by a clear reference to paper-based original documents with a view to establishing parity of treatment for data messages that satisfied the requirements of paragraph (1) of draft article 7. The prevailing view was that paragraph (3) should be deleted altogether, since it was felt that the substance of paragraph (3) was already covered by the first sentence of paragraph (2).

*Article 9. Retention of data messages*

264. The text of the draft article as considered by the Commission was as follows:

"(1) Where it is required by law that certain documents, records or information be retained, that requirement

shall be satisfied by retaining data messages, provided that the following conditions are met:

(a) The information contained therein is accessible so as to be usable for subsequent reference; and

(b) The data message is retained in the format in which it was generated, transmitted or received, or in a format which can be demonstrated to represent accurately the information generated, transmitted or received; and

(c) Transmittal information associated with the data message, including, but not limited to, originator, addressee(s), and date and time of transmission, is retained.

"(2) An obligation of an addressee to retain information in accordance with paragraph (1) shall not extend to any part of such information which is transmitted for communication control purposes but which does not enter the information system of, or designated by, the addressee.

"(3) A person may satisfy the requirements referred to in paragraph (1) by using the services of any other person, provided that the above conditions are satisfied."

*Opening words of paragraph (1) and subparagraphs (a) and (b)*

265. The Commission found the substance of the opening words of paragraph (1) and the substance of subparagraphs (a) and (b) to be generally acceptable.

*Paragraphs (1)(c) and (2)*

266. Various concerns were expressed with respect to the substance of paragraph (1)(c) and paragraph (2). One concern was that, although paragraph (1)(c) contained a reference to "transmittal information" and not to "the transmittal information", it might be misinterpreted as creating an obligation to retain all of the transmittal information associated with a data message. It was pointed out that transmittal information was often voluminous and frequently contained elements that were not important for the identification of the message. It was recalled that the matter had been discussed by the Working Group at its twenty-eighth session, and that it had been stated at that time that imposing the retention of all the transmittal information associated with a data message would create a standard that was higher than most standards existing as to the storage of paper-based communications (A/CN.9/406, para. 69). It was generally felt that a clear distinction should be drawn between those elements of transmittal information that were important for the identification of the message and the very few elements of transmittal information referred to in paragraph (2) (e.g., communication protocols) which were of no value with regard to the data message and which, typically, would automatically be stripped out of an incoming EDI message by the receiving computer before the data message was processed by the information system of the addressee.

267. Another concern was that, as currently drafted, paragraph (1)(c) might be construed as creating an obligation that information regarding the identity of the originator and addressee of a data message, as well as the date and time of its transmission, be retained, irrespective of whether such information was, in fact, made available by the communica-

tion system as part of the transmittal information. Examples were given of communication systems that did not include the time and date of transmission as standard elements of transmittal information. In that connection, the view was expressed that it should be made clear that the elements of transmittal information listed in subparagraph (c) were meant as an illustration of the kind of information that should be retained, provided that such elements were readily available as part of the transmittal information associated with the data message. The contrary view was that the list contained in paragraph (1)(c) should not be regarded as merely illustrative but rather that it should state the minimal requirements to be met for draft article 9 to apply. It was stated that, in some jurisdictions where it was required by law that contracts be dated, it would be essential that the transmittal information required to be retained under paragraph (1)(c) include information relating to date and time of the transmission. The prevailing view was that paragraph (1)(c) should not attempt to establish a precise standard by listing individual elements of information to be retained.

268. Yet another concern was that paragraph (1)(c) might impose ambiguous obligations since the distinction between transmittal information and data records was not sufficiently clear. A further concern, in connection with paragraph (2), was that a reference to information "not entering" a given information system was inappropriate, since the concept of "entry" was unclear, and it might be difficult to provide evidence that information had not entered an information system.

269. With a view to alleviating some or all of the above-mentioned concerns, the following texts were suggested as possible substitutes for paragraph (1)(c):

"(1) Transmittal information associated with the data message is retained";

"(2) [Relevant] [Material] transmittal information associated with the data message is retained";

"(3) Information necessary to reproduce how the data message was transmitted is retained".

Such information includes identification of the originator and addressee(s) of the data message, and date and time of its transmission". It was further suggested that any reference to "relevant" or "material" transmittal information would make it necessary to explain, either in the Guide to Enactment of the Model Law or in a footnote to draft article 9, what might be regarded as constituting "relevant" or "material" transmittal information. The following explanation was suggested: "material transmittal information is constituted by information regarding the identification of the originator and addressee(s) of the data message, and the date and time of its transmission". After discussion, the Commission entrusted an *ad hoc* drafting party to redraft subparagraph (c) and paragraph (2). The text proposed by that *ad hoc* drafting party was as follows:

"(c) Such information, if any, is retained as enables the identification of the origin of a data message and the date and time of its transmission or reception."

"(2) An obligation to retain documents, records or information in accordance with paragraph (1) does not

extend to any information the sole purpose of which is to enable the message to be transmitted or received."

After discussion, the Commission adopted that proposal.

#### *Paragraph (3)*

270. The Commission found the substance of paragraph (3) to be generally acceptable. As a matter of drafting, it was agreed that the words "the above conditions" should be replaced by an express reference to subparagraphs (a), (b) and (c) of paragraph (1).

### *Chapter III. Communication of data messages*

#### *Article 10. Variation by agreement*

271. The text of the draft article as considered by the Commission was as follows:

"As between parties involved in generating, storing, communicating, receiving or otherwise processing data messages, and except as otherwise provided, the provisions of this chapter may be varied by agreement."

272. The view was expressed that the principle of party autonomy embodied in draft article 10 should not be limited in scope to chapter III, but that it should apply to the entire Model Law. In support of that view, it was stated that restricting the sphere of party autonomy in commercial relationships might be regarded as creating an obstacle to trade, thus limiting the acceptability of the Model Law. The only existing limitations to party autonomy in the commercial sphere, it was said, were to be found in mandatory rules of statutory law that were generally based on considerations of public policy and in the principle of privity of contract, under which an agreement concluded between parties should not affect the rights and obligations of third parties. It was suggested that a provision along the lines of draft article 10 should be moved to chapter I and extended to cover the entire scope of the Model Law. In addition, a second paragraph should be added to the current text, which might read along the following lines: "the agreement between the parties shall not affect the rights and obligations of third parties".

273. In response, it was stated that draft article 10 was not intended to limit the sphere of party autonomy in commercial relationships. Draft article 10 did not allow contractual derogations to the rules contained in chapter II for reasons already expressed in the context of the discussion of draft article 5 (see paragraphs 234-235, above), namely that the provisions of chapter II might, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. It was recalled that such well-established rules were normally of a mandatory nature since they generally reflected decisions of public policy. An unqualified statement regarding the freedom of parties to derogate from the provisions of the Model Law might thus be misinterpreted as allowing parties, through a derogation from the provisions of the Model Law, to derogate from mandatory rules adopted for reasons of public policy. It was stated that, at least in respect of the provisions contained in chapter II, the draft Model Law should be

regarded as stating the minimum acceptable form requirement. That view was generally supported by the Commission, and the substance of draft article 10 was found to be generally acceptable.

274. It was widely felt, however, that the fact that draft article 10 was limited in scope to allow contractual derogations to the provisions of the Model Law only in the context of chapter III should not be misinterpreted as restricting freedom of contracts where it might be recognized by applicable rules of national law. For example, it was stated that in many countries contractual agreements regarding the form of commercial transactions would normally be regarded as valid as between the parties. In certain countries, contractual agreements regarding the admissibility and value of evidence, or regarding what might be regarded as an original document, would also be regarded as binding between the parties. In order to make it abundantly clear that the Model Law was not intended to affect the contractual freedom of the parties as recognized under applicable rules of national law, it was generally agreed that a second paragraph should be added to the current text of draft article 10. As to the text of that new paragraph (2), a suggestion was that it should read along the following lines:

"(2) This article is not intended to deal with any right or obligation that might arise under other chapters of this Law or by virtue of other applicable law".

While considerable support was expressed in favour of that suggestion, it was felt that the reference to "other applicable law" should be avoided, since it might be misinterpreted as an attempt to establish a conflict-of-laws rule. After discussion, the Commission adopted the following wording: "Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law referred to in chapter II", and otherwise reserved the issue for subsequent discussion.

#### *Article 11. Attribution of data messages*

275. The Commission had before it the text of draft article 11 as approved by the Working Group, which was as follows:

"(1) As between the originator and the addressee, a data message is deemed to be that of the originator if it was communicated by the originator or by another person who had the authority to act on behalf of the originator in respect of that data message.

"(2) As between the originator and the addressee, a data message is presumed to be that of the originator if the addressee, by properly applying a procedure previously agreed to by the originator, ascertained that the data message was that of the originator.

"(3) Where paragraphs (1) and (2) do not apply, a data message is [deemed] [presumed] to be that of the originator if:

(a) The data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own; or

(b) The addressee ascertained that the data message was that of the originator by a method which was reasonable in the circumstances.

However, subparagraphs (a) and (b) do not apply if the addressee knew, or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.

"(4) Where a data message is deemed or presumed to be that of the originator under this article, the content of the data message is presumed to be that received by the addressee. However, where transmission results in an error in the content of a data message or in the erroneous duplication of a data message, the content of the data message is not presumed to be that received by the addressee in so far as the data message was erroneous, if the addressee knew of the error or the error would have been apparent, had the addressee exercised reasonable care or used any agreed procedure to ascertain the presence of any errors in transmission.

"(5) Once a data message is deemed or presumed to be that of the originator, any further legal effect will be determined by this Law and other applicable law."

276. In view of the numerous concerns raised by Governments in their comments on draft article 11 (see A/CN.9/409 and Add.1, 3, and 4), a number of delegations submitted a joint proposal for a revised draft article 11. The revised text, which the Commission decided to consider as a basis for discussion was as follows:

"(1) A data message is that of the originator if it was communicated by the originator itself.

"(2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was communicated by a person who had the authority to act on behalf of the originator in respect of that data message.

"(3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if:

(a) In order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure for that purpose which was:

- (i) Previously agreed by the originator; or
- (ii) Reasonable in the circumstances; or

(b) The data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.

"(4) Paragraph (3) shall not apply:

(a) After the addressee has received reasonable notice from the originator that the data message is not that of the originator; or

(b) In a case within paragraph (3)(a)(ii) or (3)(b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.

"(5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the content of the data message as received as being what the originator intended to transmit, and to act on that assumption.

"(6) Paragraph (5) shall not apply at any time when the addressee:

(a) Has been notified by the originator or knew that there were any errors in the process of transmission; or

(b) Should have known of any such error, had it exercised reasonable care or used any agreed procedure to ascertain the presence of any errors in transmission.

"(7) Each data message received by the addressee may be regarded as a separate data message unless it repeats the content of another data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the repetition was a duplication, and not the transmission of a separate data message.

"(8) Any further legal effect of the data message shall be determined in accordance with the provisions of this Law and any other applicable law."

#### *General remarks*

277. Various concerns were expressed with respect to draft article 11 in general. One concern was that the provisions contained in draft article 11 were unnecessarily complex. Another concern was that draft article 11 unnecessarily deviated from well-established principles of the law of contracts, particularly with respect to the possibility for the originator of an erroneous message to notify the error to the addressee and to nullify the erroneous message. Yet another concern was that certain provisions of draft article 11, such as paragraphs (3) and (5) to (7), might well apply to electronic communications but would be meaningless in the context of communications by means of telegram, telex and telecopy, which were also included in the scope of application of the draft Model Law by virtue of the definition of data message contained in draft article 2.

278. In response, it was stated that a set of provisions along the lines of draft article 11, while somewhat complex in appearance, was necessary in view of the lack of legislation to accommodate the issues raised by the use of electronic means of communication and in view of the uncertainty resulting from the lack of a single technical and administrative framework, such as provided by the postal service in the context of paper-based communications. It was recalled that it was not the purpose of the Model Law to deviate from existing rules of the law of contracts. Draft article 11 was not intended to deal with the underlying transaction for the purpose of which data messages might be communicated, such as the formation of a contract or any other transaction, but rather to deal with the legal effectiveness of the communication process. As to whether all provisions of the Model Law would equally apply to telegram, telecopy and telex, it was widely felt that the issue might

need to be discussed further in the context of the review of draft article 2.

#### *New paragraphs (1) and (2)*

279. It was noted that new paragraphs (1) and (2) were based on paragraph (1) of draft article 11 as approved by the Working Group at its twenty-eighth session. A concern was expressed that paragraph (1) duplicated the wording of the definition of the term "originator" contained in draft article 2. It was thus suggested that paragraph (1) should be deleted. That suggestion did not attract sufficient support. It was generally felt that paragraph (1) was useful in that it stated the principle that an originator was bound by a data message if it had effectively sent that message. After discussion, the Commission found the substance of new paragraphs (1) and (2) to be generally acceptable.

#### *New paragraph (3)*

280. It was noted that paragraph (3), which was based on paragraphs (2) and (3) of draft article 11 as approved by the Working Group at its twenty-eighth session, dealt with three kinds of situations, in which the addressee could rely on a data message as being that of the originator: firstly, situations in which the addressee properly applied an authentication procedure previously agreed by the originator; secondly, situations, in which the addressee properly applied a procedure which was reasonable in the circumstances; and thirdly, situations in which the data message resulted from the actions of a person who, by virtue of its relationship with the originator, had access to the originator's authentication procedures.

#### *Opening words*

281. A question was raised as to the difference between the words "is entitled to regard", which appeared in the opening words of new paragraph (3), and the words "is deemed", which were used in previous versions of the corresponding paragraphs of draft article 11. In response, it was stated that the difference was in the time period during which the assumption could operate. While the words "is deemed" implied an assumption without any time limitation, the words "is entitled to regard", read in conjunction with paragraph (4), were intended to indicate that the addressee could act on the assumption that the data message was that of the originator up to the point in time it received notice from the originator that the data message was not that of the originator, or up to the point in time when it knew or should have known that the data message was not that of the originator.

#### *Subparagraph (a)*

282. A number of concerns were expressed with regard to subparagraph (a)(ii). One concern was that, as a matter of policy, it would be inappropriate to provide, by way of the risk-allocating device contained in paragraph (3), that the addressee would be entitled to regard a data message as that of the originator even though the purported originator might never have sent that message, for example, in a case of fraud. Another concern was that subparagraph (a)(ii) introduced some uncertainty and put a heavy burden of proof on

the addressee, who would have to prove what was "reasonable in the circumstances". Yet another concern was that subparagraph (a)(ii) failed to emphasize sufficiently that in all cases the basis of the originator's liability would be its relationship with the addressee. A further concern was that subparagraph (a)(ii) would be meaningless in the context of the use of such means of communication as telegram or telex.

283. Various suggestions were made to address those concerns. One suggestion was that subparagraph (a)(ii) should be deleted. Another suggestion was that, at the end of subparagraph (a)(ii), wording along the following lines should be inserted: "bearing in mind the relationship between the originator and the addressee". Yet another suggestion was that subparagraph (a)(ii) should be replaced by a provision that would set out the circumstances under which the purported originator could rebut the presumption that it had sent a given data message. While some support was expressed in favour of deletion of subparagraph (a)(ii), none of the suggestions attracted sufficient support. It was felt that subparagraph (a)(ii) was useful in that it addressed open-EDI situations, in the context of which data messages were exchanged in the absence of an interchange agreement. In addition, it was stated that the reference to "the circumstances" constituted sufficient reference to the relationship between the originator and the addressee.

#### *Subparagraph (b)*

284. The Commission found the substance of subparagraph (b) to be generally acceptable.

285. After discussion, the Commission adopted the substance of new paragraph (3). It was generally agreed, however, that the discussion of subparagraph (a)(ii) might need to be reopened in the context of the review of draft article 2.

#### *New paragraph (4)*

##### *Subparagraph (a)*

286. A number of concerns were expressed with regard to subparagraph (a). One concern was that the unintended effect of a notice being received under subparagraph (a) might be to relieve the originator from the consequences of sending a data message, with retroactive effect, irrespective of whether the addressee had acted on the assumption that the data message was that of the originator. Another concern was that subparagraph (a) could be interpreted as allowing the originator to avoid being bound by the data message by sending notice to the addressee under subparagraph (a), in a case where the message had, in fact, been sent by the originator and the addressee properly applied agreed or reasonable authentication procedures. It was thus proposed that subparagraph (a) should be deleted or, alternatively, that language along the following lines should be inserted at the end of the subparagraph: "unless the addressee provides evidence that the data message was sent by the originator". In response, it was stated that paragraph (4) was not intended to provide that receipt of a notice under subparagraph (a) would nullify the original message retroactively. It was generally felt that subparagraph (a) made it sufficiently clear that the originator was released from the binding effect of

the message after the time notice was received under subparagraph (a) and not before that time. In addition, it was pointed out that, if the addressee could prove that the message was that of the originator, paragraph (1) would apply and not subparagraph (a) of paragraph (4). After discussion, the proposal was withdrawn by its proponents. It was agreed that the purpose of subparagraph (a) should be explained clearly in the Guide to Enactment of the Model Law.

287. Yet another concern was that the term "reasonable" qualifying the term "notice" introduced some uncertainty as its exact meaning was not clear. With a view to addressing that concern, a number of alternative terms were proposed, including "prompt", "immediate", "timely" and "sufficiently timely". In the same vein, the suggestion was made to delete the term "reasonable" and insert at the end of subparagraph (a) language along the following lines: "in time sufficient to allow the addressee to react". The Commission was agreed that the notice should be such as to give the addressee sufficient time to react, for example in the case of just-in-time supply where the addressee should be given time to adjust its production chain. It was agreed that the notion of "reasonable notice" needed to be adjusted to reflect the above discussion. It was also agreed that appropriate explanations should be provided in the Guide to Enactment of the Model Law.

#### *Subparagraph (b)*

288. A concern was expressed that subparagraph (b), applied in conjunction with subparagraph (a)(i) of paragraph (3), could lead to the inappropriate result that the addressee would be entitled to rely on a data message if it had properly applied the agreed authentication procedures, even if it knew that the data message was not that of the originator. With a view to addressing that concern, it was suggested to insert a reference to paragraph (3)(a)(i) in paragraph (4)(b). While some support was expressed in favour of the suggestion, it was widely felt that the suggested reference to paragraph (3)(a)(i) should not be inserted in paragraph (4)(b), since it was important to preserve the reliability of agreed procedures.

289. After discussion, the Commission adopted the substance of paragraph (4) and referred the adjustment to be made in subparagraph (a) to the drafting group.

#### *New paragraph (5)*

290. The Commission found the substance of new paragraph (5) to be generally acceptable.

#### *New paragraph (6)*

291. A number of concerns were expressed with respect to paragraph (6). One concern was that paragraph (6) in its new formulation might be read as unnecessarily deviating from similar provisions in international instruments, including the United Nations Sales Convention, in that it introduced the notion of notice. Another concern was that paragraph (6) did not make it sufficiently clear at what time notice had to be given. A related concern was that there appeared to be some inconsistency between paragraph (6), which provided that "paragraph (5) shall not apply at any time when the ad-

dresser: (a) has been notified ..." and paragraph (4)(a), which provided that "paragraph (3) shall not apply: (a) after the addressee has received reasonable notice ...".

292. With a view to addressing those concerns, a suggestion was made that paragraph (6) should be amended along the following lines: "Paragraph (5) shall not apply when the addressee knew or should have known that there were any errors in the process of transmission". In the same vein a suggestion was made that paragraph (6) should be turned into a second sentence of paragraph (5), which should read as follows: "The addressee is not so entitled when it knows or should know by exercising reasonable care or using any agreed procedure that the transmission resulted in any error in the content of the data message as it was received". In addition, it was suggested that paragraph (4)(b) should be aligned with the newly suggested wording of paragraph (5) to read as follows: "In a case within paragraph (3)(a)(ii) or (3)(b), when the addressee knows or should know by exercising reasonable care or using any agreed procedure that the data message is not that of the originator".

293. There was general support for the suggested change of new paragraph (6) into a second sentence of new paragraph (5). As to the precise formulation of the newly suggested paragraph (5), the question was raised whether the suggested change of the tense from past ("knew or should have known") to present ("knows or should know") indicated a change in substance. In reply, it was stated that the use of the present tense merely constituted an attempt to express in a more direct way the idea already contained in the text, namely that the addressee was entitled to rely on the data message up to the point of time it learnt that the message was not that of the originator. In order to clarify that point further, additional suggestions were made to replace the words "is not so entitled when it knows or should know" by the words "is not so entitled after it knows or should know", or with the words "shall cease to be so entitled when it knows or should know". Those additional suggestions did not attract sufficient support.

294. After discussion, the Commission adopted the substance of the proposal to make new paragraph (6) a second sentence of new paragraph (5) and referred it to the drafting group.

#### *New paragraph (7)*

295. It was noted that, in order to bring new paragraph (7) in line with new paragraph (5) as amended by the Commission, corresponding changes should be made to new paragraph (7), which should read as follows: "The addressee is entitled to regard each data message received as a separate data message and to act on that assumption unless it repeats the content of another data message and the addressee knows or should know by exercising reasonable care or using any agreed procedure that the repetition was a duplication, and not the transmission of a separate data message".

296. In reply to a question raised, it was stated that the words "is entitled to regard" indicated that the addressee had a choice to act on the assumption that the message was that of the originator or not. In that connection, a concern was expressed that the addressee might abuse that discretion to



the detriment of the originator. It was pointed out that wording along the lines of paragraph (4) of draft article 11 as adopted by the Working Group at its twenty-eighth session was more appropriate. It was recalled that the earlier version of paragraph (4) had established a presumption that under certain circumstances a data message was that of the originator and provided that the presumption did not exist in case of errors in the content or erroneous duplications if the addressee knew or should have known about the errors. However, it was also recalled that the Working Group had not settled the question whether the presumption should be rebuttable or irrebuttable. The problem was said to be that: if the presumption were rebuttable and the originator were able to rebut it, the addressee would be left without protection in that it would be bound by the erroneous message, irrespective of whether it knew that it was erroneous or not; and, if the presumption was irrebuttable, the addressee would be protected in that the originator could not rebut it arguing that the message was erroneous.

297. Another concern was that new paragraph (7) failed to address the question whether the addressee was entitled to damages in case the originator sent an erroneous duplication. It was stated that, by providing the addressee with an option to regard a duplicate message as a separate message, new paragraph (7) might create conditions under which the addressee might unduly profit from the error of the originator. In order to address that concern, language along the following lines was proposed:

"Where transmission results in the erroneous duplication of a data message, the addressee is entitled to regard this as a separate message unless:

- (a) The addressee knows or should know, or
- (b) The addressee was informed that the message was an erroneous duplication.

In a case within subparagraph (b), the addressee is only entitled to damages caused by the erroneous duplication."

298. The suggestion was objected to on the ground that the question of damages should be left to applicable rules of national law. In addition, it was stated that draft article 11 as adopted by the Working Group at its twenty-eighth session did not deal with the question of damages. It was recalled that the Working Group at its twenty-sixth session had decided not to deal with the question of liability for damages (see A/CN.9/387, para. 127).

299. The Commission failed to achieve consensus on the substance of new paragraph (7). After discussion, it was decided that the substance of the new paragraph should be retained, together with the drafting changes suggested to bring that provision in line with new paragraph (5), and placed within square brackets, pending further discussion at the next session of the Commission in 1996. It was noted that, in view of the decisions made by the Commission with respect to new paragraphs (5) and (6), new paragraph (7) would need to be renumbered paragraph (6).

#### *New paragraph (8)*

300. It was stated that paragraph (8) was intended to express the principle that the attribution of authorship of a data message to the originator should not interfere with the legal

consequences of that message, which should be determined by other applicable rules of national law. In support of that principle, it was stated that paragraph (8) was useful in that it signalled that (with possible exception, e.g., of draft articles 11, 12 and 13) the draft Model Law was not intended to affect other parts of trade law, such as the law on contracts or agency. One view was that the current text of paragraph (2), which was based upon a "deeming" approach, could have the effect of interfering with the operation of the law of agency when applied to a contractual relationship between the originator and the addressee.

301. While there was agreement on the principle embodied in paragraph (8), a number of concerns were raised with regard to its current formulation. One concern was that in its current wording paragraph (8) might give the contrary impression, namely that article 11 dealt with the legal effects of data messages. In order to address that concern, the suggestion was made that paragraph (8) should be either deleted, or retained and explained in the draft Guide to Enactment, or redrafted along the following lines: "This article does not determine whether the data message has any legal effect except insofar as might result from the attribution of the data message to the originator". A suggestion in the same vein was to redraft paragraph (8) along the lines of an earlier version of draft article 11, which read as follows: "Once a data record is deemed or presumed to be that of the originator, any further legal effect will be determined by this Law and other applicable law" (see A/CN.9/406, para. 131).

302. Another concern was that the words "and any other applicable law" introduced some ambiguity since they gave the impression that paragraph (8) was a conflict-of-laws rule. It was added that such a rule would be incomplete, since it did not set out the criteria for determining other applicable law, and inappropriate, since the draft Model Law, when enacted by States, would become part of their domestic law, which would provide how any other applicable law would be determined. In order to address that concern, the suggestion was made to delete paragraph (8), or at least the last words of paragraph (8). A related concern was that paragraph (8) appeared to be inconsistent with paragraph (2) of article 3, which provided that courts and arbitral tribunals should try to settle questions not expressly settled in the draft Model Law in conformity with the general principles on which the draft Model Law was based. In order to alleviate that concern, the suggestion was made to put paragraph (8) into a footnote along the lines of the second footnote allowing States to limit the applicability of the draft Model Law to certain legal effects of a data message.

303. After deliberation, the Commission decided to delete paragraph (8) and to explain in the draft Guide to Enactment the principle embodied therein.

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

304. As the Commission concluded its discussion of draft articles 1 and 3-11, a drafting group established by the Secretariat proposed a draft revised version of articles 1 and 3-11 reflecting the deliberations and decisions that had taken place. A view was expressed that, instead of adopting articles 1 and 3-11 as revised by the drafting group, the Commission



should only take note of those revised articles, pending a final decision as to the remainder of the articles of the draft Model Law. It was stated that a number of draft articles still needed to be discussed by the Commission and that consideration of those draft articles might lead to a reopening of the discussion that had taken place at the current session. After consideration of the report of the drafting group, the widely prevailing view was that, since articles 1 and 3-11 as revised by the drafting group appropriately reflected the deliberations and decisions of the Commission at its current session, they should be formally adopted by the Commission. The text of articles 1 and 3-11 as adopted by the Commission is reproduced in annex II of this report, which also reproduces the text of draft articles 2 and 12-14 as approved by the Working Group at its twenty-eighth session.

305. As to how the debate on the draft Model Law should be continued at the twenty-ninth session of the Commission in 1996, particularly with respect to articles 1 and 3-11, it was generally agreed that the Commission at its current session should not attempt to preempt the debate to be carried on at its next session. However, it was strongly advised that, with the exception of the few provisions on which the Commission had not come to a final conclusion at the current session, namely paragraph (2) of article 10 and paragraphs (3)(a)(ii) and (6) of article 11, provisions adopted by the Commission at its current session should be regarded as final, subject to any amendment that might become necessary as a consequence of the decisions to be taken by the Commission at its twenty-ninth session in 1996 with respect to draft articles 2 and 12-14.

#### **D. Future work with respect to the draft Model Law**

306. At the close of the discussion on draft article 11, the Commission noted that it had not completed its consideration of the draft Model Law and decided to place the draft Model Law, together with the draft Guide to Enactment of the Model Law, on the agenda of its twenty-ninth session to be held in New York in 1996. It was agreed that the discussion should be resumed at the twenty-ninth session of the Commission with a view to finalizing the text of the Model Law and adopting the Guide to Enactment at that session.

#### **E. Future work in the field of electronic data interchange**

307. The Commission noted that, at its twenty-seventh session in 1994, general support had been expressed in favour of a recommendation made by the Working Group at its twenty-seventh session that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment as soon as the preparation of the Model Law had been completed. It was also noted that, on that basis, a preliminary debate with respect to future work to be undertaken in the field of electronic data interchange had been held in the context of the twenty-ninth session of the Working Group (for the report on that debate, see A/CN.9/407, paras. 106-118).

308. With regard to the scope of future work, one suggestion made at the twenty-ninth session of the Working Group

was that the work should cover multimodal transport documents of title. Another suggestion was that, while work could include transport documents of title in general, particular emphasis should be placed on maritime bills of lading since the maritime transport area was the area in which EDI was predominantly practised and in which unification of law was urgently needed in order to remove existing impediments and to allow the practice to develop. The Working Group had come to the conclusion that future work could focus on EDI transport documents, with particular emphasis on maritime electronic bills of lading and the possibility of their use in the context of the existing national and international legislation dealing with maritime transport. After having established a set of rules for the maritime bills of lading, the Commission could examine the question whether issues arising in multimodal transport could be addressed by the same set of rules or whether specific rules would need to be elaborated.

309. After discussion, the Commission endorsed the recommendation made by the Working Group that the Secretariat should be entrusted with the preparation of a background study on negotiability and transferability of EDI transport documents, with particular emphasis on EDI maritime transport documents, taking into account the views expressed and the suggestions made at the twenty-ninth session of the Working Group with regard to the scope of future work and the issues that could be addressed. A number of other topics were suggested for inclusion in the study, including a report on the potential problems for the use of EDI in maritime transport under existing international instruments and a report on the work undertaken by other organizations in related areas of work. It was agreed that particular emphasis should be put in the study on work currently undertaken by other international organizations, such as the *Comité Maritime International* (CMI) or the European Union, and to the BOLERO project. In that connection, the view was expressed that work undertaken within CMI, or the BOLERO project, were aimed at facilitating the use of EDI transport documents but did not, in general, deal with the legal effects of EDI transport documents. It was stated that particular attention should be given in the study to the ways in which future work by UNCITRAL could bring legal support to the new methods being developed in the field of electronic transfer of rights. The Commission expressed the wish that the requested background study, for the preparation of which the cooperation of other interested organizations such as CMI might be sought, would provide the basis on which to make an informed decision as to the feasibility and desirability of undertaking work in the area.

#### **F. Re-engineering of WP.4**

310. The Commission was informed of the "re-engineering" process being currently carried out within the Economic Commission for Europe with respect to the Working Party on Facilitation of International Trade Procedures (hereinafter referred to as "WP.4") of the Committee on the Development of Trade. It was recalled that the initial decision made by the Commission at its seventeenth session (1984), to place the subject of the legal implications of automatic data processing to the flow of international trade on

its programme of work as a priority item, had been made after taking note of a report of WP.4, which suggested that, since the legal problems arising in that field were essentially those of international trade law, the Commission, as the core legal body in the field of international trade law, appeared to be the appropriate central forum to undertake and coordinate the necessary action.<sup>7</sup>

311. The Commission expressed its general concern with the possible implications of the "Final re-engineering report" published as document TRADE/WP.4/R.1104. That document, which stated that "topics falling under the auspices of WP.4 [included] modernizing legal procedures" (paragraph 19), suggested that the Economic and Social Council should recognize the proposed new Committee to be substituted for WP.4 as a result of the proposed "re-engineering" process as "the centre of competence for all of the United Nations" in the area of trade facilitation (paragraph 64). The terms of reference suggested for the proposed new Committee included "[facilitation of] international transactions, through the simplification and harmonization of procedures and information flows, thereby contributing to the growth of global commerce. To accomplish this general task, the Committee [should] in particular: review and analyse the procedures required to perform international transactions with a view to their reduction, simplification and harmonization; [...] develop recommendations to address legal issues and remove legal constraints to electronic trade transactions and electronic procedures; coordinate and, where relevant, harmonize the programme of work with other international organizations such as [...] UNCITRAL" (paragraph 72). As part of the suggested work programme for the proposed new Committee, "the following would be given high priority: [...] develop recommendations to address legal issues and remove legal constraints to electronic transactions and to electronic procedures" (paragraph 96).

312. The Commission reaffirmed its support of the work already accomplished by WP.4 in the technical field, particularly as regards the development of EDIFACT messages. It was generally agreed that the Commission should seek to establish closer cooperation with the community of EDI users represented in WP.4, with a view to furthering the development of legal rules adapted to the technical environment. However, the Commission concluded that, in view of the general mandate of UNCITRAL as the core legal body in the field of international trade law in the United Nations system, the above-mentioned proposals were not acceptable. The Commission requested the Secretariat to bring that conclusion to the attention of the Economic Commission for Europe.

313. The Commission noted that the proposed "Final re-engineering report" had not been adopted by WP.4 at its fifty-first session (March 1995) and that the development of the "re-engineering process" would be further considered by WP.4 at its fifty-second session (September 1995). The Commission requested the Secretariat to continue to monitor closely that process. It was generally agreed that the matter should be brought to the attention of the General Assembly, with a recommendation to reaffirm the role of the Commis-

sion as the core legal body in the field of international trade law. With respect to EDI and related means of communication, the use of which was likely to affect the entire range of international trade relationships in the near future, it was generally felt that the Commission should play a central role with respect to the development of uniform rules specifically geared to solving the legal issues arising out of the use of such modern means of communication. Examples in point were the preparation of the UNCITRAL Legal Guide on Electronic Funds Transfers, the UNCITRAL Model Law on International Credit Transfers and the draft Model Law on Legal Aspects of EDI and Related Means of Communication. It was also felt that the Commission should play an equally important role with respect to the necessary process of adapting existing commercial law to the increased use of modern means of communication.

#### IV. INTERNATIONAL COMMERCIAL ARBITRATION

##### A. Introduction

314. The decision by the Commission to commence work on the project was taken at its twenty-sixth session in 1993.<sup>8</sup> The first draft prepared by the Secretariat pursuant to that decision was entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings" (A/CN.9/396/Add.1), which the Commission considered at its twenty-seventh session in 1994.<sup>9</sup>

##### B. Discussion of draft Notes on Organizing Arbitral Proceedings

315. The Commission noted that the project had attracted considerable attention among practitioners and that it had been discussed at several national and international meetings. The Commission expressed particular appreciation to the International Council for Commercial Arbitration (ICCA) for organizing a discussion of the project at the XIIth International Arbitration Congress, held by the Council at Vienna from 3 to 6 November 1994. The critical and favourable comments expressed at the Congress and other meetings were useful in preparing a thoroughly revised draft entitled "Draft Notes on Organizing Arbitral Proceedings" (A/CN.9/410), which the Commission had before it at its current session. (For the conclusion of the Commission, see paragraphs 370 to 373, below).

##### 1. Text as a whole

316. There was wide and strong support in the Commission for the project and for the purpose of the Notes, which were to serve as a reminder of questions relating to the conduct of arbitrations that, if circumstances so warranted, it might be useful to consider in order to facilitate the arbitral process. It was said that by raising awareness about the need for proper organization of proceedings, the Notes would help avoid surprise and misunderstandings in arbitral

<sup>7</sup>"Legal aspects of automatic trade data interchange" (TRADE/WP.4/R.185/Rev.1, paras. 12 and 149). The text of that study was reproduced in A/CN.9/238, annex II.

<sup>8</sup>Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 291-296.

<sup>9</sup>Ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 111-195.

proceedings and make the proceedings more efficient. While the advice given in the Notes might be useful in international as well as domestic arbitration, the text would be of particular importance in international cases, in which the participants often had different legal backgrounds and different expectations relating to the conduct of arbitrations. Furthermore, the text would provide welcome assistance to less experienced practitioners.

317. There was general approval for the principles that had been borne in mind in preparing the draft, among which were the following: the Notes must not impinge upon the beneficial flexibility of arbitral proceedings; it was necessary to avoid establishing any requirement beyond the existing laws, rules or practices, and in particular it was necessary to ensure that the sole fact that the Notes, or any part of them, were disregarded would not lead to a conclusion that any procedural principle was violated; the Notes should not seek to harmonize disparate arbitral practices or recommend using any particular procedure.

318. However, strong reservations were also expressed about the project. It was said that experienced arbitrators did not need the advice in the draft Notes while those without sufficient experience could not rely on the Notes for sufficient guidance as to how to conduct arbitrations. Moreover, if the arbitral tribunal would present the Notes to the parties, that might lead to unnecessary discussions about matters relating to organizing proceedings; in addition, a party might invoke the Notes in order to insist on holding such discussions. Thus, the Notes might make arbitral proceedings lengthier, costlier and more complex.

319. The Commission, convinced of the usefulness of the Notes and desirous of avoiding difficulties or misunderstandings that were feared, embarked on a review of the draft text, bearing in mind the purpose of the Notes and the stated underlying principles. It was said, in particular, that by not leaving any doubt that the Notes did not diminish the prerogatives of the arbitral tribunal, the ability of the arbitral tribunal to conduct the proceedings flexibly and efficiently was undiminished.

## **2. Introductory part: "Purpose and origin of the Notes" (paragraphs 1-11 of the draft Notes)**

320. It was observed that the substance of the table of contents of the Notes could serve as a checklist of matters to be borne in mind in organizing arbitral proceedings, and that a reference to such a checklist was made in paragraph 11 of the draft Notes. In order to highlight better such use of the table of contents, a suggestion was made to insert the checklist after paragraph 11.

321. As regards the introductory part, the following suggestions were made: to mention, possibly in paragraph 1, that the Notes could be used both in arbitrations administered by an institution and in non-administered arbitrations; to recast paragraph 2 so as to avoid using the term "suggestions" and to state positively that the Notes did not establish any binding legal requirement on parties or arbitrators; that in some contexts the expression "administered arbitration" was unclear and that it was preferable to use instead an expression such as "arbitration administered by an institu-

tion"; to clarify that the Notes were prepared with a particular view to international arbitrations, while the text could be useful also in domestic arbitrations; it was pointed out, however, that some domestic arbitrations tended to be influenced to a greater degree than international arbitrations by practices and rules used in court proceedings and that therefore the draft Notes were not drafted to be directly relevant to domestic arbitration. While it was suggested to delete the second sentence of paragraph 2 as unnecessary, the opposing view was that the sentence was necessary to stress the non-binding nature of the Notes.

322. As to paragraph 4, it was suggested to delete the reference to "type and complexity of issues of fact and law"; to state expressly that the discretion of the arbitral tribunal in conducting the arbitral proceedings was subject to rules agreed by the parties and the law governing the proceedings, including the fundamental principles of procedure; that expressions such as "decisions on organizing proceedings" were preferable to "procedural decisions", used in paragraph 4 and elsewhere, inasmuch as the latter term might give rise to a controversy as to whether a matter was one of substance or procedure; to use, where appropriate, the term "procedural orders" as a term used in practice; to delete footnote 2 since, in referring to flexibility of proceedings, many other sets of rules, including those of arbitral institutions, could be given as examples; to add the word "just" to the words at the end of paragraph 4 so that they would read "the need for a just and cost-efficient resolution of the dispute".

323. It was suggested to emphasize, in the context of paragraphs 5 or 10 of the draft Notes, that it depended on the stage of the proceedings which of the organizational matters discussed in the Notes should usefully be raised and that care should be taken not to raise such matters prematurely.

324. A view was expressed that the statement in paragraph 6 about decisions made by the presiding arbitrator should be revised so as to express the limits to the prerogatives of the presiding arbitrator to decide alone. It was proposed to delete, in paragraph 6, the text after the first sentence, since it raised questions without answering them and since it dealt with potentially controversial matters. While that suggestion was opposed, it was proposed to reconsider the words "invite the parties to enter into a procedural agreement", which might give rise to controversy and delay, in particular if the invitation referred to agreement to a set of rules.

325. A suggestion was made not to mention in paragraph 7 the possibility of meeting at places other than the place of arbitration, since such freedom might be restricted by the applicable rules or law. There was opposition to that suggestion, since the passage highlighted a method that might be necessary for an efficient conduct of proceedings. It was considered that the substance of the first sentence of paragraph 8 should be expressed more clearly.

326. It was considered that paragraph 11, and the use of the word "agenda", might be misunderstood as implying that meetings devoted to procedural matters (referred to in paragraph 8 also as "preparatory conferences") were regularly held, which was not the case; furthermore, the significance of a checklist of procedural matters as set out in the Notes was not limited to preparatory conferences.

### 3. *Procedural matters for possible consideration* (paragraphs 12-92 of the draft Notes)

#### *Deposits for costs (item 1)*

327. It was considered that a deposit for costs was often not the very first matter that the arbitral tribunal raised with the parties and that, therefore, it would be more appropriate to place the item later in the Notes, perhaps close to items 4 and 5 ("Place of arbitration" and "Administrative services").

#### *Set of arbitration rules (item 2)*

328. One suggestion was to delete item 2, since a discussion concerning the choice of arbitration rules might give rise to controversy or lengthy discussions. In addition, an agreement on a set of rules of an arbitral institution without the case being administered by that institution would require some rules to be modified, in particular the rules that gave a function to an organ of the institution (e.g. as regards the challenge of an arbitrator or other functions of supervision by the institution). Such a modification presented a complex task; if the rules were left unmodified, however, problems difficult to solve might arise during the proceedings.

329. The opposite proposal was to keep the item and even to strengthen the effect of the second sentence of paragraph 15 by deleting the words of caution in the third sentence.

330. While there was considerable support for keeping the item, including the third sentence, several suggestions were made for additional clarifications: that an agreement on a set of arbitration rules was not a necessity and that the fact that the parties did not agree on a set of rules did not prevent the arbitral tribunal from proceeding with the case on the basis of the law governing the arbitral procedure; that, because of possible difficulties in cases when the parties agreed on rules of an institution (see paragraph 328, above) it was better to delete the reference to "another set of rules" in the example within the parentheses, or, alternatively, to state that it was advisable to agree on a set of rules for arbitration that was not administered by an institution.

331. The last suggestion was objected to on the ground that the modified text would appear to favour holding arbitrations that were not administered by an institution, for which there was no justification.

332. Bearing in mind the objection, it was suggested that the first two sentences of paragraph 15 should be replaced by wording along the following lines: "Sometimes parties who have not included in their arbitration agreement a stipulation that a set of arbitration rules will govern their arbitral proceedings might wish to do so after the arbitration begins. If that occurs, the UNCITRAL Arbitration Rules might be used without modification. In the alternative, the parties might wish to adopt the rules of an arbitral institution. In that case, it would be necessary to secure agreement of that institution and to stipulate the terms under which the arbitration could be carried on in accordance with the rules of the institution."

333. While there was agreement in principle on the suggested text, two observations were made: that the revised item did not reflect the possibility of agreeing on a section of the UNCITRAL Arbitration Rules or on modifying those Rules; that the agreement of an arbitral institution was necessary only as regards the performance of certain functions by that institution and that the text might be clarified to reflect, with appropriate cautions, various other ways in which parties might utilize the rules of arbitral institutions.

334. It was reiterated that the proposed text did not reduce the need for keeping the words of caution contained in the last sentence of paragraph 15 and for clarifying expressly that, despite the lack of agreement on a set of arbitration rules, the arbitral tribunal remained able to determine, on the basis of the law governing the arbitral procedure, how the case would be conducted.

#### *Language of proceedings (item 3)*

335. It was observed that paragraph 17 appeared to imply that in principle all documents annexed to the statements of claim and defence had to be translated into the language of the proceedings, and that it required an express decision for a party to be able to present a document without a translation. It was suggested that a more neutral approach, such as the one expressed in article 17(2) of the UNCITRAL Arbitration Rules, should be adopted.

#### *Place of arbitration (item 4)*

336. It was suggested to delete the first sentence of paragraph 20 as unnecessary. The opposite view was that the sentence should be retained since it clarified the context in which the arbitral tribunal was to determine the place of arbitration. It was suggested that the word "typically" in the second sentence, in particular the corresponding word used in some other language versions, was either unclear or indicated that the power of the arbitral tribunal was limited, and that the word should be deleted. It was also suggested to mention that the parties might agree on a place of arbitration either directly or indirectly.

337. As to the list of factors possibly influencing the choice of the place of arbitration in paragraph 21, various suggestions were made: to place factors (a) and (b) (referring to the convenience of the participants and support services) at the end of the list; that factor (c) (the law on arbitral procedure) was the most important; that factor (d) (legal regime for enforcement of the award) should be placed first; that factor (f) ("perception of a place as being neutral") was unclear, potentially confusing and should be deleted; that the arbitral tribunal, before deciding on the place of arbitration, might wish to discuss that with the parties.

338. Citing the differing suggestions reflected in the preceding paragraph, and the difficulty of properly clarifying the interplay of the factors in the short discussion under item 4, it was suggested to delete paragraph 21. The prevailing view, however, was to keep it, since it usefully drew attention to the variety of factual and legal considerations in choosing a place of arbitration.

339. The proposal for deleting the second sentence of paragraph 22 was not adopted, since the sentence highlighted an important aspect of flexibility in the conduct of proceedings (see also paragraph 325, above).

#### *Administrative services (item 5)*

340. It was said that the references to various types of services were too detailed and might give rise to an impression that an arbitration was a major and expensive administrative exercise. It was pointed out that paragraphs 23 and 24 did not distinguish properly between the services that most arbitral institutions regularly provided (e.g., rooms for hearings and meetings) and services that were not always necessary or were often not provided by institutions, but were to be secured by the parties themselves (e.g., travel arrangements).

341. It was suggested to mention in paragraph 26 that the fees for the secretary appointed by an institution administering the case were normally borne by the institution, while in other cases such fees would typically form part of the arbitration costs and would be paid from the amount deposited to cover those costs.

342. It was proposed to delete the phrase "or if the secretary's tasks imply the presence of the secretary during the deliberations of the arbitral tribunal", because the presence of the secretary during the deliberations was in some parts of the world not controversial, in particular when the secretary was appointed by the arbitral institution administering the case; furthermore, even where the presence of a secretary raised concerns, they were quite different from the concern, mentioned in paragraph 27, that the secretary's tasks might not be clearly distinguishable from the tasks incumbent on the arbitrators.

#### *Confidentiality (item 6)*

343. A view was expressed that paragraph 28 should be modified so as to indicate more clearly that the arbitral tribunal was not merely a passive recorder of an agreement of the parties and that the arbitrators were also bound to respect the confidential nature of information concerning the arbitration. While confidentiality was widely viewed as an important advantage of arbitration over court litigation, there appeared to be possibly diverging expectations of parties as regards the extent of confidentiality, to which fact the attention of the reader of the Notes should be drawn.

344. Suggestions were made for simplifying and shortening the discussion in paragraphs 29 to 31.

345. A view was expressed that the way paragraph 29 was drafted might leave a wrong impression that electronic means of communication were more insecure than was in fact the case. A contrary view was that the paragraph properly reflected the nature of risks involved in electronic communications.

#### *Routing of writings among parties and the arbitrators (item 7)*

346. The following suggestions were made: to indicate that the examples given in paragraph 32 were examples only; to revise the order of the examples given; to cover also

cases in which the arbitral tribunal directed a communication to one party only; to strengthen the suggestion about the advisability of a timely determination of the routing of writings; to indicate that, in the case of an arbitration administered by an institution, a system of routing writings would often be determined by the rules or practices of the institution; to clarify the second sentence so as to reflect better the actual practice; to refer to possible measures that might be taken to discourage refusals by a party to accept writings or use similar dilatory tactics.

#### *Telefax and other electronic means of sending writings (item 8)*

347. Recalling the observation on paragraph 29 of the draft Notes (see paragraph 345, above), it was said that also paragraph 33 might leave a wrong impression that telefax was more insecure than was in fact the case, in particular in view of the widespread and increasing use of security devices built into communication systems. It was suggested that the paragraph should mention that the arbitral tribunal and the parties might consider which telefax messages should be confirmed by mailing or otherwise delivering the documents whose facsimile had been transmitted by electronic means.

348. It was suggested to reduce the overly detailed discussion in paragraphs 34 to 36 to several sentences. It was understood that the use of electronic means of communication depended on the agreement of those concerned.

349. In connection with time-limits for submission of writings, it was suggested to take into account the question of different time zones. It was also suggested to address the situation when the originator of a message had not received a confirmation of receipt.

#### *Timing of written submissions (item 9)*

350. It was considered that the expression "timing" (and in particular the corresponding word in some other language versions) in the title was misleading in that submissions were scheduled not only with reference to a calendar but also with reference to the stages of the proceedings.

351. It was suggested to add a paragraph indicating that different practices existed with respect to submissions which parties might present after the conclusion of the hearings (post-hearing submissions) and that, in view of those differences, guidance to the parties would be useful. In connection with that suggestion it was proposed to modify the title of item 9 along the lines of "Written submissions" or "[Arrangements for] [Exchange of] written submissions".

#### *Practical details concerning written submissions and evidence (e.g., copies, numbering of items of evidence, references to documents, numbering of paragraphs) (item 10)*

352. It was observed that the examples given in the title between the parentheses were necessary to make the title meaningful when it would appear in a checklist of matters for possible consideration (see paragraph 320, above). It was proposed to review other titles in that light.

353. It was thought by some that paragraph 40 described in excessive detail and gave too much prominence to matters that were petty and often of marginal significance. The paragraph might also signal to a non-experienced arbitrator a wrong sense of priority. Moreover, if the arbitral tribunal should refuse to accept a submission that did not comply with a technical arrangement mentioned in the paragraph, that might be considered a violation of procedural rights of that party. The Commission, however, adopted the view that it was useful to mention those practical details in the Notes, bearing in mind, and possibly expressing in the paragraph, that the Notes were not binding and that the arbitral tribunal should use its discretion in dealing with matters mentioned in the paragraph.

#### *Defining points at issue (item 11)*

354. As to paragraph 41, it was thought that an early fixing of a list of the points at issue might cause difficulties if later developments called for a revision of the list. The discussion in the paragraph was said to be reminiscent of requirements to define at an early stage of the proceedings the points at issue (or the terms of reference of the arbitral tribunal), which existed in some legal systems and in the practice of some arbitral institutions and which, as considered by some, caused problems in practice. It was considered that the paragraph should suggest that the arbitral tribunal should proceed flexibly in clarifying points at issue, bearing in mind the possibility that those points might change and that arbitration rules often had provisions as to how to deal with such changes. It was also suggested that it should be mentioned in the Notes that the "terms of reference", required to be drawn up under the rules of some arbitral institutions, served the same purpose as a list of points at issue. It was considered that, unless those amendments to the paragraph were to be made, it would be preferable to delete the whole item 11.

355. As to paragraph 43, it was suggested that it was unclear what the difference was between the "award" and the "decision", and that the use of the term "award" was preferable.

356. A suggestion was made to include a paragraph addressing the case where the arbitral tribunal considered that the relief or remedy sought by a party was insufficiently definite and the arbitral tribunal decided that it should be formulated more precisely (see also draft Guidelines for Preparatory Conferences in Arbitral Proceedings (A/CN.9/396/Add.1), "D. Defining issues and order of deciding them", remarks under (ii), and the consideration in the Commission of the point<sup>10</sup>).

#### *Possible settlement negotiations and their effect on scheduling (item 12)*

357. No observations were made on the substance of the item.

#### *Documentary evidence (item 13)*

358. The substance of paragraphs 45, 46 and 54 received general support.

359. Suggestions were made for the deletion of paragraphs 47-49 because they were too detailed. Those suggestions were opposed on the ground that paragraphs 47-49 referred to practices that could result in substantial savings. Suggestions were also made to delete paragraphs 50-53, since they gave prominence to practices that were controversial or not acceptable in some parts of the world. Those suggestions were opposed on the ground that, because those practices differed widely and it was therefore necessary to avoid surprise and misunderstandings, the paragraphs clarified to the parties how requests for documents would be dealt with. The Commission, in the spirit of compromise and wishing to ensure the broadest acceptability of the Notes, decided to retain the substance of paragraphs 47-49, delete paragraphs 50-53 and limit the discussion of requests for documents to the substance of article 24(3) of the UNCITRAL Arbitration Rules.

360. The following suggestions were made: that it might be useful to mention in paragraph 45 the possibility that court assistance would be needed in obtaining evidence (as envisaged, e.g., in article 27 of the UNCITRAL Model Law on International Commercial Arbitration); to clarify, in paragraph 47, that, with respect to the case under (b), the words "a party protests" meant a statement that the party had not received the communication; that paragraph 49 might refer to a possibility that evidence be presented by using computerized means.

361. It was considered that paragraph 50 should also reflect the practice according to which a party, instead of handing over a document to the other party, allowed that other party to inspect the document at the place where the document was kept. In addition, appropriate mention should be made of requests that a document be handed over to an expert or that the expert be given access to the document.

#### *Physical evidence other than documents (item 14)*

362. No observations were made on the substance of the item.

#### *Witnesses (item 15)*

363. Suggestions were made to delete paragraphs 61 and 62, since they were promoting practices according to which a party presenting a witness met the witness in private and helped the witness prepare the written statement. Those practices, in the view of many practitioners, compromised the credibility of the testimony, were frowned upon in various parts of the world, or might in some instances be contrary to law. The opposing view was that paragraphs 61 and 62 should be maintained, precisely because the opinions about the practices were so different; it was necessary to explain the various possibilities and leave to the applicable rules, law and wisdom of the arbitral tribunal to determine the manner of proceedings. The Commission decided that paragraphs 61 and 62 should be revised, reflecting that there were differing practices and that no practice should be preferred, and taking into account the above concerns.

364. It was considered that paragraph 63 should be deleted, because it dealt in a simplistic way with a question that affected fundamental rights of a party to present its case.

<sup>10</sup>Ibid., para. 151.



*Experts and experts witnesses (item 16)*

365. No observations were made on the substance of item 16.

*Hearings (item 17)*

366. A suggestion was made to reflect in paragraph 83 also the case in which a summary of oral statements and testimony was written by the secretary of the arbitral tribunal.

*Multi-party arbitration (item 18)*

367. It was suggested, and the Commission agreed, that paragraphs 87 and 88 should be deleted, since they did not deal with organizing arbitral proceedings. It was decided to delete also paragraph 89, since the separation of issues, as indicated in the paragraph, might present a complex task and raise difficulties concerning the respect of the rights of the parties, and since it was not possible to deal with those difficulties in the context of the Notes.

368. It was considered that the rather generally formulated paragraph 90 should not appear as a separate item, and that its substance should be included in another suitable place in the Notes.

*Possible requirements concerning filing or delivering the award (item 19)*

369. It was said that it was usually the winner in the dispute who had an interest in filing the award, that item 19 had little to do with organizing the proceedings and that there was no need to say anything about the matter in the Notes. The Commission, however, adopted the view that the item was useful, since different solutions existed as to how and by whom an award had to be filed, if it had to be filed at all, and since the parties might not be aware of such requirements.

### C. Conclusion

370. The Commission, having completed the review of the substance of the draft Notes, requested the Secretariat to prepare, in light of the considerations in the Commission, a revised draft of the Notes for final approval by the Commission at its twenty-ninth session in 1996.

371. It was recalled that at its twenty-sixth session in 1993 the Commission postponed its decision as to whether work should be undertaken in the areas of multi-party arbitration and the taking of evidence in arbitration.<sup>11</sup>

372. As to multi-party arbitration, suggestions were made at the current session that it would not be promising to undertake work in that area because the great variety of possible multi-party situations did not lend itself to useful general solutions; it was also said that experience in other international organizations proved that meaningful results on the topic were elusive. Nevertheless, the Commission con-

sidered that the Secretariat should continue to monitor the law and practice in the field of multi-party arbitration so as to be able to present to a future session a document exploring the desirability and feasibility of work by the Commission in that field.

373. As to the taking of evidence in arbitration, it was observed that the discussions of the draft Notes on Organizing Arbitral Proceedings showed that practitioners in international commercial arbitration had different expectations as to how evidence in arbitration should be taken. Since those different expectations gave rise to difficulties in practice, it was thought that the Commission should study the desirability and feasibility of work in that area. The Secretariat was requested to prepare for a future session a document to serve as a basis for consideration by the Commission.

### V. RECEIVABLES FINANCING

374. At its twenty-sixth session (1993), the Commission considered a note by the Secretariat containing a brief discussion of certain legal problems in the area of assignment of claims and of past and current work on assignment and related topics (A/CN.9/378/Add.3). The Commission then requested the Secretariat to prepare a study on the feasibility of unification work in the field of assignment of claims.<sup>12</sup> In response to that request, the Secretariat presented to the Commission, at its twenty-seventh session (1994), a report on legal aspects of receivables financing (A/CN.9/397). The report focused on assignment effected for financing purposes (i.e. for raising income or credit) and suggested that a number of assignment-related problems could be addressed by a set of uniform rules that the Commission could prepare. At that session, the Commission requested the Secretariat to prepare a further study that would discuss in more detail the issues that had been identified and would be accompanied by a first draft of uniform rules.<sup>13</sup>

375. Pursuant to that request, the Secretariat submitted to the Commission, at its current session, a report discussing the possible scope of future work and a number of assignment related issues, and suggested some possible solutions to problems arising in the context of receivables financing (A/CN.9/412). The report contained preliminary drafts of uniform rules that were intended to highlight some of the questions and the possible answers thereto, so as to assist the Commission in determining the feasibility of future work on the topic. The report concluded that it would be both desirable and feasible for the Commission to prepare a set of uniform rules, the purpose of which would be to remove obstacles to receivables financing arising from the uncertainty existing in various legal systems as to the validity of cross-border assignments (in which the assignor, the assignee and the debtor would not be in the same country) and the effects of such assignments on the debtor and other third parties.

376. The Commission expressed its appreciation to the Secretariat for pursuing cooperation with UNIDROIT, the Hague Conference on Private International Law ("the Hague

<sup>12</sup>Ibid., para. 301.

<sup>13</sup>Ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), para. 210.

<sup>11</sup>Ibid., Forty-eighth Session, Supplement No. 17 (A/48/17), para. 295.



Conference"), the European Bank for Reconstruction and Development (EBRD), the International Bank for Reconstruction and Development (IBRD) and, in the United States of America, the National Conference of Commissioners on Uniform State Laws. Steps taken included the submission of a draft of document A/CN.9/412 to those organizations for comments and oral presentation of its final version to the UNIDROIT Governing Council at its recent meeting (Rome, 29 March to 1 April 1995). The Commission reaffirmed the need for active cooperation with all national and international organizations active in the field, including representatives of the relevant sectors, public and private, and the legal profession, who would be the end-users of any uniform law to be prepared by the Commission.

377. Wide support was expressed in the Commission for work on the topic. It was stated that the background reports submitted by the Secretariat in the last three years were a good starting-point for future work since they had identified a practical problem, with which international trade was faced due to the diversity of laws, and had presented some possible solutions. In addition, it was said that work by the Commission on assignment of receivables could facilitate international trade, since assignment was one of the most important transactions in the financing of international trade. Moreover, it was pointed out that work by the Commission on assignment could usefully relate to its work on cross-border insolvency and build-operate-transfer (BOT) projects, since the problem of recognition and enforcement of cross-border assignments usually arose in case of insolvency of the assignor, and assignment of receivables was an integral part of BOT contractual schemes.

378. At the same time, a number of concerns were expressed. One concern was that any overlap or conflict with work already done in UNIDROIT (UNIDROIT Convention on International Factoring) or currently under way (draft UNIDROIT uniform rules on international interests in mobile equipment) should be avoided. Another concern was that the topic was a complicated one and should be studied further before it could be submitted to a working group. Yet another concern was that work on assignment might not usefully contribute to the resolution of the crucial problem of priority among several claimants laying a claim to the assigned receivables, until the most likely solution, i.e. registration, had been considered further in the context of future work to be undertaken by the Commission on negotiability/transferability of rights in goods and by UNIDROIT on international security interests in mobile equipment. Deferral of work on assignment was also suggested in view of the incipient work on cross-border insolvency, on the ground that the assignment context presented one of the main problem areas in insolvency. Similarly, it was suggested that future work on BOT projects would necessarily raise questions of assignment of receivables. Moreover, the concern was expressed that the private international law aspects of assignment of receivables, which were raised in the report before the Commission and the draft uniform rules contained therein, were particularly complex and should not be dealt with, in particular by way of a possibly partial approach that might have the unintended effect of enhancing uncertainty instead of uniformity of law. In that connection, some doubt was expressed as to whether any uniform rules on assignment, without some private international law rules,

would add anything to the already existing UNIDROIT Convention on International Factoring.

379. The prevailing view was that the Commission should assign the report and the draft uniform rules contained therein to a working group with a view to preparing a uniform law on assignment in receivables financing. It was emphasized that the Commission, in view of its universal membership and general mandate as the core legal body of the United Nations system in the field of international trade law, should play a particularly active role in the field of trade financing.

380. As regards the concern expressed as to potential duplication of efforts and overlap with the work of UNIDROIT, the observer of UNIDROIT stated that the project as now defined would not overlap or conflict with the UNIDROIT Convention on International Factoring, which in the meantime had entered into force on 1 May 1995 for France, Italy and Nigeria and was being considered for ratification by a number of other countries. With regard to the work of UNIDROIT on international security interests in mobile equipment, the observer of UNIDROIT pointed to the need for close cooperation, in particular in the field of registration systems, which was an important aspect of the work of UNIDROIT in that area of law. As to the private international law aspects of assignment, it was pointed out that the difficulty in addressing them should not result in their exclusion from future work of the Commission on the topic, but should rather lead to closer cooperation with the Hague Conference, for example, by the holding of joint meetings of experts on issues of common interest related to assignment of receivables.

381. As to the form that work by the Commission could take, while it was recognized that the matter would need to be addressed at a later stage when the detailed content of the uniform rules would be better known, the prevailing view at the current stage was in favour of preparing a model law. For example, it was stated that a model law might be a more suitable form of work in view of the wide divergences existing among legal systems and the complexity of the problems arising in the context of assignment in receivables financing. In that connection, it was stated that assignment took place in the context of complex financing transactions, about the economic aspects of which there might be a divergence of opinions in developed and developing countries. It was suggested that, if the Commission were to prepare a model law, a commentary could also be prepared discussing the various financing practices in the context of which assignment of receivables might take place, as well as the differences existing among the various legal systems in the area of assignment. As to the mandatory or non-mandatory nature of the uniform rules to be prepared, a view was expressed that the uniform rules to be prepared should include a general provision recognizing party autonomy.

## VI. POSSIBLE FUTURE WORK

### A. Cross-border insolvency

382. The Commission had before it a note by the Secretariat reporting on the UNCITRAL-INSOL Judicial

Colloquium on Cross-Border Insolvency (Toronto, 22-23 March 1995) (A/CN.9/413). The purpose of the Colloquium was to obtain for the Commission, as it embarks on work on cross-border insolvency, the views of judges and of Government officials concerned with insolvency legislation on the specific issue of judicial cooperation in cross-border insolvency cases and the related topics of court access for foreign insolvency administrators and recognition of foreign insolvency proceedings (hereinafter referred to as "judicial cooperation" and "access and recognition"). It had been decided at the last session that work by the Commission should focus, at least at the current stage, on those limited aspects.<sup>14</sup> Participants at the Judicial Colloquium included 60 judges and Government officials from 36 States, representing a diversity of legal systems and experiences.

383. It was recalled that the Commission's decision to undertake work on cross-border insolvency was taken in response to suggestions made to it by practitioners and other trade circles directly concerned with the problem. That proposal was made first at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century", a proposal which the Commission decided at its twenty-sixth session in 1993 to pursue further.<sup>15</sup> Subsequently, in order to assess the desirability and feasibility of work in that area and to define appropriately the scope of the work, the UNCITRAL-INSOL Colloquium (Vienna, 17-19 April 1994) was held, involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders. That first UNCITRAL-INSOL Colloquium gave rise both to the suggestion that work by the Commission designed with the limited but useful goal of facilitating judicial cooperation and access and recognition would be desirable, and that a multinational meeting of judges would be a most meaningful step in further assessing the desirability, feasibility and scope of such work.

384. The participants at the Judicial Colloquium were aided in their discussion by a background report prepared by a group of experts assembled by INSOL. The report summarized the current legal environment, including obstacles that often stood in the way of judicial cooperation and access and recognition in cases of cross-border insolvency, due in particular to diversity of approaches among legal systems and in many cases to lack of adequate legislative frameworks for judicial cooperation and for access and recognition.

385. The report also described the legislative frameworks that did exist in a limited number of States specifically dealing with judicial cooperation and with access and recognition in the insolvency context, and that might serve to inspire in part future work by the Commission. Such legislation varied in the extent to which cooperation and assistance were mandatory or subject to the discretion of the requested court as regards both the questions of access and recognition and the degree of cooperation to be given. Also described were various techniques and notions employed in pursuit of judicial cooperation and access and recognition in the absence of a specific legislative or treaty framework.

386. The report made several recommendations, including, for example: that States should be encouraged to enact in their legislation some basic rules to apply in cases of cross-border insolvency; that an applicant for recognition should not be deemed to have submitted fully to the jurisdiction of the foreign country when appearing in connection with the insolvency; and that, upon recognition, such cooperation and assistance should be available as is not inconsistent with the law of the foreign country, with the relevant court being given the discretion to provide such aid and assistance as might be appropriate in the circumstances.

387. The Commission expressed its appreciation for the assistance that had been provided to date by INSOL, and welcomed the expression of willingness by INSOL to remain involved with and support work by the Commission in the future, for example, INSOL's statement of its willingness to organize an additional judicial colloquium.

388. With the above report by way of general background information, a major portion of the Judicial Colloquium programme was devoted to presentations on six major cases of cross-border insolvency by judges from various countries and differing legal systems that presided over proceedings in some of those cases, as well as by insolvency administrators and other court-appointed insolvency officials that had been involved. The programme also included observations by leading academics in the field of insolvency law, a closing evaluation by a multinational panel of judges and several open floor segments, which substantially added to the range of experiences and views presented.

389. The experiences and views reported at the Judicial Colloquium reflected the general willingness and interest of judges to cooperate in cases of cross-border insolvencies, but also the fact that such cooperation was often hindered by disparity or inadequacy of law. That was so particularly in legal systems in which it was not typical for judges to exercise discretion in the absence of specific statutory rules and obligations. Moreover, even in jurisdictions where judges were given broad discretionary power, it had been shown that a legislative framework could provide added predictability as regards resolution of cross-border insolvencies.

390. In view of the above, the consensus view at the Judicial Colloquium was that it would be worthwhile for the Commission to attempt to provide such a legislative framework, for example, by way of model legislative provisions. A consensus at the Judicial Colloquium supported also the inclusion in the text to be prepared by the Commission of provisions on access and recognition. Finally, it was reported to the Commission that proposals made as to the possible form and content of the Commission's work included, for example, model legislative provisions containing a "menu of options" for legislators, possibly inspired in part by alternative approaches followed in existing legislation on judicial cooperation and on access and recognition.

391. Having before it the views expressed at the Judicial Colloquium, the Commission considered the next steps that it should take. Wide support was expressed for assigning to a working group on a priority basis the task of developing a model legislative framework for judicial cooperation and

<sup>14</sup>Ibid., paras. 215-222.

<sup>15</sup>Ibid., *Forty-eighth Session, Supplement No. 17* (A/48/17), paras. 302-306.

for access and recognition. At the same time, there was the view expressed that the subject of cross-border insolvency should not be accorded a priority higher than other topics being considered for future work. In support of that view it was stated that other work, such as on BOT (see paragraphs 394-400, below), was urgently needed, that the matter of cross-border insolvency might be considered adequately treated under domestic law or in accordance with judicial assistance treaties, and that the subject was not necessarily of a strictly commercial nature.

392. The prevailing view, however, was that the development of a legislative framework for judicial cooperation and for access and recognition in cross-border insolvencies should be assigned to a working group. It was noted that the various steps that had been taken by the Secretariat to ascertain the desirability and feasibility of work on the topic had identified an urgent need for the Commission to address in an area of critical importance for international trade, in particular since it was likely that the incidence of cross-border insolvency was likely to continue increasing. It was further noted that those preparatory steps had defined the scope and possible form of the work, so as to make it timely for the matter to be taken up by a working group. The Commission further noted that the assignment of the subject to a working group would not necessarily hamper advancing work on other subjects in which interest had been expressed, in view of the stage of development of work on those other subjects.

393. As to the specific content of the work by the Commission, a view was expressed in favour of including in cooperation legislation some version of an automatic stay of execution of claims. That would provide at least a minimum period of time to examine the request of the foreign insolvency representative before a liquidation or dismemberment of the insolvent estate. The Commission noted that the question would be examined by the Working Group along with a range of other questions that had been raised at the Judicial Colloquium as regards the possible scope, approaches and effects of the legal text to be prepared. It was also noted that the work to be carried out would be aimed at taking account of approaches found in various legal systems and taking advantage of the experiences gained in various multilateral efforts in the field of insolvency.

## **B. Build-operate-transfer projects**

394. At the twenty-seventh session in 1994, the Secretariat had presented a note apprising the Commission of the progress of work in UNIDO on the preparation of "Guidelines for the development, negotiating and contracting of BOT projects" (A/CN.9/399), and suggesting possible areas in which the Commission could consider taking up future work. The Commission emphasized the relevance of BOT and requested the Secretariat to present a note for the twenty-eighth session of the Commission on possible future work on the subject of BOT projects.

395. Pursuant to that request, the Secretariat submitted to the Commission at the current session a note setting out the possible areas in which the Commission could take up work with regard to BOT (A/CN.9/414). It was reported that preparation of the Guidelines by UNIDO was at an ad-

vanced stage and that the Secretariat of the Commission had closely followed the work done on the Guidelines, in particular those aspects that related to possible future work by the Commission. It was also noted that the Guidelines were geared towards describing the main policy concerns that States should address when deciding whether or how to implement BOT projects and that, since the Guidelines covered the subject of BOT generally, they did not deal in extensive detail with the issues suggested for possible future work by the Commission. A statement by the observer of UNIDO provided the Commission with information on work being carried out in UNIDO on BOT projects, including progress on preparation of the UNIDO Guidelines. The Commission expressed its appreciation for the information provided.

396. It was reported that, due to a number of factors, there had been a substantial increase in many States in the number of BOT projects being implemented. Chief among the factors that had led to the interest in BOT projects was the potential for mobilization of private sector resources for infrastructure development without the necessity of raising the public debt. It was pointed out that it was particularly so at a time of an increase worldwide in privatization of various sectors previously reserved for the public sector, coupled with decreasing availability of public sector funds for infrastructure development. The other advantages included increased involvement of the private sector in the management of public infrastructure, increased potential for direct foreign investments and the opportunity for governments to use the BOT facilities as a benchmark for the performance of similar projects in the public sector. It was noted, however, that, despite the advantages and potential that existed for BOT projects, a number of practical obstacles of a legal nature might make it difficult to implement such projects. It was therefore suggested that the Commission could consider taking up work on BOT with a view to assisting States in alleviating some of the legal obstacles that made realization of BOT projects difficult.

397. It was reported that some of those obstacles might arise because of the lack of a proper legal and regulatory framework to attract long-term private-sector involvement in such projects. Since the private investors and financiers carried most of the risk for the performance of the project, they would have a keen interest in the existence of a legal infrastructure that encouraged long-term private investments, enabled a fair return on their investment and ensured the enforceability of the contractual obligations entered into by the various parties. It was therefore suggested that the Commission could consider preparation of guidelines to assist States in establishing a legal framework conducive to the implementation of BOT projects. Such guidelines could address the types of general business, investment and commercial legislation that would provide a sound legal basis for carrying out BOT projects, together with model legislative provisions that could be used by States wishing to prepare specific legislation to govern the implementation of such projects. It was suggested that model legislative provisions for BOT-specific legislation could deal with such issues as the legal basis for the granting of the concession, the extent of possible government support, the regulatory framework for the management and operation of BOT projects and possible incentives that the Government might wish to grant.

398. It was further noted that additional obstacles to implementing BOT projects might arise, for example, as regards the procurement aspects of implementation. Unlike the normal practice in procurement for traditional projects, where the Government solicited tenders on the basis of a well-defined project within predetermined specifications, in BOT the call for tenders might precede any design work. To the extent that there might be a lack of clear guidelines as to the basis on which to evaluate tenders or proposals that would in all likelihood contain varied solutions to a set of problems, a lengthy and therefore costly bidding process might ensue, one that would run the risk of compromising the integrity of the procurement process. The Government also had to define clearly how to deal with unsolicited proposals since, in many instances, the private sector was encouraged to take the initiative in project identification. It was therefore suggested that future work on procurement could include guidance to Governments on means of carrying out procurement in a manner that best promoted competition and transparency and avoided negotiations conducted in a manner that might cause loss of confidence in the procurement process. That could include guidance on preparation of solicitation documents, preparation of criteria for evaluation and the means of carrying out the evaluation in different circumstances. Means by which such guidance could be provided might include preparation of model procurement regulations or of model bid solicitation documents for BOT.

399. It was reported that yet another obstacle to implementation of BOT projects was the limited experience, in particular on the Government side, in negotiating simultaneously with a multiplicity of parties, many of whom were contractually interrelated. Although most of the contracts involved in implementing BOT projects might not, in themselves, present any novel issues, the BOT context presented some problems in that all the various contracts had to fit into a composite contractual package. The suggestion was therefore made that another additional form of work on BOT, relating to contracting questions, could be initiated by a study by the Secretariat on the problems encountered in contracting for BOT. Such a study could include consideration of the means by which the Commission would carry out work in that respect, for example, by means of a supplement to the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works.

400. Wide support was voiced in the Commission for taking up work in the areas suggested by the Secretariat. It was pointed out that the BOT project-financing mechanism had raised a considerable amount of interest in many States and that work by the Commission in the suggested areas would assist such States in tackling the problems that had been identified. It was noted, however, that, since the work to be undertaken by the Commission would be partly influenced by the final content of the UNIDO Guidelines, and taking into account that the practice with regard to BOT was still developing, it would be useful to provide the Secretariat with the opportunity to study further the issues proposed for future work. It was also noted that, in the three areas of possible work referred to, the Commission's work would be tailored so as not to duplicate work carried out by UNIDO on BOT projects. The Commission therefore requested the

Secretariat to prepare a report on the issues proposed for future work with a view to facilitating discussion of the matter at the Commission's twenty-ninth session in 1996.

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

401. The Commission noted that the Secretariat had agreed with Committee D of the International Bar Association to cooperate in monitoring the implementation in national laws of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>16</sup> (New York, 1958). It was said that the purpose of the project was in particular to look into the following questions: was the Convention incorporated into the national legal system of the States parties so that its provisions had the force of law; had States parties added to the uniform regime of the Convention provisions, whether pursuant to declared reservations to the Convention or otherwise, which modified the conditions of recognition or enforcement of awards; which requirements for obtaining recognition and enforcement not contemplated in the Convention were added in national laws.

402. It was stressed that it was not the purpose of the project to monitor individual court decisions applying the Convention. Such an exercise would be beyond the resources of the Secretariat and was not necessary for the project as outlined above; furthermore, case law applying the Convention was being collected and published by other organizations, most notably in the Yearbook of Commercial Arbitration by the International Council for Commercial Arbitration (ICCA).

403. The primary purpose of the project was to publish the findings. It was said to be premature to predict whether any proposals to the Commission might emanate from the project. One tentative idea mentioned was the preparation of a guide for legislators, possibly with a model act implementing the Convention.

404. In order to enable the Secretariat to work on the project, the Commission called upon the States parties to the Convention to send to the Secretariat the laws dealing with the recognition and enforcement of foreign arbitral awards.

## VII. CASE-LAW ON UNCITRAL TEXTS (CLOUT)

### A. Introduction

405. Pursuant to a decision taken by the Commission at its twenty-first session (1988), the Secretariat established the Case-Law on UNCITRAL Texts (CLOUT).<sup>17</sup> The mechanism for the operation of CLOUT was set forth in document A/CN.9/SER.C/GUIDE/1.

<sup>16</sup>United Nations, *Treaty Series*, vol. 330, p. 3.

<sup>17</sup>For background information on CLOUT, see A/CN.9/267; *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, para. 377; A/CN.9/312; and *Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17)*, paras. 98-109.

## B. Consideration by the Commission

406. At its current session, the Commission noted with appreciation that since its twenty-seventh session (1994) three additional sets of abstracts with court decisions and arbitral awards relating to the United Nations Sales Convention and the UNCITRAL Model Law on International Commercial Arbitration ("the Model Arbitration Law") were published (A/CN.9/SER.C/ABSTRACTS/4-6). The conviction was widely expressed that CLOUT was beneficial, in particular in promoting the uniform interpretation and application of the statutory texts of UNCITRAL, which was an important aspect of the mandate of the Commission. The Commission also affirmed the importance to it of CLOUT in the fulfilment of its responsibility of promoting the uniform interpretation and application of its legislative texts. That was in view, in particular, of the universal membership of the Organization and its ability to reach the users of those texts in all six United Nations languages.

407. The Commission also noted with appreciation that a draft thesaurus of the United Nations Sales Convention, namely an analytical list of issues arising in the context of the Convention, which had been prepared by the Secretariat, was finalized by Professor John O. Honnold. It was noted that the thesaurus could facilitate searches for decisions relevant to a given issue or a given article of the United Nations Sales Convention that could be undertaken in the context of both a paper publication and a data bank intended to be established by the Secretariat. In reply to a query raised, it was noted that a data bank containing abstracts could prove to be extremely useful if it were to be made available to users of the United Nations Sales Convention throughout the world via electronic communications systems. In that regard, the suggestion was made that a thesaurus should also be prepared for the Model Arbitration Law, in order to facilitate searches for decisions and arbitral awards applying the Model Law as well.

408. The Commission expressed its appreciation to the national correspondents and the Secretariat for their work and urged States to cooperate with the Secretariat in the operation of CLOUT and to facilitate the carrying out of the tasks of the national correspondents. It was suggested that States might consider ways and means by which the national correspondents could be assisted in identifying and collecting court decisions and arbitral awards applying an UNCITRAL legislative text, in preparing abstracts thereon and in forwarding those abstracts to the Secretariat in a timely fashion. The Commission also urged States that had not yet appointed a national correspondent to do so. It was noted that in order for CLOUT to achieve its full capacity in furthering the desired uniformity in interpretation and application of UNCITRAL texts it was important that CLOUT would be constantly updated and would reflect the case law of all implementing States.

409. The Commission noted that the Secretariat's work of editing abstracts, storing decisions and awards in their original form, translating abstracts into the other five United Nations languages, publishing them in the six United Nations languages, forwarding abstracts and full texts of decisions and awards to interested parties upon request and establishing and operating a data bank would substantially

increase as the number of decisions and awards covered by CLOUT increased. The Commission therefore requested that adequate resources be made available to its Secretariat for the effective operation of CLOUT.

410. A number of queries were raised. One query referred to the conditions for the appointment of national correspondents. In reply, it was noted that, as explained in the User Guide (paragraph 5), any State that had adopted a convention emanating from UNCITRAL or that had enacted legislation based on an UNCITRAL model law could appoint such a national correspondent. It was also noted that national correspondents might, for example, be lawyers in Government or private practice, or law professors or other individuals well positioned to monitor case decisions. The primary task of the national correspondent was said to be to collect court decisions issued and arbitral awards published in his or her respective State that were of relevance to the interpretation and application of UNCITRAL legal texts. That meant in fact that national correspondents would not necessarily report a case that merely referred to an UNCITRAL legal text, since it might have no interpretative value. Another query was whether decisions issued by an administrative body should be reported. In reply, it was explained that decisions of, e.g., administrative agencies might also be reported, provided that they had interpretative value.

411. With regard to the relationship between the Commission and the national correspondents in CLOUT-related matters, the Commission reaffirmed its earlier decision that policy matters, such as, for example, the question of cooperation with private entities, fell within its mandate, while the specific details of the operation of CLOUT should be left to the discretion of the national correspondents.<sup>18</sup>

## VIII. TRAINING AND TECHNICAL ASSISTANCE

412. The Commission had before it a note by the Secretariat (A/CN.9/415) outlining the training and technical assistance activities of the Commission that had taken place since the previous session and indicating the direction of future activities being planned. UNCITRAL seminars and briefing missions for Government officials are designed to explain the salient features and utility of international trade law instruments of UNCITRAL, as well as of certain texts relevant to international trade law prepared by other organizations. The Secretariat might be requested to provide a briefing mission when, for example, a developing country or newly independent State is considering the role that UNCITRAL legal texts are to play in its law reform.

413. It was reported that since the previous session, the following seminars and briefing missions had taken place: (a) Shanghai, China (27-28 June 1994), held in cooperation with the China International Economic and Trade Commission (CIETAC), and attended by approximately 90 participants; (b) Harare, Zimbabwe (1-3 August 1994), held in cooperation with the Office of the Attorney-General, and attended by approximately 70 participants; (c) Gaborone, Botswana (8-10 August 1994), held in cooperation with the

<sup>18</sup>Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), para. 207.



Office of the Attorney-General, and attended by approximately 50 participants; (d) Windhoek, Namibia (12-16 August 1994), held in cooperation with the Office of the Attorney-General, and attended by approximately 30 participants; (e) Nairobi, Kenya (12-15 September 1994), held in cooperation with the Office of the Attorney-General, and attended by approximately 60 participants; (f) Tblisi, Georgia (7-9 November 1994), briefing mission held in cooperation with the Ministry of Foreign Affairs; (g) Baku, Azerbaijan (11-15 November 1994), briefing mission held in cooperation with the Ministry of Foreign Affairs; (h) Yerevan, Armenia (16-18 November 1994), briefing mission held in cooperation with the Ministry of Foreign Affairs; (i) Panama City, Panama (17-18 November 1994), held in cooperation with the Chamber of Commerce and Boutin Law Firm, and attended by approximately 150 participants; (j) Cali, Colombia (21-22 November 1994), held in cooperation with the Chamber of Commerce and the Inter-American Commission of Commercial Arbitration, and attended by approximately 150 participants; (k) Tashkent, Uzbekistan (21-23 November 1994), briefing mission held in cooperation with the Ministry of Foreign Economic Relations; (l) Prague, Czech Republic (4-5 April 1995), held in cooperation with the Ministry of Industry and Trade, and attended by approximately 70 participants.

414. The Commission noted that the Sixth UNCITRAL Symposium on International Trade Law was being held, on the occasion of the twenty-eighth session of the Commission, from 22 to 26 May 1995. As was the case at previous Symposia, lecturers were invited primarily from delegations to the Commission session and from the Secretariat. The travel and subsistence costs of twenty-three participants from Africa, Asia, eastern Europe and Latin America were paid from the UNCITRAL Trust Fund for Symposia. In addition, 65 individuals attended without such financial assistance.

415. The Secretariat reported that technical assistance was provided to States preparing legislation based on UNCITRAL model laws in the areas of international commercial arbitration, procurement and international credit transfers. Such assistance was requested to take various forms, including, for example, reviews of preparatory drafts of legislation from the viewpoint of UNCITRAL model laws, assistance in the preparation of drafts, comments on reports of law reform commissions, and briefings for legislators, judges, arbitrators and other end users of UNCITRAL legal texts embodied in national legislation (e.g., judges, arbitrators and procurement managers).

416. In order to facilitate further the provision of technical assistance by the Secretariat, the Commission authorized the Secretariat to request States to provide it with legislation currently in effect in the areas of activity of the Commission.

417. The Secretariat reported that, for the remainder of 1995, seminars and legal-assistance briefing missions were being planned in Africa, Asia, Latin America and eastern Europe.

418. It was also reported that, as it had done in recent years, the Secretariat had agreed to co-sponsor the next three-month International Trade Law Post-Graduate Course

to be organized by the University Institute of European Studies and the International Training Centre of the International Labour Organization at Turin. In 1994, the fourth year in which the Course was offered, approximately half of the participants were from Italy and 26 from outside of Italy, with a majority of those being from developing countries. Issues of harmonization of international trade law and various items on the Commission's work programme were covered in the Course.

419. The Commission noted with approval that the Secretariat had taken steps to obtain cooperation and coordination with other agencies, both within and without the United Nations system, in the provision of training and technical assistance in the field of international trade law. It also noted reports that there apparently was an increase in attention being paid by States to law reform relating to international trade, as well as a degree of increasing attention by bilateral and multilateral development agencies, including other parts of the United Nations system, to the importance of harmonization and modernization of commercial law. It was noted that, from the standpoint of States that were the recipients of legal technical assistance, such cooperation and coordination was particularly desirable. It was emphasized that coordination and cooperation among technical assistance agencies increased the extent to which the guidance and assistance would help to establish legal systems that not only were internally consistent, but also utilized internationally developed trade law conventions, model laws, and other legal texts and would thus maximize the ability of business parties from different states to plan and implement business transactions successfully.

420. The Commission therefore expressed its appreciation and renewed its call for continued and increased cooperation and coordination among entities providing legal technical assistance, with a view to ensuring that, when United Nations system entities, such as the United Nations Development Programme and the International Bank for Reconstruction and Development, or outside entities, are involved in providing legal technical assistance, the legal texts formulated by the Commission and recommended by the General Assembly to be considered are in fact so considered and used.

421. The Commission noted that the ability of the Secretariat to implement training and technical assistance plans was contingent upon the receipt of sufficient funds in the form of contributions to the UNCITRAL Trust Fund for Symposia, as well as on the provision to the Secretariat of the necessary human resources, which was not currently the case. In the current situation, the demand for training and technical assistance with respect to UNCITRAL legal texts and the need to promote the use of those texts, remained to a significant extent unfulfilled. It was noted that no funds for the travel of participants and lecturers had been provided for in the regular budget. As a result, expenses had to be met by voluntary contributions to the UNCITRAL Trust Fund for Symposia, which remained at an insufficiently low level.

422. In order to facilitate the making of contributions to the UNCITRAL Trust Fund for Symposia, the Commission decided to request that it be placed on the agenda of the pledging conference taking place within the framework of

the General Assembly session, on the understanding that that would not have any effect on the obligation of a State to pay its assessed contribution to the Organization.

423. It was noted that of particular value were contributions made to the UNCITRAL Trust Fund for Symposia on a multi-year basis, because they permitted the Secretariat to plan and finance the programme without the need to solicit funds from potential donors for each individual activity. Such a contribution has been received from Canada. In addition, contributions from Austria, Denmark, France, Pakistan and Switzerland have been used for the seminar programme. The Commission expressed its appreciation to those States and organizations that have contributed to the Commission's programme of training and assistance by providing funds or staff or by hosting seminars. The Commission also renewed its call that it be provided with the human resources to meet the need for its training and technical assistance activities.

## IX. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS

424. The Commission considered the status of signatures, ratifications, accessions and approvals of conventions that were the outcome of its work, that is, the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) ("the Limitation Convention"), the Protocol amending the Limitation Convention (Vienna, 1980), the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ("the Hamburg Rules"), the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("the United Nations Sales Convention"), the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) ("the UNCITRAL Bills and Notes Convention") and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991) ("the United Nations Terminal Operators Convention"). The Commission also considered the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). In addition, the Commission took note of the jurisdictions that had enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration ("the UNCITRAL Arbitration Model Law").

425. The Commission noted with pleasure that, since the report submitted to the Commission at its twenty-seventh session (1994), Cuba had deposited an instrument of accession and Poland an instrument of ratification with regard to the Limitation Convention, and that both States had deposited instruments of accession with regard to the Protocol amending the Limitation Convention.

426. The Commission was pleased to note that the Czech Republic had deposited an instrument of succession to the signature by the former Czechoslovakia of the Hamburg Rules.

427. The Commission was pleased to note the deposit, since its twenty-seventh session, of instruments of ratification by Poland and Singapore with regard to the United Nations Sales

Convention and the accession to the Convention by Cuba, Georgia, Lithuania, Republic of Moldova and New Zealand.

428. The Commission was pleased to note that, since its twenty-seventh session, instruments of accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards had been deposited by Bolivia, Lithuania, Mali, Mongolia, Portugal, Senegal, Venezuela and Zimbabwe.

429. The Commission noted with pleasure that, since its twenty-seventh session, legislation based on the UNCITRAL Arbitration Model Law had been enacted in Bahrain, Hungary, Singapore and Ukraine.

## Hamburg Rules

430. The Commission recalled its consideration at its twenty-seventh session (1994) of the status of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ("the Hamburg Rules").<sup>19</sup> The Commission reiterated its serious concern about the problems that arose as a result of the coexistence of different liability regimes relating to the carriage of goods by sea.<sup>20</sup>

431. The Commission noted that, pursuant to the considerations at that session, the Secretary-General had sent a note verbale to the Member States of the United Nations, informing them of the considerations of the Commission and of the Secretary-General's conviction that the problems could best be overcome by a wide adherence to the Hamburg Rules, and recommending to the Governments to consider an early adherence to the Hamburg Rules.

432. Recalling and appreciating that the Comité Maritime International (CMI) had expressed an interest in working together with the Commission towards a solution that would produce uniformity of law,<sup>21</sup> the Commission was informed that CMI had received some 22 replies to a questionnaire it had sent to its member national organizations seeking their opinions on how the current problems could be overcome. While an analysis of the replies had yet to be formulated by CMI, the conclusion could be drawn that no consensus view was emerging as to how the law on the carriage of goods by sea should be modernized and harmonized.

433. The Commission requested the Secretary-General of the United Nations to continue his efforts to promote wider adherence to the Hamburg Rules.

## Activities of other organizations

434. The Commission heard with interest a statement on behalf of the Asian-African Legal Consultative Committee (AALCC) about the activities of its standing committee on trade law matters in relation to monitoring and reviewing international trade law from an African-Asian perspective. The Commission was informed of two of its initiatives,

<sup>19</sup>*Ibid.*, paras. 247-252.

<sup>20</sup>*Ibid.*, para. 249.

<sup>21</sup>*Ibid.*, para. 251.



namely, the preparation of legal and institutional guidelines for privatization programmes and for a post-privatization regulatory framework and the promotion of standardization and harmonization of commercial law and practices in the African-Asian region.

435. The Commission heard with interest a statement on behalf of UNIDROIT concerning its current work in establishing a data bank on uniform law, including a planned meeting with relevant international organizations at Rome in early 1996 to discuss the feasibility of the project.

436. The Commission was also informed of the activities of the Organization of American States with regard to pursuing the unification and harmonization of trade law in the Americas. The Commission took note of the completion of the Inter-American Convention on the law applicable to international contracts prepared by the Specialized Conference on Private International Law, sponsored by the Organization.

#### X. GENERAL ASSEMBLY RESOLUTIONS ON THE WORK OF THE COMMISSION

437. The Commission took note with appreciation of General Assembly resolution 49/54 of 9 December 1994, in which the General Assembly noted with satisfaction the adoption by the Commission of the UNCITRAL Model Law on Procurement of Goods, Construction and Services and of the Guide to Enactment of the Model Law. In paragraph 2 of the resolution, the General Assembly recommended that, in view of the desirability of improvement and uniformity of the laws of procurement, all States should give favourable consideration to the Model Law when they enact or revise their procurement laws.

438. The Commission took note with appreciation of General Assembly resolution 49/55 of 9 December 1994 on the report of the twenty-seventh session of the Commission, held in 1994. In particular, it was noted that in paragraph 7 the General Assembly appealed to Governments, the relevant United Nations organs, organizations, institutions and individuals, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to make voluntary contributions to the Trust Fund for the Commission to grant travel assistance to developing countries that were members of the Commission. That Trust Fund was established pursuant to resolution 48/32 of 9 December 1993.

439. The Commission further noted with appreciation the decision of the General Assembly in paragraph 8 of its resolution 49/55 to continue its consideration in the competent Main Committee, during the forty-ninth session of the General Assembly of granting travel assistance, within existing resources, to the least developed countries that were members of the Commission, at their request and in consultation with the Secretary-General, in order to ensure the full participation by all Member States in the sessions of the Commission and its working groups.

440. The Commission also noted with appreciation that the General Assembly, in paragraph 10 of that resolution, had

stressed the importance of bringing into effect the conventions emanating from the work of the Commission for the global unification and harmonization of international trade law, and to that end, had urged States that had not done so to consider signing, ratifying or acceding to those conventions.

441. The Commission further noted with appreciation that the General Assembly in paragraph 4 of the same resolution, had reaffirmed the importance, in particular for developing countries, of the work of the Commission concerned with training and assistance in the field of international trade law, and that the Assembly, in paragraph 5, expressed the desirability for the Commission to sponsor seminars and symposia to provide such training and assistance. It was observed that the Commission had increased its training and assistance within the limited human and financial resources available.

442. The Commission welcomed the request by the General Assembly to the Secretary-General to ensure that adequate resources should be allocated for the effective implementation of the programmes of the Commission. The Commission in particular hoped that the Secretariat would be allocated sufficient resources to meet the increased demands for training and assistance and the growing workload relating to the "Case law on UNCITRAL texts" (CLOUT) (see paragraphs 405-411, above).

443. The Commission was informed that efforts were being made within the Secretariat of the Organization to allocate sufficient resources to the secretariat of the Commission. However, as it was probable that additional resources were not likely to be made available so as to meet the needs of the secretariat of the Commission, the Commission appealed to the Governments to come to the assistance of the secretariat. It was suggested that the assistance by Governments or their aid agencies might take various forms. Among those mentioned were: assigning to the secretariat of the Commission, for a year or so, lawyers who would be integrated, as United Nations Associate Experts, into the work of the secretariat; reserving some research capacity in national institutions for comparative law research on possible future work topics; co-sponsoring seminars jointly with the secretariat; delegating lecturers to seminars on texts emanating from the Commission; donating air-tickets and accommodation for lecturers or for participants in regional seminars coming from developing countries; and sponsoring and covering costs of interns, in particular those from developing countries, in the secretariat of the Commission.

#### XI. OTHER BUSINESS

##### A. Bibliography

444. The Commission noted with appreciation the bibliography of recent writings related to the work of the Commission (A/CN.9/417).

445. The Commission stressed that it was important for it to have as complete as possible information about publications, including academic theses, commenting on results of its work. It therefore requested Governments, academic institutions and other relevant organizations to send to the Secretariat copies of such publications.

### B. Willem C. Vis International Commercial Arbitration Moot

446. It was reported to the Commission that the Institute of International Commercial Law at the Pace University School of Law, New York, had organized the second Willem C. Vis International Commercial Arbitration Moot (Vienna, 22-26 March 1995). Legal issues that the teams of students participating in the Moot dealt with were based on the United Nations Convention on Contracts for the International Sale of Goods, the Convention on the Limitation Period in the International Sale of Goods, the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules. In the 1995 Moot, 22 teams participated from law schools from 15 countries. The third Moot would be held in March 1996 at Vienna.

447. The Commission heard the report with interest and appreciation. It regarded the Moot, with its international participation, as an excellent method of teaching international trade law and disseminating information about current uniform texts.

### C. Date and place of the twenty-ninth session of the Commission

448. It was decided that the Commission would hold its twenty-ninth session from 28 May to 14 June 1996 in New York, at which time it would complete work on the draft Model Law on Electronic Data Interchange and the Notes on Organizing Arbitral Proceedings.

### D. Sessions of working groups

449. It was decided that the name of the Working Group on the New International Economic Order would be changed to "Working Group on Insolvency Law", in order to reflect the subject being assigned to it. It was further decided that the Working Group would hold its eighteenth

session from 30 October to 10 November 1995 at Vienna. The Commission authorized the holding of a nineteenth session of the Working Group from 1 to 12 April 1996 in New York, should, in the view of the Working Group, the progress of work so warrant.

450. It was decided that the Working Group on International Contract Practices would hold its twenty-fourth session from 13 to 24 November 1995 at Vienna, which would be devoted to work on assignment in receivables financing.

451. While the Commission agreed that the Working Group on Electronic Data Interchange would hold its thirtieth session from 4 to 15 March 1996 at Vienna, it was later determined, for reasons relating to the availability of interpretation services, that the thirtieth session of the Working Group had to take place from 26 February to 8 March 1996 at Vienna.

## ANNEX I

### *Draft United Nations Convention on Independent Guarantees and Stand-by Letters of Credit*

Annex I is reproduced in part three, I of this *Yearbook*.

## ANNEX II

### *Draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication*

Annex II is reproduced in part three, II of this *Yearbook*.

## ANNEX III

### *List of documents before the Commission at its twenty-eighth session*

Annex III is reproduced in part three, V of this *Yearbook*.

## B. United Nations Conference on Trade and Development: extract from the report of the Trade and Development Board on the first part of its forty-second session (TD/B/42(1)/19(Vol.I))\*

"I. C. (agenda item 6) (b) *Progressive development of the law of international trade: twenty-eighth annual report of the United Nations Commission on International Trade Law*

At its 868th (closing) meeting, on 20 September 1995, the Trade and Development Board took note of the report of the United Nations Commission on International Trade Law on its twenty-eighth session (A/50/17), which had been circulated to the Board under cover of a note by the UNCTAD secretariat (TD/B/42(1)/16). The Board took note also of the statement made in this connection by the representative of Hungary.<sup>10</sup>

"II. B. *Statement by the representative of Hungary on agenda item 6(b)*

In connection with the Board's action on the report of the United Nations Commission on International Trade Law (UNCITRAL) on its twenty-eighth session (A/50/17),<sup>11</sup> the representative of Hungary said that UNCITRAL's activities had a direct relevance to international trade practices. By its very nature UNCITRAL focused on legal texts that were intended to serve either as a model or as binding rules if an international convention were concluded. In the view of his delegation, the processes under way in UNCITRAL should be brought to the attention of the business community. The UNCTAD secretariat could examine the modalities for doing this and endeavour to provide the relevant general information.

<sup>10</sup>For the summary of the statement by Hungary, see section II.B."

<sup>11</sup>For the Summary of the statement by Hungary, see section II.B."

\*Official Records of the General Assembly, Fiftieth Session, Supplement No. 15 (A/50/15).

## C. General Assembly: report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session; report of the Sixth Committee (A/50/640 and Corr.1)

### I. INTRODUCTION

1. The item entitled "Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session" was included in the provisional agenda of the fiftieth session of the General Assembly pursuant to Assembly resolution 49/55 of 9 December 1994.

2. At its 3rd plenary meeting, on 22 September 1995, the General Assembly, on the recommendation of the General Committee, decided to include the item in its agenda and to allocate it to the Sixth Committee.

3. For its consideration of the item, the Sixth Committee had before it the following documents:

(a) Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session;<sup>1</sup>

(b) Report of the Secretary-General on the implementation of paragraph 8 of General Assembly resolution 49/55 on granting travel assistance to delegates of developing countries (A/50/434).

4. The Sixth Committee considered the item at its 3rd to 5th and 35th meetings, from 26 to 28 September and on 9 November 1995. The views of the representatives who spoke during the Committee's consideration of the item are set out in the relevant summary records (A/C.6/50/SR.3-5 and 35).

5. At the 3rd meeting, on 26 September, the Chairman of the United Nations Commission on International Trade Law at its twenty-eighth session introduced the report of the Commission on the work of that session.

6. At the 5th meeting, on 28 September, the Chairman of the Commission made a closing statement.

### II. CONSIDERATION OF PROPOSALS

#### A. Draft resolution A/C.6/50/L.4

7. At the 35th meeting, on 9 November, the representative of Austria, on behalf of Algeria, Argentina, Australia, Aus-

<sup>1</sup>Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17).

tria, Belgium, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Canada, Croatia, the Czech Republic, Denmark, Ecuador, Egypt, Finland, Germany, Greece, Guatemala, Honduras, Hungary, Italy, Kenya, Mexico, Morocco, Norway, Peru, Poland, Portugal, Singapore, Slovakia, Spain, Sweden, Turkey, Uganda, Uruguay and Venezuela, later joined by Albania, Azerbaijan, Bulgaria, Cyprus, France, India, Myanmar, Nigeria and Thailand, introduced a draft resolution entitled "Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session" (A/C.6/50/L.4).

8. At the same meeting, the Committee adopted draft resolution A/C.6/50/L.4 (see para. 12, draft resolution I).

9. The representative of the Russian Federation made a statement after the adoption of the draft resolution (see A/C.6/50/SR.35).

#### B. Draft resolution A/C.6/50/L.5

10. At the 35th meeting, on 9 November, the representative of Austria, on behalf of Australia, Austria, Bosnia and Herzegovina, Canada, Croatia, the Czech Republic, Denmark, Ecuador, Finland, Guatemala, Honduras, Hungary, Italy, Norway, Portugal, Singapore, Slovakia, Spain, Sweden, the United Kingdom of Great Britain and Northern Ireland and the United States of America, later joined by France and Thailand, introduced a draft resolution entitled "United Nations Convention on Independent Guarantees and Stand-by Letters of Credit" (A/C.6/50/L.5).

11. At the same meeting, the Committee adopted draft resolution A/C.6/50/L.5 without a vote (see para. 12, draft resolution II).

### III. RECOMMENDATIONS OF THE SIXTH COMMITTEE

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

[The Texts are not reproduced in this section. Draft resolutions I and II were adopted, with editorial changes as General Assembly resolutions 50/47 and 50/48 (see section D below).]

## D. General Assembly resolutions 50/47 and 50/48 of 11 December 1995

50.47. *Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session*

*The General Assembly,*

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it created the United Nations Commission on Inter-

national 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 conviction that the progressive harmonization and unification of international trade law, in reducing or

removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would significantly contribute 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,

*Stressing* the value of participation by States at all levels of economic development and with different legal systems in the process of harmonizing and unifying international trade law,

*Having considered* the report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session,<sup>1</sup>

*Mindful* of the valuable contribution to be rendered by the Commission within the framework of the United Nations Decade of International Law, particularly as regards the dissemination of international trade law,

*Concerned* about the relatively low incidence of expert representation from developing countries at sessions of the Commission and particularly of its working groups during recent years, owing in part to inadequate resources to finance the travel of such experts,

*Having considered* the report of the Secretary-General,<sup>2</sup>

*Concerned* about the fact that the need for and interest in the training and assistance programme of the Commission can only partially be met, in view of the limited human and financial resources available, and that the work of the Secretariat in the context of the Case-Law on the United Nations Commission on International Trade Law Texts would substantially increase as the number of the court decisions and arbitral awards covered thereby grows,

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session;

2. *Takes note with satisfaction* of the completion and adoption by the Commission of the draft Convention on Independent Guarantees and Stand-by Letters of Credit;<sup>3</sup>

3. *Commends* the Commission for the progress made at its twenty-eighth session in the preparation of a draft Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication, as well as in the preparation of draft Notes on Organizing Arbitral Proceedings, and in this connection welcomes the decision of the Commission to continue its consideration of the draft Model Law and the draft Notes with a view to completing its work during its twenty-ninth session;

4. *Welcomes* the decision of the Commission to commence work on the subjects of receivables financing and cross-border insolvency, and to consider the feasibility and desirability of undertaking work on negotiability and transferability of electronic data interchange transport documents,

based on a background study to be prepared by the Secretariat and on the discussion of the topic by the Working Group on Electronic Data Interchange at its thirtieth session;

5. *Reaffirms* 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 order to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law, and in this connection recommends that the Commission, through its secretariat, continue to maintain close cooperation with the other international organs and organizations, including regional organizations, active in the field of international trade law;

6. *Also reaffirms* the importance, in particular for developing countries, of the work of the Commission concerned with training and technical assistance in the field of international trade law, such as assistance in the preparation of national legislation based on legal texts of the Commission;

7. *Expresses* the desirability for increased efforts by the Commission in sponsoring seminars and symposia to provide such training and technical assistance, and in this connection:

(a) *Expresses* its appreciation to the Commission for organizing seminars and briefing missions in Armenia, Azerbaijan, Botswana, China, Colombia, the Czech Republic, Georgia, Kenya, Namibia, Panama, Uzbekistan and Zimbabwe;

(b) *Expresses* its appreciation to the Governments whose contributions made it possible for the seminars and briefing missions to take place, and appeals to Governments, the relevant United Nations organs, organizations and 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 financing and organizing seminars and symposia, in particular in developing countries, and in the award of fellowships to candidates from developing countries to enable them to participate in such seminars and symposia;

(c) *Appeals* to the United Nations Development Programme and other bodies responsible for development assistance, such as the International Bank for Reconstruction and Development and the European Bank for Reconstruction and Development, as well as to Governments in their bilateral aid programmes, to support the training and technical assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission;

8. *Appeals* to Governments, the relevant United Nations organs, organizations and institutions and individuals, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to make voluntary contributions to the Trust Fund for travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General;

9. *Decides*, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to continue its consideration in the competent

<sup>1</sup>Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17).

<sup>2</sup>A/50/434.

<sup>3</sup>Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), annex I.

Main Committee during the fiftieth session of the General Assembly of granting travel assistance, within existing resources, to the least developed countries that are members of the Commission, at their request and in consultation with the Secretary-General;

10. *Requests* the Secretary-General to ensure that adequate resources are allocated for the effective implementation of the programmes of the Commission;

11. *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;

12. *Also requests* the Secretary-General to submit a report on the implementation of paragraph 9 above to the General Assembly at its fifty-first session.

87th plenary meeting  
11 December 1995

#### 50/48. *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit*

##### *The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it created 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,

*Being aware* of the uncertainty and lack of uniformity currently prevailing among the various legal systems in the field of independent guarantees and stand-by letters of credit,

*Being convinced* that the adoption of a convention on independent guarantees and stand-by letters of credit will usefully contribute to overcoming the current uncertainties and disparities in this field of considerable practical importance and thus facilitate the use of such instruments,

*Being aware* that the Commission, at its twenty-second session in 1989, decided to prepare uniform legislation on independent guarantees and stand-by letters of credit and entrusted the Working Group on International Contract Practices with the preparation of a draft,

*Noting* that the Working Group devoted eleven sessions, from 1990 to 1995, to the preparation of the draft United

Nations Convention on Independent Guarantees and Stand-by Letters of Credit, and 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 twenty-eighth session of the Commission, either as members or observers, with a full opportunity to speak and make proposals,

*Taking note with satisfaction* of the decision of the Commission at its twenty-eighth session<sup>1</sup> to submit the draft Convention to the General Assembly for its consideration,

*Taking note* of the draft Convention adopted by the Commission,<sup>2</sup>

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for preparing the draft United Nations Convention on Independent Guarantees and Stand-by Letters of Credit;

2. *Adopts* and opens for signature or accession the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, contained in the annex to the present resolution;

3. *Calls upon* all Governments to consider becoming party to the Convention.

87th plenary meeting  
11 December 1995

<sup>1</sup>Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), para. 201.

<sup>2</sup>Ibid., annex I.

## ANNEX

### UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

#### CHAPTER I. SCOPE OF APPLICATION

##### *Article 1*

##### *Scope of application*

1. This Convention applies to an international undertaking referred to in article 2:

(a) If the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State, or

(b) If the rules of private international law lead to the application of the law of a Contracting State,

unless the undertaking excludes the application of the Convention.

2. This Convention applies also to an international letter of credit not falling within article 2 if it expressly states that it is subject to this Convention.

3. The provisions of articles 21 and 22 apply to international undertakings referred to in article 2 independently of paragraph 1 of this article.

## Article 2

*Undertaking*

1. For the purposes of this Convention, an undertaking is an independent commitment, known in international practice as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or persons ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person.

2. The undertaking may be given:

- (a) At the request or on the instruction of the customer ("principal/ applicant") of the guarantor/issuer;
- (b) On the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal/ applicant") of that instructing party; or
- (c) On behalf of the guarantor/issuer itself.

3. Payment may be stipulated in the undertaking to be made in any form, including:

- (a) Payment in a specified currency or unit of account;
- (b) Acceptance of a bill of exchange (draft);
- (c) Payment on a deferred basis;
- (d) Supply of a specified item of value.

4. The undertaking may stipulate that the guarantor/issuer itself is the beneficiary when acting in favour of another person.

## Article 3

*Independence of undertaking*

For the purposes of this Convention, an undertaking is independent where the guarantor/issuer's obligation to the beneficiary is not:

- (a) Dependent upon the existence or validity of any underlying transaction, or upon any other undertaking (including stand-by letters of credit or independent guarantees to which confirmations or counter-guarantees relate); or
- (b) Subject to any term or condition not appearing in the undertaking, or to any future, uncertain act or event except presentation of documents or another such act or event within a guarantor/issuer's sphere of operations.

## Article 4

*Internationality of undertaking*

1. An undertaking is international if the places of business, as specified in the undertaking, of any two of the following persons are in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer.

2. For the purposes of the preceding paragraph:

- (a) If the undertaking lists more than one place of business for a given person, the relevant place of business is that which has the closest relationship to the undertaking;
- (b) If the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant for determining the international character of the undertaking.

## CHAPTER II. INTERPRETATION

## Article 5

*Principles of interpretation*

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 the international practice of independent guarantees and stand-by letters of credit.

## Article 6

*Definitions*

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

- (a) "Undertaking" includes "counter-guarantee" and "confirmation of an undertaking";
- (b) "Guarantor/issuer" includes "counter-guarantor" and "confirmer";
- (c) "Counter-guarantee" means an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment under that other undertaking has been demanded from, or made by, the person issuing that other undertaking;
- (d) "Counter-guarantor" means the person issuing a counter-guarantee;
- (e) "Confirmation" of an undertaking means an undertaking added to that of the guarantor/issuer, and authorized by the guarantor/issuer, providing the beneficiary with the option of demanding payment from the confirmer instead of from the guarantor/issuer, upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the confirmed undertaking, without prejudice to the beneficiary's right to demand payment from the guarantor/issuer;
- (f) "Confirmer" means the person adding a confirmation to an undertaking;
- (g) "Document" means a communication made in a form that provides a complete record thereof.

## CHAPTER III. FORM AND CONTENT OF UNDERTAKING

## Article 7

*Issuance, form and irrevocability of undertaking*

1. Issuance of an undertaking occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer concerned.
2. An undertaking may be issued in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary.
3. From the time of issuance of an undertaking, a demand for payment may be made in accordance with the terms and conditions of the undertaking, unless the undertaking stipulates a different time.
4. An undertaking is irrevocable upon issuance, unless it stipulates that it is revocable.

*Article 8**Amendment*

1. An undertaking may not be amended except in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph 2 of article 7.

2. Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, an undertaking is amended upon issuance of the amendment if the amendment has previously been authorized by the beneficiary.

3. Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, where any amendment has not previously been authorized by the beneficiary, the undertaking is amended only when the guarantor/issuer receives a notice of acceptance of the amendment by the beneficiary in a form referred to in paragraph 2 of article 7.

4. An amendment of an undertaking has no effect on the rights and obligations of the principal/applicant (or an instructing party) or of a confirmer of the undertaking unless such person consents to the amendment.

*Article 9**Transfer of beneficiary's right to demand payment*

1. The beneficiary's right to demand payment may be transferred only if authorized in the undertaking, and only to the extent and in the manner authorized in the undertaking.

2. If an undertaking is designated as transferable without specifying whether or not the consent of the guarantor/issuer or another authorized person is required for the actual transfer, neither the guarantor/issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it.

*Article 10**Assignment of records*

1. Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the undertaking.

2. If the guarantor/issuer or another person obliged to effect payment has received a notice originating from the beneficiary, in a form referred to in paragraph 2 of article 7, of the beneficiary's irrevocable assignment, payment to the assignee discharges the obligor, to the extent of its payment, from its liability under the undertaking.

*Article 11**Cessation of right to demand payment*

1. The right of the beneficiary to demand payment under the undertaking ceases when:

(a) The guarantor/issuer has received a statement by the beneficiary of release from liability in a form referred to in paragraph 2 of article 7;

(b) The beneficiary and the guarantor/issuer have agreed on the termination of the undertaking in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph 2 of article 7;

(c) The amount available under the undertaking has been paid, unless the undertaking provides for the automatic renewal or for

an automatic increase of the amount available or otherwise provides for continuation of the undertaking;

(d) The validity period of the undertaking expires in accordance with the provisions of article 12.

2. The undertaking may stipulate, or the guarantor/issuer and the beneficiary may agree elsewhere, that return of the document embodying the undertaking to the guarantor/issuer, or a procedure functionally equivalent to the return of the document in the case of the issuance of the undertaking in non-paper form, is required for the cessation of the right to demand payment, either alone or in conjunction with one of the events referred to in subparagraphs (a) and (b) of paragraph 1 of this article. However, in no case shall retention of any such document by the beneficiary after the right to demand payment ceases in accordance with subparagraph (c) or (d) of paragraph 1 of this article preserve any rights of the beneficiary under the undertaking.

*Article 12**Expiry*

The validity period of the undertaking expires:

(a) At the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the undertaking, provided that, if the expiry date is not a business day at the place of business of the guarantor/issuer at which the undertaking is issued, or of another person or at another place stipulated in the undertaking for presentation of the demand for payment, expiry occurs on the first business day which follows;

(b) If expiry depends according to the undertaking on the occurrence of an act or event not within the guarantor/issuer's sphere of operations, when the guarantor/issuer is advised that the act or event has occurred by presentation of the document specified for that purpose in the undertaking or, if no such document is specified, of a certification by the beneficiary of the occurrence of the act or event;

(c) If the undertaking does not state an expiry date, or if the act or event on which expiry is stated to depend has not yet been established by presentation of the required document and an expiry date has not been stated in addition, when six years have elapsed from the date of issuance of the undertaking.

## CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

*Article 13**Determination of rights and obligations*

1. The rights and obligations of the guarantor/issuer and the beneficiary arising from the undertaking are determined by the terms and conditions set forth in the undertaking, including any rules, general conditions or usages specifically referred to therein, and by the provisions of this Convention.

2. In interpreting terms and conditions of the undertaking and in settling questions that are not addressed by the terms and conditions of the undertaking or by the provisions of this Convention, regard shall be had to generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice.

*Article 14**Standard of conduct and liability of guarantor/issuer*

1. In discharging its obligations under the undertaking and this Convention, the guarantor/issuer shall act in good faith and



exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit.

2. A guarantor/issuer may not be exempted from liability for its failure to act in good faith or for any grossly negligent conduct.

#### Article 15

##### Demand

1. Any demand for payment under the undertaking shall be made in a form referred to in paragraph 2 of article 7 and in conformity with the terms and conditions of the undertaking.

2. Unless otherwise stipulated in the undertaking, the demand and any certification or other document required by the undertaking shall be presented, within the time that a demand for payment may be made, to the guarantor/issuer at the place where the undertaking was issued.

3. The beneficiary, when demanding payment, is deemed to certify that the demand is not in bad faith and that none of the elements referred to in subparagraphs (a), (b) and (c) of paragraph 1 of article 19 are present.

#### Article 16

##### Examination of demand and accompanying documents

1. The guarantor/issuer shall examine the demand and any accompanying documents in accordance with the standard of conduct referred to in paragraph 1 of article 14. In determining whether documents are in facial conformity with the terms and conditions of the undertaking, and are consistent with one another, the guarantor/issuer shall have due regard to the applicable international standard of independent guarantee or stand-by letter of credit.

2. Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer shall have reasonable time, but not more than seven business days following the day of receipt of the demand and any accompanying documents, in which to:

- (a) Examine the demand and any accompanying documents;
- (b) Decide whether or not to pay;

(c) If the decision is not to pay, issue notice thereof to the beneficiary.

The notice referred to in subparagraph (c) above shall, unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, be made by teletransmission or, if that is not possible, by other expeditious means and indicate the reason for the decision not to pay.

#### Article 17

##### Payment

1. Subject to article 19, the guarantor/issuer shall pay against a demand made in accordance with the provisions of article 15. Following a determination that a demand for payment so conforms, payment shall be made promptly, unless the undertaking stipulates payment on a deferred basis, in which case payment shall be made at the stipulated time.

2. Any payment against a demand that is not in accordance with the provisions of article 15 does not prejudice the rights of the principal/applicant.

#### Article 18

##### Set-off

Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer may discharge the payment obligation under the undertaking by availing itself of a right of set-off, except with any claim assigned to it by the principal/applicant or the instructing party.

#### Article 19

##### Exception to payment obligation

1. If it is manifest and clear that:

- (a) Any document is not genuine or has been falsified;
- (b) No payment is due on the basis asserted in the demand and the supporting documents; or
- (c) Judging by the type and purpose of the undertaking, the demand has no conceivable basis,

the guarantor/issuer, acting in good faith, has a right, as against the beneficiary, to withhold payment.

2. For the purposes of subparagraph (c) of paragraph 1 of this article, the following are types of situations in which a demand has no conceivable basis:

- (a) The contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;
- (b) The underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;

(c) The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) Fulfilment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary;

(e) In the case of a demand under a counter-guarantee, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter-guarantee relates.

3. In the circumstances set out in subparagraphs (a), (b) and (c) of paragraph 1 of this article, the principal/applicant is entitled to provisional court measures in accordance with article 20.

## CHAPTER V. PROVISIONAL COURT MEASURES

#### Article 20

##### Provisional court measures

1. Where, on an application by the principal/applicant or the instructing party, it is shown that there is a high probability that, with regard to a demand made, or expected to be made, by the beneficiary, one of the circumstances referred in subparagraphs (a), (b) and (c) of paragraph 1 of article 19 is present, the court, on the basis of immediately available strong evidence, may:

(a) Issue a provisional order to the effect that the beneficiary does not receive payment, including an order that the guarantor/issuer hold the amount of the undertaking, or

(b) Issue a provisional order to the effect that the proceeds of the undertaking paid to the beneficiary are blocked, taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious harm.

2. The court, when issuing a provisional order referred to in paragraph 1 of this article, may require the person applying therefor to furnish such form of security as the court deems appropriate.

3. The court may not issue a provisional order of the kind referred to in paragraph 1 of this article based on any objection to payment other than those referred to in subparagraphs (a), (b) and (c) of paragraph 1 of article 19, or use of the undertaking for a criminal purpose.

## CHAPTER VI. CONFLICT OF LAWS

### Article 21

#### *Choice of applicable law*

The undertaking is governed by the law the choice of which is:

- (a) Stipulated in the undertaking or demonstrated by the terms and conditions of the undertaking; or
- (b) Agreed elsewhere by the guarantor/issuer and the beneficiary.

### Article 22

#### *Determination of applicable law*

Failing a choice of law in accordance with article 21, the undertaking is governed by the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued.

## CHAPTER VII. FINAL CLAUSES

### Article 23

#### *Depositary*

The Secretary-General of the United Nations is the depositary of this Convention.

### Article 24

#### *Signature, ratification, acceptance, approval, accession*

1. This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until ... [the date two years from the date of adoption].
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open to 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 25

#### *Application to territorial units*

1. If a 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 one or more of them, and may at any time substitute another declaration for its earlier declaration.
2. These declarations are to state expressly the territorial units to which the Convention extends.
3. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the place of

business of the guarantor/issuer or of the beneficiary is located in a territorial unit to which the Convention does not extend, this place of business is considered not to be in a Contracting State.

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

### Article 26

#### *Effect of declaration*

1. Declarations made under article 25 at the time of signature are subject to confirmation upon ratification, acceptance or approval.
2. Declarations and confirmations of declarations 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 which makes a declaration under article 25 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary.

### Article 27

#### *Reservations*

No reservations may be made to this Convention.

### Article 28

#### *Entry into force*

1. This Convention enters into force on the first day of the month following the expiration of one year from the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession.
2. For each State which becomes a Contracting State to this Convention after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.
3. This Convention applies only to undertakings issued on or after the date when the Convention enters into force in respect of the Contracting State referred to in subparagraph (a) or the Contracting State referred to in subparagraph (b) of paragraph 1 of article 1.

### Article 29

#### *Denunciation*

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.
2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period 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 ... one thousand nine hundred and ninety-..., 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 the present Convention.

*Part Two*

**STUDIES AND REPORTS  
ON SPECIFIC SUBJECTS**

# **I. INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT**

## **A. Report of the Working Group on International Contract Practices on the work of its twenty-second session (Vienna, 19-30 September 1994) (A/CN.9/405) [Original: English]**

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## INTRODUCTION

1. Pursuant to a decision taken by the Commission at its twenty-first session,<sup>1</sup> the Working Group on International Contract Practices devoted its twelfth session to a review of the draft Uniform Rules on Guarantees being prepared by the International Chamber of Commerce and to an examination of the desirability and feasibility of any future work relating to greater uniformity at the statutory law level in respect of guarantees and stand-by letters of credit. The Working Group recommended that work be initiated on the preparation of a uniform law, whether in the form of a model law or in the form of a convention.

2. That recommendation was accepted by the Commission at its twenty-second session.<sup>2</sup> The Working Group devoted its thirteenth to twenty-first sessions to the preparation of a uniform law (the reports of those sessions are found in documents A/CN.9/330, A/CN.9/342, A/CN.9/345, A/CN.9/358, A/CN.9/361, A/CN.9/372, A/CN.9/374, A/CN.9/388 and A/CN.9/391). That work has been carried out on the basis of background working papers prepared by the Secretariat on possible issues to be included in the uniform law. Those background papers included: A/CN.9/WG.II/WP.63 (tentative considerations on the preparation of a uniform law); A/CN.9/WG.II/WP.65 (substantive scope of application, party autonomy and its limits, rules of interpretation); A/CN.9/WG.II/WP.68 (amendment, transfer, expiry and obligations of the guarantor); A/CN.9/WG.II/WP.70 and A/CN.9/WG.II/WP.71 (fraud and other objections to payment, injunctions and other court measures, conflict of laws and jurisdiction). The draft articles of the uniform law, which the Working Group decided should as a working assumption be in the form of a draft Convention, were presented by the Secretariat in A/CN.9/WG.II/WP.67, A/CN.9/WG.II/WP.73 and Add.1, A/CN.9/WG.II/WP.76 and Add.1, A/CN.9/WG.II/WP.80 and A/CN.9/WG.II/WP.83. The Working Group also had presented to it, in A/CN.9/WG.II/WP.77, a proposal by the United States of America relating to rules for stand-by letters of credit. At its previous session, the twenty-first, the Working Group noted that the current reading begun by the Working Group (A/CN.9/WG.II/WP.80 and A/CN.9/WG.II/WP.83) would be the final reading of the draft articles prior to submission of the text to the Commission at its twenty-eighth session (1995), as requested by the Commission.<sup>3</sup>

3. The Working Group, which was composed of all States members of the Commission, held its twenty-second session in Vienna, from 19 to 30 September 1994. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Chile, Canada, China, Costa Rica, Ecuador, Egypt, France, Germany, Hungary, India, Iran (Islamic Republic of), Japan, Morocco, Nigeria, Poland, Russian Federation, Saudi Arabia, Spain, Sudan, Thailand, Togo, United Kingdom of Great Britain and Northern Ireland and United States of America.

4. The session was attended by observers from the following States: Algeria, Bosnia and Herzegovina, Brazil, Colombia, Croatia, Czech Republic, Indonesia, Kuwait, Romania, Sweden, Switzerland, Turkey, Ukraine, Venezuela and Yemen.

5. The session was attended by observers from the following international organizations: United Nations Industrial Development Organization (UNIDO), the Hague Conference on Private International Law, Banking Federation of the European Union and Federación Latinoamericana de Bancos (FELABAN).

6. The Working Group elected the following officers:

*Chairman:* Mr. J. Gauthier (Canada)

*Rapporteur:* Mr. M. Koteswara Rao (India).

7. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.82) and a note by the Secretariat containing articles 1 to 27 of the draft Convention (A/CN.9/WG.II/WP.83).

8. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a draft Convention on independent guarantees and stand-by letters of credit.
4. Other business.
5. Adoption of the report.

## I. DELIBERATIONS AND DECISIONS

9. The Working Group discussed draft articles 17 to 27 and draft articles 1 to 7(1) as set forth in A/CN.9/WG.II/WP.83. The deliberations and conclusions of the Working Group relating to draft articles 17 to 27, and 1 to 7(1), of the draft Convention are set forth below in chapter II.

10. Following its approval of the substance of those articles, the Working Group referred the draft articles of the Convention that it had considered to a drafting group that included delegates from China, France, Russian Federation, Spain and the United Kingdom and was established by the Secretariat to assist it in implementing the decisions of the Working Group and ensuring consistency among the six official language versions. The Working Group reviewed the articles after the review by the drafting group and approved the text of those articles as set forth in the annex.

## II. CONSIDERATION OF ARTICLES OF THE DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

## Chapter IV. Rights, obligations and defences

*Article 17. Payment or rejection of demand**Paragraph (2)*

11. The Working Group resumed its consideration of paragraph (2), which had been commenced at the twenty-first session, on the basis of a draft reflecting the two alternative texts that the Secretariat had been requested to present. One alternative required the guarantor/issuer to refuse payment when shown facts making the demand manifestly and clearly improper, while the other provided in such cases a

<sup>1</sup>Official Records of the General Assembly, Forty-third session, Supplement No. 17 (A/43/17), para. 18.

<sup>2</sup>Ibid., Forty-fourth session, Supplement No. 17 (A/44/17), para. 244.

<sup>3</sup>Ibid., Forty-eighth session, Supplement No. 17 (A/48/17), para. 273.



discretionary right to make payment, provided that such payment would be consistent with the good faith obligation in article 13. In the face of differing views as to which alternative would be appropriate, the view was expressed that paragraph (2) could be deleted. However, the Working Group took the view that the retention of paragraph (2) was necessary and turned to a discussion of which approach to retain and how it should be formulated.

12. While there was unanimous accord that, at least in theory, the guarantor/issuer would and should refuse payment in the face of manifest and clear evidence of impropriety, as a practical matter, interest was expressed in a discretionary ("may pay/may refuse payment") approach so as to give the guarantor/issuer a degree of leeway in cases in which the evidence might still leave a degree of doubt in the guarantor/issuer's mind as to whether there was in fact impropriety. Attention was drawn to the prevalence of disputes and allegations of improper demands for payment in the context surrounding demands for payment of undertakings of the type in question. It was stressed that a discretionary approach in such cases would provide a defense for the guarantor/issuer that decided, because of doubt, to pay, while a mandatory ("shall not pay") approach would tend to push guarantor/issuers to refuse payment in such cases. This, it was said, would stultify and make uncertain the very undertakings that the draft Convention was intended to support.

13. The view was also expressed that a mandatory approach would implicate to an undesirable degree the draft Convention in the guarantor/issuer's relationship with the principal/applicant, which it had been agreed would not be the focus of the draft Convention. Interest in a discretionary approach also resulted from a concern that a mandatory approach would raise difficulties because the formulations "shown facts" and "manifestly and clearly" would be unfamiliar in some jurisdictions and might raise the spectre of over-involving the guarantor/issuer in the underlying transaction.

14. Yet another concern was that an across-the-board mandatory approach would not take into account the possible need for exceptions to address situations such as confirmation and negotiation and perhaps other contexts of correspondent-banking relationships, in which the paying bank might not be privy to the allegations of impropriety and would then encounter difficulties in obtaining reimbursement. It was noted that this was a question that might apply as well to other provisions of the draft Convention and would be considered by the Working Group at a later point.

15. At the same time, reservations were expressed concerning the discretionary approach on the ground that it would dilute the certainty of the undertaking, and would thus impair the fundamental right of the beneficiary, which was to obtain payment of a conforming demand. It was further suggested that uncertainty inherent in the discretionary approach would raise difficulties for obtaining preliminary measures, in particular in jurisdictions in which the claimant had to show that it had a clear right that would be vindicated in the main proceedings. In response to those concerns, it was suggested that explicit reference might be made in paragraph (2) of article 21, which provided for provisional court measures. It was also pointed out that the risk of dilution of the certainty of the undertaking would be

alleviated by the fact that a beneficiary whose demand for payment had been wrongfully refused could sue the guarantor/issuer for wrongful dishonour. Another suggestion in the same direction was to expand paragraph (1 *bis*) to cover these concerns about a discretionary approach.

16. In support of the mandatory approach, it was stressed that a duty for the guarantor/issuer not to pay was a logical consequence of the rules in article 19 on improper demand and that a rule that stated a duty not to pay formed a basis for the provisions in article 21 on provisional court measures. It was also stated that the guarantor/issuer in its relation to the principal/applicant sometimes had a duty not to pay, regardless of the provisions in the Convention, and that therefore a mandatory approach would in fact not create a greater uncertainty. Further, it was pointed out that the Working Group at its nineteenth session decided on a mandatory approach (A/CN.9/374, para. 113). After deliberation, the Working Group took the view that the mandatory approach was preferable. In order to meet the concern that the notion "manifestly and clearly" would be unfamiliar in some jurisdictions, the Working Group requested the Secretariat to prepare a formulation that would explicitly wed in paragraph (2) the notions of "manifestly and clearly" with the obligation of the guarantor to act in good faith pursuant to article 13. However, a note of caution was struck that pains should be taken to avoid suggesting that, by including a reference both to the notions of "manifestly and clearly" and "good faith", new hurdles for obtaining provisional measures were intended to be placed in jurisdictions where only one or the other concept was known.

#### *Paragraph (3)*

17. Views were exchanged as to whether to retain the words in brackets in paragraph (3), which restricted the instances in which the guarantor/issuer was required to give notice of rejection of a demand for payment to the beneficiary to the cases specified in paragraphs (1) and (2) of article 17. Retention of the words in the brackets was urged since the philosophy behind prompt notification was in particular to give the beneficiary a chance to correct discrepancies in the demand that were curable. The prevailing view, however, was that the words in brackets should be deleted. It was felt that the requirement to give notice should be broader, covering all grounds for rejection, not only those covered in paragraph 17(1) and (2). It was noted that the deletion of the words in brackets would not necessarily render overly broad the provisions in article 17(4) dealing with sanctions for failure to comply with provisions of article 16(2), since article 17(4), in essentially all of its possible variants, referred to sanctions in relation to discrepancy in documents.

#### *Paragraph (4)*

18. Various views were exchanged as to whether or not the draft Convention should contain provisions as proposed in paragraph (4), which provided for sanctions against a guarantor/issuer who failed to examine a demand and any other accompanying documents as required by provisions of article 16(2) or failed to give notice to the beneficiary of the rejection of the demand as required by article 17(3). In opposition to the inclusion of such a provision in the draft

Convention, it was stated: that matters of sanctions, especially as they related to damages, should be left to domestic law rather than that law being replaced by the draft Convention; that the draft Convention did not provide for sanctions in other areas where there might be a failure of notification; and that the preclusion rule, as proposed in variants A and B of paragraph (4), was too harsh on the guarantor/issuer and was not appropriate as a sanction, in particular since it might have consequences that were not apparent to the drafters of the Convention.

19. In support of including a provision on sanctions, at least to the extent of including a preclusion rule, it was stated that such a provision would add value and effectiveness to the draft Convention. It was further stated that the rule would introduce discipline, certainty and efficiency in banking practice, providing an incentive to the guarantor/issuer to give notice and examine the demand and accompanying documents. It was noted that, while a preclusion rule was not in place in the Uniform Rules for Demand Guarantees (URDG) with respect to guarantees, it was in place under the Uniform Customs and Practice for Documentary Credits (UCP) in relation to stand-by letters of credit, reflecting the fact that the preclusion rule had its origins in mercantile practice rather than in legal theory or doctrine. It was suggested that its inclusion in the draft Convention would promote uniformity between the two systems, and help to instil an added degree of discipline in guarantee practice in cases where examination of documents was relevant.

20. Differing views were expressed as regards the four variants contained in paragraph (4), with many of those views sharing a hesitation about attempts contained in the variants to set out a rule on damages. In support of variant A, it was noted that it restricted itself to precluding a guarantor/issuer who failed to comply with provisions contained in article 16(2) and 17(3) from invoking any discrepancy in the documents not discovered or not notified to the beneficiary as required by those provisions, and that this was an area in which the bank was well placed to take action. Variant C was praised for containing the limitation on the preclusion rule to the effect that only reliance on discrepancies that would have been curable was prohibited. However, variant C did not receive much support, since it was viewed as being too prescriptive and introducing uncertainty.

21. While some support was expressed for variant D as stating a relatively clearer rule on damages, reservations were expressed as regards that variant on the grounds that it did not deal with preclusion, instead providing for liability for damages, but without clarifying whether the liability it created would be based on fault or strict liability. Objections were also raised to the portion of variant B dealing with damages.

22. As regards which formulation of a preclusion rule would be preferable, the Working Group generally preferred the one contained in the first portion of variant B. As regards the inclusion of the words "not discovered" in variant B, it was explained that those words were intended to cover the situation where a guarantor/issuer had not examined the documents as required in article 16(1) and were designed to encourage the guarantor/issuer to examine the demand and

any other accompanying documents. The Working Group decided, however, that those words could be deleted.

23. After deliberation, the Working Group decided to retain paragraph (4) provisionally, within square brackets, containing only the preclusion rule as set forth in the first portion of variant B. This would allow further consideration of whether or not the preclusion rule should be retained in the draft Convention and, if retained, whether it should be mandatory.

24. Upon concluding its consideration of paragraph (4) the Working Group paused to consider a proposal to reinstate paragraph (1 *ter*), which prohibited the guarantor/issuer from refusing payment on the grounds of the financial difficulty or other inability of the principal/applicant, but which it had been decided at the twenty-first session (A/CN.9/391, para. 127) to delete. The Working Group affirmed that earlier decision.

### *Article 19. Improper demand*

#### *Title*

25. The Working Group noted a view that the title of the article would be unfamiliar to practitioners who were accustomed in this context to the terms "fraud" and "abuse". It was decided, however, to affirm the continued use of the term "improper demand" in view of the aim of the draft Convention to cover in a single instrument both independent bank guarantees and stand-by letters of credit, and the attendant desirability of avoiding the use of terms, such as "fraud" and "abuse", that might be unfamiliar or have divergent meanings in various jurisdictions.

26. The Working Group also noted a view that article 19, and the draft Convention, did not deal explicitly with counter-guarantees. While it was generally recognized that, as indicated in subparagraph (a) of article 6 (definition of "undertaking"), counter-guarantees, themselves, defined in subparagraph (d) of article 6, were considered to be autonomous undertakings covered by the provisions of the draft Convention, there might be some merit in referring explicitly to counter-guarantees in article 19, or perhaps instead in articles 17 and 21, and perhaps at certain other points in the text. The Working Group agreed to review the matter further at a later stage in its deliberations.

#### *Paragraph (1)*

27. As had been the case at the twentieth session (see A/CN.9/388, para. 18), the concern was expressed that in some jurisdictions the term "forgery" used in subparagraph (a) traditionally had a technical meaning that might result in the characterization of a demand as improper even though the forgery concerned was insignificant and without fraudulent intent. It was suggested that the expression "fraudulently false or fraudulently completed" should be used instead. The Working Group felt, however, that the suggested replacement could not be accepted in view of the decision not to make use of the term "forgery". The Working Group also noted a concern that, in some jurisdictions, the term "fraud" might in fact be construed in a narrow fashion with the result that some cases intended to be covered by article 19

would in fact fall beyond its scope. Other alternatives proposed included referring to the lack of authenticity and false content of the document or to the essential or material nature of the misrepresentation. The Working Group decided that the existing formulation should be reviewed by the drafting group in view of the concern raised.

28. As regards subparagraphs (b) and (c), the Working Group noted a concern that the references in those provisions to "no payment being due on the basis asserted in the demand", to "judging" and to a demand having "no conceivable basis" were incompatible with simple-demand guarantees and other independent undertakings and would enmesh the guarantor/issuer in investigating the underlying transaction. However, it was pointed out that the purpose of article 19 was merely to define "improper demand", and that the subjective factors concerning the degree of knowledge of impropriety that needed to be in the possession of the guarantor/issuer or a court in order for payment to be refused or for provisional measures to be issued were matters dealt with in article 17 and 21 respectively.

29. A drafting suggestion was made to the effect that the word "or" might be added at the end of subparagraph (a) in order to make it clear that the grounds referred to in paragraph (1) were alternative rather than cumulative elements of impropriety, a matter which was left to the consideration of the drafting group.

30. Subject to the consideration of the various drafting suggestions that had been made, the Working Group found the substance of paragraph (1) to be generally acceptable.

#### *Paragraph (2)*

31. The Working Group agreed to retain the reference that had been added at the end of subparagraph (b) to the possibility that an undertaking would be issued to cover the risk of a declaration of invalidity of the underlying transaction.

32. The concern was expressed that the formulation in subparagraph (c), which was said to refer to typical cases of dispute underlying calls of performance bonds, was incompatible with the context of simple-demand guarantees. As was the case with respect to similar concerns that had been expressed with regard to paragraph (1)(b) and (c), it was pointed out that the purpose of article 19 was to define impropriety of a demand, rather than to refer to the subjective factor of the degree of knowledge required by the guarantor/issuer or a court in any given case for payment to be interrupted. It was suggested, however, that subparagraphs (c) and (d) might be clearer if they began with the words "there can be no doubt that ...".

33. As regards subparagraph (d), the question was raised whether the reference there to "misconduct" on the part of the beneficiary that prevented performance of the secured obligation was perhaps unnecessarily narrow and might be broadened to refer generally to the conduct of the beneficiary. In response, it was recalled that the Working Group had decided that paragraph (2) should enshrine, as examples of types of improper demands, clear cases of impropriety and that it was for that reason that reference was made to misconduct.

34. After deliberation, the Working Group agreed that the substance of paragraph (2) was generally acceptable.

#### *Article 20. Set-off*

35. The view was expressed that the reference to a right of set-off on the part of "another person authorized to effect payment" might create problems particularly in those instances where the other person might have a personal debt against the beneficiary and might wish to avoid payment by raising a claim for set-off. In support of the deletion of those words, it was stated that they extended the scope of set-off beyond what should be recognized in the draft Convention. Furthermore, it was stated in this regard that the rule was irrelevant, if that person had no obligation to pay. After discussion, the Working Group agreed that the words "or another person authorized to make payment" should be deleted.

### **Chapter V. Provisional court measures**

#### *Article 21. Provisional court measures*

##### *Paragraph (1)*

36. The Working Group recalled that the basic intention underlying article 21 was to prevent the beneficiary from receiving funds on an improper demand. Some doubts were expressed, however, as to the necessity of maintaining article 21 in the draft Convention. In support of deletion, it was stated that the law on injunctive relief was well established in some States and that any attempts to establish rules on injunctive relief peculiar only to independent guarantees and standby letters of credit would create obstacles to wide adherence to the Convention. It was further stated that the "high probability" test for the granting of provisional measures as currently drafted in article 21 set a threshold that would be considered too low in some States, thus enlarging and encouraging the possibility of granting injunctions, and that the test for provisional relief should rather be formulated along the lines of "manifest and clear" evidence of impropriety.

37. In favour of the retention of article 21, it was stated that it was very important to establish the right of access to the courts by the principal/applicant to prevent the beneficiary from receiving funds on an improper demand. In such instances, it was stated, it was also important to clearly define the basis of court action so as to limit interference on the basis of mere suspicion, something which would seriously compromise the independence of the undertaking. It was further stated that, as had been noted by the Working Group at its twentieth session (see A/CN.9/388, para. 39), one of the central purposes of the draft Convention was to unify and harmonize the law in the area of fraud and abuse and that including rules on provisional court measures was an essential element in achieving that aim. As regards the test of "high probability", it was stated that it was a reasonable test for the granting of provisional measures since, if the test were set too high, then the court would in effect be making a final determination on the matter.

38. After deliberation, the prevailing view was that article 21 should be retained. The Working Group then consid-

ered how to craft a more defined test than "high probability" for the granting of provisional measures, so as to meet the concerns that had been raised. One suggestion was that article 21 should not refer to any test as such but should leave the decision on the circumstances under which to grant provisional measures to national law. Another suggestion was to apply the rule that provisional measures should only be granted on the basis of *prima facie* evidence of an improper demand. These suggestions did not, however, gain support. In support of maintaining the test of "high probability" it was stated that it was important to use terms that did not have a unique meaning in any particular jurisdiction or legal system, but that clearly indicated to the judge that provisional measures should not be granted lightly.

39. Another proposal regarding the basis on which the court could issue provisional measures, and one that was found generally agreeable, was that article 21 qualify the evidence leading to the decision as having to be serious and plausible. Various proposals were made as to how specifically to qualify such evidence. One proposal was to provide that the evidence should be "manifest and clear". This, however, was objected to on the basis that those words are used in article 17 in a different context. Another proposal was to provide that the court should only make a decision to issue provisional measures on the basis of "material" evidence. This was also objected to on the ground that the word "material" might be taken to mean the production of documentary evidence, an understanding that would be too restrictive. After deliberation, the Working Group agreed that a phrase along the lines of "immediately available strong evidence" could be used as it indicated that the evidence must not only be present and available, but must also be strong. The Working Group referred the implementation of the agreed formulation to the drafting group.

40. With regard to the words in square brackets "[or that funds of the guarantor/issuer or of the beneficiary are blocked]", it was suggested that they should be replaced by the words "that the proceeds of the guarantee are blocked" so as to specify that the words were applicable not to any funds that might belong to the guarantor/issuer, but only to the amount that corresponded to the amount of the undertaking. This suggestion was referred to the drafting group. Furthermore, the question was raised whether the court should take into account on its own motion the interests of the beneficiary if, for example, the guarantor/issuer did not oppose the provisional measure.

41. The view was also expressed that the last part of paragraph 21(1), regarding the "balance of convenience" test, was heavily weighed on the side of the principal/applicant as it did not mention that account should also be taken of the harm that the beneficiary was likely to suffer as a consequence of the provisional order. The Working Group, however, decided to retain those words unchanged, since it was felt that the formulation, along with the provision in paragraph (3), allowed adequate space for the interests of the beneficiary to be taken into account.

#### Paragraph (3)

42. The Working Group noted that the main new element in paragraph (3) involved modifying the term "security" to

the term "form of security" so as to avoid a narrow, technical interpretation of the provision. It was pointed out that the intention of paragraph (3) was to provide the court with the ability to impose such measures as it would deem fit to protect the interests of the parties. A proposal was made that it might be preferable to state in a more general manner that the issuance of an injunction may be subjected to any conditions as would be necessary to preserve the interests of the parties rather than stating the means by which this could be done. In objection to that proposal, it was stated that such a provision might be too general, leaving room for an excessive degree of discretion and increasing the risk of abuse. Furthermore, it was pointed out, paragraph (3) was not specifically geared to protect the interests of the beneficiary, but was also meant as a discretionary measure which would enable judges to apply measures that would limit the filing of spurious or ill-founded actions. After deliberation, the Working Group retained paragraph (3) unchanged.

#### Paragraph (4)

43. A suggestion was made that paragraph (4) was too restrictive since, under certain circumstances, a court may wish to issue an injunction on some other basis than improper demand or the use of an undertaking for illegal purposes. It was pointed out, however, that these restrictions only related to the type of injunctions issued pursuant to paragraph (1) of article 21 and that such injunctions should be so restricted. The Working Group thus retained paragraph (4) unchanged.

## Chapter VI. Jurisdiction

### Article 24. Choice of court or arbitration

44. Pursuant to the decision of the Working Group at the twentieth session (see A/CN.9/388, para. 84), and following on consultations that had taken place between the secretariat of the Commission and the Secretariat of the Hague Conference on Private International Law, the Working Group had before it a variant of chapter VI in addition to the one that had been considered at the twentieth session (A/CN.9/WG.II/WP.76/Add.1). According to the earlier variant, the choice and determination of jurisdiction were non-exclusive. The new variant rendered the choice of jurisdiction by the parties under article 24 exclusive, while effect of a determination of court jurisdiction, under article 25, would essentially remain non-exclusive. In order to address the concern that had been raised about providing for exclusive effect of a choice of jurisdiction by the parties in the absence of a scheme for recognition and enforcement of the decision, a safety valve was included in subparagraph (d) of article 24 *bis*. That provision would enable a court other than the one chosen by the parties to take jurisdiction if the decision of the chosen court was not capable of recognition or enforcement. Article 24 *bis* also set forth a number of additional exceptions to exclusivity of a choice of court by the parties.

45. On the basis of the texts before it, the Working Group resumed its consideration of whether to include chapter VI in the draft Convention. As had been the case previously, doubts and hesitations were expressed in that regard. Various interventions were made to the effect that a chapter on

jurisdiction was unnecessary and beyond the essential scope of the Convention. Reference was made to the fact that regional conventions on jurisdiction and recognition and enforcement of judgments existed, in particular the Brussels and Lugano Conventions on jurisdiction and enforcement of foreign judgments in civil and commercial matters, and the Inter-American instrument in this sphere. It was also pointed out that the Hague Conference on Private International Law was embarking on the preparation of a global convention. Another objection to inclusion of provisions on jurisdiction, at least along the lines of those presented in the draft, was that they were incomplete. Reference in this regard was made in particular to the absence of rules on recognition and enforcement of judgments, which was said to be the important twin element that should be added to the provisions on jurisdiction.

46. It was further suggested that a model for a more complete set of provisions could be found in the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993). In addition to containing provisions on jurisdiction, that Convention contained provisions not only on recognition and enforcement, but also on several other issues, for example, notification of the defendant of an application for court measures. It was further suggested that, in addition to filling gaps, the meaning of some of the provisions in the draft of chapter VI might have to be considered further, for example, that of subparagraph (c) of article 24 *bis*. It was questioned whether the reference there to a chosen court declining to exercise jurisdiction suggested a rule of *forum non-conveniens*. The view was expressed that prior to engaging in what might be a time-consuming exercise of addressing the various concerns that had been raised regarding chapter VI, the Working Group should, in the limited time remaining, turn first to further review of the substantive provisions of the draft Convention.

47. In support of retaining chapter VI, it was stated that the chapter, though incomplete, contained rules that were basically sound and could do no harm and that would be useful from a practical viewpoint. It was also suggested that the existence of multilateral jurisdiction, recognition and enforcement schemes, which, to the extent they existed, were on a regional basis, should not preclude the inclusion of chapter VI. A further ground cited for dealing in the draft Convention with jurisdiction and related issues was that the matter could just as well be dealt with, as regards independent guarantees and stand-by letters of credit, in one instrument along with the substantive rules, and that the work would be carried out more appropriately within the context of the elaboration of the substantive rules themselves. By way of a possible middle ground between the approach in the current version of the draft Convention, and a fuller array of provisions as suggested above, the proposal was made to include a relatively simple provision that, without disturbing existing procedural rules concerning jurisdiction in force in Contracting States, would establish the right of court access to the claimant and recognize freedom of contract as regards choice of jurisdiction.

48. On the basis of the views that had been exchanged, the Working Group decided to postpone further consideration of whether to retain chapter VI, and of its possible content

were it to be retained, until after further review of the substantive rules in the draft Convention.

## Chapter VII. Conflict of laws

### Article 26. Choice of applicable law

49. In its deliberations on article 26 the Working Group first considered whether or not provisions on conflict of laws should be included in the draft Convention. In support of the view that it was not necessary to include such provisions in the draft Convention, it was stated that the usefulness of the provisions would be limited unless they formed part of a complete regime of choice-of-law provisions. In response, it was stated that inclusion of such rules in the draft Convention would strengthen the reliability and utility of the instrument covered by recognizing party autonomy in the choice of law and by reducing the extent to which disputes would arise in relation to determination of the issue of applicable law. After deliberation, the prevailing view was that the draft Convention should contain provisions on applicable law.

50. A concern was expressed that the approach used to describe the scope of the choice-of-law provision ("rights, obligations and defences relating to an undertaking") might not be wide enough to encompass all issues relating to the instrument on which disputes might arise. It was suggested that it might not, for instance, cover the formation of the undertaking and other issues that should be covered by the choice-of-law provisions, and that this inference might be reinforced from the fact that the title of chapter IV was "Rights, obligations and defences". An alternative was proposed which would refer to "the relationship between the guarantor/issuer and beneficiary" as the subject matter of the choice-of-applicable-law provision. It was said that the approach was favoured in other international conventions such as the 1980 Rome Convention on the Law Applicable to Contractual Obligations. It was pointed out, however, that that approach, though perhaps suitable where the undertaking would be construed in contractual terms, might be inappropriate where the undertaking would not be considered contractual in nature. It was noted that the use of such a term to describe the undertaking had been rejected by the Working Group at an earlier session. It was further said that the terms "rights, obligations and defences" was wide enough to cover the formation of an undertaking. Another proposal was to refer generally to the undertaking as being governed by the chosen law. The Working Group referred the matter to the drafting group.

51. After deliberation, the Working Group agreed that the substance of article 26 was generally acceptable.

### Article 27. Determination of applicable law

52. The view was expressed that article 27, instead of referring to the place of business of the guarantor/issuer, should refer instead to some other place, based on a flexible formula. In support of a flexible approach, reference was made to the complexity in applying a simple "place of business" rule in the context of issuance of "dematerialized

instruments". A proposal to address those concerns was to refer to the law of the relevant transaction which was the subject of the dispute under the undertaking and to which the undertaking was most closely connected. Such an approach, however, did not win sufficient support. Another proposal was to combine the flexibility of that approach with a general guidance to courts to look to the place of issuance. According to the latter proposal, the text would read along the lines of "failing a choice of law in accordance with article 26, ... the undertaking is governed by the law of the State with which it is most closely connected, which is usually the place where it was issued". The prevailing view, however, was that, while the proposed approaches would have a benefit of reflecting some approaches taken in regional conventions on the subject, the aim of article 27 was to give a more specific and certain rule, for the context of independent guarantees and stand-by letters of credit and that it should refer to the place of business of the guarantor/issuer.

53. At the same time, the Working Group, in order to add more precision to the rule, in particular as regards contexts of issuance such as branch-banking, agreed to refer more precisely to the law of the state where the guarantor/issuer has that place of business at which the undertaking was issued.

54. The Working Group affirmed that article 27 applied to counter-guarantees, confirmations, and other undertakings subject to the draft Convention, even though they were not specifically referred to therein. This was in line with the working assumption generally in the draft Convention as to its scope of application. It was noted that, were it felt desirable to make a more explicit statement concerning the coverage of counter-guarantees and confirmations, this could more appropriately be done with a general provision in article 3.

## Chapter I. Scope of application

### *Article 1. Scope of application*

#### *Paragraph (1)*

55. A question was raised as to the necessity to refer to the rules of private international law in paragraph (1) as an independent basis for the application of the draft Convention, alternative to the issuance of the undertaking in a Contracting State. The view was expressed that the relevance of such a provision would be limited to those instances where the parties made a choice of law since, if they did not, then article 27 would apply and the applicable law would be the law of the place of issuance of the undertaking. Furthermore, it was stated that including the provision would create a system that would be complicated, in particular, in those cases where the parties chose to apply the law of a Contracting State but the undertaking was issued in a non-Contracting State. Then the parties would have to be very specific about their choice of the law of the Contracting State, if they did not wish the draft Convention to apply. The proposal to delete the reference to rules of private international law did not, however, receive support. It was noted in this regard that the draft Convention reflected the approach used in the

United Nations Convention on Contracts for the International Sale of Goods.

56. The Working Group affirmed that applicability of the draft Convention based on the place of issuance of the undertaking in a Contracting State and applicability based on the rules of private international law were two different tests and not a double test. It was suggested that this might be made clearer were the two references separated by adding the words "if not, if" between the words "or" and "the" so as to read: "... if it is issued in a Contracting State or, if not, if the rules of private international law lead to the application of the law of a Contracting State ...". The Working Group referred the proposal to the drafting group.

57. A query was raised as to why the parties should be given the right to exclude the application of the Convention, which, once ratified, would become the law of the Contracting State. It was stated that the matter was further complicated by the presence of paragraph (3), which made chapters V, VI and VII applicable even in those cases where the Convention was not applicable pursuant to the scope provision in paragraph (1). It was said that this would also leave the impression that all the other provisions were not mandatory, a matter which was still to be considered by the Working Group on an article by article basis. A related suggestion with regard to the right of parties to exclude the Convention was that paragraph (1) should state that the parties could exclude the draft Convention "either in part or in whole", rather than referring simply to the choice of either applying or excluding the Convention as a whole.

58. In reply to these concerns it was pointed out that two separate matters were involved: the first, which was addressed in the affirmative in article 1, was whether the parties had the right to exclude the draft Convention. The second, separate matter was, once the draft Convention did apply, the identification of the provisions that would be subject to party autonomy. As regards the manner of distinguishing between mandatory and non-mandatory aspects of the draft Convention, it was pointed out that, rather than establishing a list of all the mandatory provisions in the draft Convention, a better solution might be to indicate party autonomy in those instances where it was relevant. The question was not relevant to all aspects of the draft Convention, for example, article 1.

59. A further question was raised as to the form in which exclusions of the Convention could be made. It was pointed out in this regard that paragraph (1) stated that exclusions should be made in the undertaking, while the exclusion of the draft Convention might be agreed in an amendment of the undertaking pursuant to article 8. In response, it was pointed out that the expression "undertaking" would have to be understood as encompassing any amendments that had been made by the parties to the undertaking as originally issued. It was recalled that a rule of interpretation to that effect had been included but later deleted, and that it might be useful to reinstate such a rule of interpretation in the text for purposes of clarity. As to whether exclusion of the draft Convention should be permitted to be made elsewhere than on the face of the undertaking, the Working Group noted the concern that allowing exclusions that would not appear on the face of the undertaking documents would raise undesir-



able risks and uncertainties for third parties relying on the information appearing on the face of the instrument (e.g., in the negotiation context). Accordingly, the Working Group agreed that any agreements regarding exclusions of the Convention would have to be made within the instrument, although a different conclusion could be reached for the use of "system rules" to exclude application of the draft Convention, as in the case, for example, of the use of SWIFT messages to issue undertakings.

60. The above discussions on the form of exclusions of the draft Convention prompted the Working Group to note that, in its review of the draft articles, it would have to ensure that the words "unless otherwise ... elsewhere agreed ...", which appeared at various points, only were used to refer to stipulation by the parties made outside of the undertaking documents, and were not inadvertently used to refer to a stipulation in an amendment to the original terms of an undertaking.

61. It was noted that the reference to opting out of the draft Convention itself did not refer to the exclusion of national law, even in those instances where national law might be equivalent or similar to the provisions of the draft Convention. The understanding was that, if the application of the Convention were to be excluded, then the undertaking would be subject to the law that would have applied in the absence of the Convention.

62. Lastly, the Working Group discussed the relationship between the formulation used in paragraph (1) regarding the scope of the Convention and the wording in article 27 regarding determination of applicable law. It was felt to be important that the rule defining the scope of application of the Convention and the rule on the determination of applicable law be expressed in a parallel manner. There was general agreement that the two provisions should refer in a similar manner to the place of business of the guarantor/issuer at which the undertaking was issued and the matter was left to the drafting group. It was also pointed out that it might be necessary to consider making some changes to article 6(i) so as to take into account those instances where the guarantor/issuer might have different places of business, in particular branches, in different jurisdictions.

#### *Paragraph (2)*

63. The Working Group considered the question whether or not paragraph (2) of article 1, which allowed parties to make the draft Convention applicable to commercial letters of credit, should be retained in the draft Convention. In favour of deletion, it was said that the provision could seem ambiguous as to exactly the instruments intended to be covered. It was said that the uncertainty stemmed from the fact that the draft Convention did not contain a definition of the term "commercial letter of credit." It was also stated that, in any event, even without such a provision in paragraph (2), parties that wished to apply any part of the draft Convention to any instrument could do so as it was not possible to prohibit such action. It was further said that the coverage of any instrument that would not otherwise be regarded as an "undertaking" under the draft Convention, if that were thought to be desirable, could be achieved by amending the definition of "undertaking" in

article 2(1). That approach, however, failed to attract sufficient support, as the Working Group thought it to be preferable rather to include a provision along the lines of paragraph (2).

64. Another proposal was to broaden paragraph (2) by making it a general opting-in provision that referred to "other independent undertakings" and did not restrict the possibility of opting-in solely to commercial letters of credit, as was the case in the current draft. In support of the proposal it was said that there were several other types of undertakings in wide use that could usefully be subjected to the draft Convention, including, for example: irrevocable reimbursement obligations; instruments drawn in relation to pre-advice under article 11 of UCP; and commitments to purchase documents relating to demands for payment. It was said that the latter arose in situations where banks not prepared to add a confirmation, for example, for foreign exchange restrictions, would instead issue an irrevocable commitment to purchase the relevant documents of the demand. The Working Group was not prepared, however, to broaden paragraph (2) as proposed. In opposition to the proposal it was said that the draft Convention had been developed with independent guarantees and stand-by letters of credit in mind and a general opting-in provision would bring into the scope instruments whose character was not considered in the elaboration of the draft Convention.

65. The Working Group then turned its attention to a proposal to amend paragraph (2) to provide for automatic coverage of commercial letters of credit by the draft Convention, rather than merely providing for an opting-in possibility. In support of the proposal, it was said that commercial letters of credit were of the same legal nature as stand-by letters of credit, which was evidenced by the fact that they were subject to the same rules of practice. In opposition to the proposal, it was said that the draft Convention had been developed with independent guarantees and stand-by letters of credit in mind, and its provisions might not be appropriate to commercial letters of credit. In response, it was said that any attempt to differentiate between stand-by letters of credit and commercial letters of credit was artificial, as the two instruments were indistinguishable and the preparation of the draft Convention presented a historic opportunity to accord to commercial letters of credit the benefit of its rules. An overriding consideration in the consideration of this issue was that a number of delegations indicated that they could not take a definitive stand on the matter as they had not anticipated its discussion at the present session and did not therefore have an opportunity to consult in their countries on the matter. It was noted that the issue of extending coverage of the draft Convention to commercial letters of credit was likely to be raised again and that it would therefore be useful for such consultations to be held. The Working Group therefore decided, at least at this stage, not to accept the proposal.

66. As regards the formulation of paragraph (2), it was decided to use the words "letter of credit other than a stand-by letter of credit" rather than the words "commercial letter of credit", in particular since the term "commercial letter of credit" was not defined in the draft Convention. The question of whether to delete the word "also" was referred to the drafting group.

67. Subject to the above decision, the Working Group found the substance of paragraph (2) to be generally acceptable.

#### *Paragraph (3)*

68. The Working Group noted that the effect of paragraph (3) was that the provisions of chapters V (article 21, provisional court measures), chapter VI (articles 24 to 25 *bis*, jurisdiction) and chapter VII (articles 26 and 27, conflict of laws) would apply irrespective of whether, in any given case, the Convention would be applicable by virtue of article 1(1). While a concern was voiced as to the desirability of independent applicability of part of the draft Convention in such a manner, the Working Group was prepared to accept such an approach in relation to chapter VI, if that chapter was in the end retained, and chapter VII. However, it was generally agreed that the reference to chapter V should not be included in paragraph (3).

### *Article 2. Undertaking*

#### *Paragraph (1)*

69. As had been the case when the scope provisions were considered on previous occasions, the concern was expressed that the formulation in the draft Convention should avoid the risk of inadvertently, at least in some jurisdictions, encompassing certain private undertakings of an independent nature. Such promises might be made, for example, to renew a legal obligation. A concern was also expressed as to inadvertent inclusion of surety bonds and promissory notes. The view was expressed that the current draft did not address that risk sufficiently. It was proposed to meet that concern by referring in paragraph (1) specifically to independent guarantees and stand-by letters of credit, by adding words along the lines of "as referred to in common banking practice". An alternative proposal to meet the concern was to expand the list of express exclusions in subparagraph (b).

70. While it was pointed out that the express intent of the draft Convention was to encompass only independent undertakings, thereby excluding surety bonds, and that it was not intended to cover private or consumer transactions, the Working Group felt that it would be desirable to make the scope provision clearer. This was particularly so since there admittedly were other undertakings, not intended to be covered, that did possess an element of abstraction, thereby conceivably leading to the possibility of some confusion, as unlikely as some might consider that to be. This risk also stemmed from the nature of article 1, which did not, as shown by the title of the draft Convention, fully define the field covered, relying instead on a more general description. It was agreed that additional clarity could in fact be achieved, as proposed, by adding to subparagraph (a) words such as "usually referred to as independent guarantees or stand-by letters of credit". It was noted that this added degree of precision would remove the need for retaining subparagraph (b), since it would now also be clearer that instruments such as insurance contracts were outside of the scope of the draft Convention.

71. A proposal was made to add a provision to article 2 to make it clear that the draft Convention did not venture to

regulate questions of capacity to issue undertakings, something which the Working Group affirmed was never intended to be covered. It was suggested that without a clarification on this point, particularly in view of the open-ended reference to "guarantor/issuer" in subparagraph (a), there might be uncertainty. The concern was expressed that, in the absence of such a clarification, States might contemplate a declaration or reservation on the point, and a text along the following lines was therefore proposed: "The Contracting States will maintain the freedom to determine the categories of persons or institutions competent to issue undertakings referred to in paragraph (1)". The view was expressed that adding such a provision would clarify the matter more effectively than an alternative approach that was suggested, namely, to set forth the clarification in a footnote.

72. While emphasizing that the draft Convention did not at all intend to regulate questions of competence or capacity to issue undertakings, the Working Group declined, however, to make the suggested change, since it was felt that the matter was already sufficiently clear. Furthermore, it was pointed out that, since there was a whole range of issues that were not regulated by the draft Convention, including some possibly raising questions of competence, to address the point with respect to just one aspect of the draft Convention might create uncertainty with respect to those other aspects of the text. For example, it might inadvertently suggest that, with respect to provisional court measures, the draft Convention was delving into the question of the competence of particular courts to act.

73. Suggestions of a drafting nature were made and referred to the drafting group. One such suggestion was that the word "indicating", used in the phrase "indicating that payment is due ...", might, at least in some languages, compromise the independent, documentary character of the undertaking. Use of the word "signifying" was suggested as a replacement. Another concerned the word "contingency". It was emphasized that the concept that should be conveyed by that term did not involve unforeseen events, not envisaged in the undertaking, but rather events the eventual occurrence of which was uncertain.

74. A further suggestion was that subparagraph (a), in referring only to a "simple demand or upon presentation of documents" might inadvertently preclude an undertaking referring simply to the presentation of documents in order to trigger payment, without any reference to a "demand" for payment as such. After deliberation, however, the Working Group took the view that the existing formulation was satisfactory, and that undertakings not literally referring to a demand as such would not necessarily fall outside the provision.

#### *Paragraph (2)*

75. The Working Group found the substance of paragraph (2) to be generally acceptable.

#### *Paragraph (3)*

76. With regard to subparagraph (a), the proposal was made to delete the words "in a specified currency or unit of account" as they referred to something that was self-

understood. The Working Group agreed, however, to retain the provision in its existing form.

77. Although the view was expressed that it was not necessary to add in subparagraph (b) the parenthetical reference to "draft", in juxtaposition with the term "bill of exchange", the Working Group decided to retain the additional term. It was felt that this added degree of descriptiveness, at least in those languages where two separate terms existed, would ease application of the draft Convention in those jurisdictions where the term "draft" was used as a functional equivalent of "bill of exchange". It was noted that a similar approach was used in UCP, reflecting general banking use of "draft". The Working Group declined to support the addition of a reference to payment by way of a promissory note. It was recalled that paragraph (2) should be regarded as an illustrative or indicative, rather than exhaustive, listing of forms of payment. Accordingly, the intent of the provision in this case was to give an example of what was a frequent form of payment in the type of undertaking dealt with by the draft Convention. Also failing to attract sufficient support was a proposal to add an explicit reference in subparagraph (b) to the specification of a currency. In the same light, the Working Group agreed to the deletion of the reference to "a specified amount".

78. The view was expressed that subparagraph (d) ("supply of a specified item of value") should be deleted since it referred to what might be considered a rather unusual form of payment, and even illegal in some States. The prevailing view, however, was that the provision should be retained.

#### *Paragraph (4)*

79. The Working Group noted that a reference had been added to paragraph (4) referring to the designation by the guarantor/issuer of one of its branches as the beneficiary, provided that in such cases the undertaking expressly stated that the draft Convention was to apply. That reference had been added pursuant to the decision at the twenty-first session that the draft Convention should not preclude the possibility of a designation of a branch as beneficiary (A/CN.9/391, para. 20). With the addition of that text, paragraph (4) now referred to two distinct cases, the other being the designation of the guarantor/issuer itself as the beneficiary when it was acting in favour of another person.

80. Upon consideration of the additional text, some doubts were expressed as to the advisability of referring to the case of the designation of a branch of the guarantor/issuer as the beneficiary. The view was expressed that, to the extent that they might arise, such cases were unusual and would be difficult to fit into the confines of the draft Convention without possibly raising questions beyond its scope, in particular questions of company law. In particular, the question might arise in any given case whether a branch was a legally distinct entity from the rest of the corporate body. In addition, it was suggested that the provision would raise the anomalous spectre of a branch taking legal action against another part of the corporate entity such as the main office to assert rights under the draft Convention. A question was also raised as to whether it was intended that in the branch case the draft Convention would be applied even in a purely domestic context. In view of the questions raised, the Work-

ing Group was urged to delete the reference to branches as beneficiaries, though it was emphasized that such a deletion would not preclude application of the draft Convention by agreement.

81. In support of including the provision, it was pointed out that, though admittedly unusual, there were cases in practice of designation of a branch as beneficiary. The possible cases referred to resulted not only from peculiar commercial and legal circumstances, but included contexts such as nationalization of a branch, which might be viewed as conferring upon a branch a more distinct character. A similar reference was made to the insolvency context, in which various branches of a bank in different countries may be placed under the supervision of bankruptcy trustees. The view was also expressed that precedent might be found in UCP for distinguishing between different parts of a corporate entity as guarantor/issuer and beneficiary, since that text contained the rule that, for the purposes of UCP, different branches of a bank were to be considered different banks. Reference was also made to a distinction of that type found in the UNCITRAL Model Law on International Credit Transfers. However, even from the standpoint of favouring application of the draft Convention in such cases, some dissatisfaction was expressed with the current formulation, according to which the draft Convention would apply only if expressly so stated in the undertaking. It was said that this apparently precluded an agreement by the parties elsewhere than on the face of the undertaking. A better approach to applicability of the draft Convention in such cases, it was said, might be simply to say nothing about the matter in the draft Convention.

82. After deliberation, and in light of the various views that had been expressed, the Working Group decided to delete the reference to the branch-as-beneficiary case. The Working Group emphasized, however, that the deletion of that text was not intended to preclude application of the draft Convention in such cases.

#### *Article 3. Independence of undertaking*

83. A suggestion was made that article 3 should indicate with greater specificity the independence of the counter-guarantee from the first guarantee and also from the underlying transaction. It was stated that the words "or to any other undertaking", though aimed at making clear this principle, did not do so adequately. It was proposed that in order to make clear the intention of the provision in this respect, the text should be expanded to include words along the following lines: "a counter-guarantee is independent from the guarantee to which it relates and also from the underlying transaction". It was pointed out that this formulation would also have the benefit of clearly reflecting the position in a similar manner to an equivalent provision in article 2(c) of URDG.

84. The Working Group agreed that the principle of the independence of a counter-guarantee, provided that it met the general test of independence in article 3, should be clear in the draft Convention. To this extent, some support was expressed for a clarification of the point in article 3. However, doubts were expressed as to whether the proposed

wording might inadvertently go beyond the scope of article 3 by stating a general rule that counter-guarantees were independent, without reference to the general requirements to be met by undertakings in order to be independent. It was suggested that it would be better to maintain the present formulation, but to make it clear that it referred also to the independence of counter-guarantees by adding words such as "(including guarantees to which counter-guarantees relate)" after the words "or to any other undertaking".

85. Concerns were expressed, however, about making any specifications in article 3 with regard to the question of the independence of the counter-guarantee. It was pointed out that article 3 was placed in chapter I, dealing with the scope of application of the Convention, and should thus be limited to issues regarding scope and should not contain substantive operational rules. Furthermore, and along the same lines, it was stated that article 3 was meant only to establish the attributes that undertakings (which, pursuant to article 6(a), included counter-guarantees) would have to meet to be considered independent and thus to fall within the scope of the Convention, but not to state that counter-guarantees were independent. In this regard, it was emphasized that the words "or to any other undertaking", should be read together with the definition of "undertaking" in article 6(a), which stated that an "undertaking" could also include a counter-guarantee. It was stated that the words could then also be read and understood to mean "or to any other guarantee", thus encompassing the context of a counter-guarantee. After deliberation, the prevailing view in the Working Group was that the words "or to any other undertaking" should be retained in their present form (for further discussion on this issue, see paragraph 130, below).

86. A query was raised as to the effect the principle of the independence of the counter-guarantee from the first guarantee would have in those instances, for example, where there was fraud involving the first guarantee, and as to what would constitute fraud in the counter-guarantee. In response, it was pointed out that such a problem was not directly related to the independence of the counter-guarantee as such, but was related to the question of improper demand dealt with in article 19 and in which there was no distinction made between the first guarantor and the counter-guarantor as far as improper demand was concerned. It was suggested that any further clarification of the point might be considered in that context.

87. The Working Group then considered which of the two formulations in square brackets, "[not]..." or "[except presentation of documents or another such act or event]...", should be retained preceding the words "falling within the guarantor/issuer's operational purview". Preference was expressed for the retention of the second variant on the ground that it better and more clearly dealt with the concept of non-documentary conditions. A further proposal was made, however, to describe more clearly that the last phrase in article 3 was aimed at non-documentary conditions, and that some examples could even be provided of instances when the provision would be applicable. In support of that proposal it was stressed that the words "operational purview" were not very clear and were thus open to differing interpretations. It was pointed out that, while in some jurisdictions the courts might treat any act that a bank undertook to perform as

within that bank's operational purview, in other jurisdictions any act that went beyond normal banking business would be regarded as outside the operational purview of the bank. A suggestion was made that, if the words "in its banking business" were added to the end of the sentence, it would help clarify the matter. This was objected to, however, on the basis that the Working Group had decided not to limit the notion of "guarantor/issuer" to banks.

88. In concluding its discussion of article 3, the Working Group recalled that it had discussed at length the question of non-documentary conditions at previous sessions, most recently at the twenty-second session (see A/CN.9/391, paras. 22-33), and had arrived at the current formulation set out in article 3 as a compromise taking into account the various viewpoints and considerations that had been raised. It was pointed out that it would be difficult to arrive at a common understanding of what was meant by the term "operational purview" and that a better solution would be to leave the text unchanged, with the result that those words would be interpreted by courts taking into account the context and relevant facts. After deliberation, the Working Group decided to retain the words along the lines of "except presentation of documents or another such act or event," and requested the drafting group to consider whether a term more generally clearer than "operational purview" could be found.

#### *Article 4. Internationality of undertaking*

##### *Paragraph (1)*

89. The Working Group focused on whether to retain the reference to the place of business of the confirmer in the list of parties whose places of business were relevant to a determination of internationality of the undertaking. The discussion was spurred by a number of questions that were said to arise from inclusion of such a reference. Those questions included, for example, whether, if the confirmer and the beneficiary were in the same country, the confirmer's relationship with the beneficiary should be governed by the draft Convention, the extent to which the matter should be viewed through the prism of a single transaction, and whether the provision should also include a reference to the place of business of the counter-guarantor.

90. In favour of deleting the reference to the confirmer, the view was expressed that the guarantor/issuer's relationship with the beneficiary should be viewed in the light of its separate character. It was said that, in particular when the confirmer and the beneficiary were in the same country, this separate undertaking might be considered a domestic affair that should not be used for determining the internationality of the guarantor/issuer's undertaking to the beneficiary. It was said that a reference to the confirmer might lead to anomalous results, for example, in the case where, subsequent to the issuance of an undertaking by a guarantor/issuer to a beneficiary in the same country, a confirmation is added by a confirmer in a foreign country. Questions were also raised as to the implications for this matter of conflict-of-laws rules, including any references to such rules as contained in the draft Convention.

91. Various views were adduced in favour of retention of the reference to the confirmer. One such view was that the

internationality of the undertaking should be determined from the perspective of the entire transaction, including not only a possible confirmation, but also taking into account the possible presence of a counter-guarantee. A proposal to this effect was made along the following lines: "For the purposes of the present Convention, guarantees, counter-guarantees and confirmations relating to an international undertaking are themselves international undertakings". It was pointed out that the effect of such a provision could be to render a purely domestic undertaking international by virtue of a counter-guarantee issued in another country. A drafting refinement suggested for the proposal was, for the purposes of clarity, to use instead words along the lines of "relating to, or in support of, an international guarantee".

92. While the Working Group was not prepared to expand the scope of paragraph (1) to include a mention of the place of business of the counter-guarantor, the prevailing view was that the reference to the confirmer should be retained. It was suggested that the case of confirmation differed from that of the counter-guarantee from the standpoint of determining internationality of an undertaking. Attention was drawn to the fact that, in the typical case of confirmation, the guarantor/issuer and the beneficiary would be in different countries, and the confirmer would be in the same country as the beneficiary. In such a typical context, the beneficiary would request confirmation for the very purpose of being able to make the demand for payment in its own country. By contrast, the guarantor/issuer of a guarantee supported by a counter-guarantee could typically be in the same country as the beneficiary, to the effect that that domestic guarantee would be transformed into an international undertaking subject to the draft Convention by virtue of the addition to paragraph (1) of a reference to the place of business of the counter-guarantor. Aside from general hesitation about such an expansion of the scope of application of the draft Convention, questions were raised, for example, as to the effect under such an expanded approach of issuance of the first guarantee in a non-Contracting State. That question was raised with particular reference to the rule in article 27 that, absent a choice by the parties, the law applicable to the undertaking was the law of the place of issuance.

93. After deliberation, the Working Group agreed to the retention of the reference to the confirmer, and declined to expand the scope of the provision to refer to the counter-guarantor. In the conclusion of the deliberations on paragraph (1), it was noted that the possibility would exist in the future for a further exchange of views on the provision should additional perspectives be developed on the matters raised.

#### *Paragraph (2)*

94. A view was expressed that paragraph (2) should be deleted because it might raise questions the answer to which could be uncertain. Those questions concerned in particular what would happen if no place of business were specified in the undertaking for a party, or if the place of business specified in the undertaking was not in fact the place of business of the party in question. In response to those concerns, it was pointed out that the purpose of paragraph (2) was to provide a clarifying rule for those cases in which there already was some uncertainty due to the information specified

in the undertaking, uncertainty due either to the listing in the undertaking of more than one place of business for a party, or due to the listing of a residence rather than a place of business. It was also pointed out that a similar rule was found in other international texts, such as the United Nations Convention on Contracts for the International Sale of Goods.

95. Several proposals were made to modify the rule in the present text of paragraph (2), none of which in the end were supported by the Working Group. One such proposal was to provide that, in the case of a listing of more than one place of business, any one of the places listed could be considered for the purposes of determining internationality. Another proposed amendment was to replace the reference to the "place which has the closest relationship with the undertaking" with a reference to the place where the documents are to be examined. It was pointed out with regard to the latter proposal that paragraph (2) was meant to have a broader application than merely to the guarantor/issuer and that therefore the proposed change would unduly narrow the scope of the provision. Another proposal was to try to address the concerns that had been raised regarding paragraph (2) by removing in paragraph (1) the words "as specified in the undertaking". Yet another proposal was to include a specific reference in paragraph (2) to the "headquarters" of a party in the event of a listing of multiple places of business.

96. A question was raised as to the appropriateness of the reference in subparagraph (b) of paragraph (2) to "habitual" residence. The Working Group affirmed the use of this term, which, it was pointed out, appeared in other UNCITRAL texts including the UNCITRAL Model Law on International Commercial Arbitration (article 1(4)) and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (article 2(3)).

97. After deliberation and consideration of the various proposals that had been made, the Working Group decided to retain paragraph (2) in its present form. It was noted that, in subparagraph (a), the references to "place" would be replaced by references to "place of business".

#### *Article 5. Principles of interpretation*

98. A question was raised as to the meaning of the term "the international practice of independent guarantees and stand-by letters of credit". It was stated that the rationale behind this phrase was to refer to well-established international standards of practice that had been established internationally with regard to independent guarantees and stand-by letters of credit, and to exclude resort to practices of a lower standard than that which had been established and accepted internationally. It was suggested that addition of the word "standard" before the word "international" would better reflect this understanding, and make it clear that reference was not being made to some standard other than the one generally accepted in practice. A further suggestion was made that, since, in interpretation of the Convention, reference would actually be made to banking practice, which was said to be the appropriate reference point, the phrase should in fact refer to "international standard banking practice".



99. Objections were raised, however, to any reference to banking practice. It was pointed out that the issuance of undertakings was not limited to banks under the draft Convention and that the range of types of issuing institutions might increase in the future, therefore suggesting the need for a formulation that was more open to developments in practice. It was stated that the Convention should therefore not limit itself to banking practice. Furthermore, it was pointed out, article 5 did not state that in interpreting the Convention regard should be had to international practice, but that regard should be had to the observance of good faith in international practice.

100. The view was expressed, however, that the understanding underlying the origin of article 5 was that, since the two instruments could be issued by institutions other than banks, it was important to maintain the high standards of fairness and balance that had evolved over time within banking practice and which were reflected in URDG and UCP. It was stated that other issuing institutions should not claim that, since they were not banks, they should not be subject to the high standards established in banking practice. It was also pointed out that there might be a need to align article 5 with article 13(1) which referred to "generally accepted standards of international practice".

101. The Working Group recalled that it had discussed the matter at its eighteenth session (see A/CN.9/372, para.77 and A/CN.9/WG.II/WP.76), at which the formulation that was agreed on was "the observance of good faith in international guarantee and stand-by letter of credit practice". After deliberation, the Working Group agreed to revert to that formulation as it better reflected the common understanding with regard to article 5.

#### Article 6. Definitions

##### *Chapeau*

102. The Working Group found the *chapeau* to be generally acceptable.

##### *Subparagraph (a) ("undertaking")*

103. Differing views were expressed as to which of the words in square brackets should be retained ("includes" or "may refer to"). Preference was expressed for retention of the word "includes" on the basis that it better captured the intention of the provision, which was to provide an indicative description of "undertaking" as found in article 2(1). It was stated, however, that, in the draft Convention, the word "undertaking" could in some instances mean all the described instruments, or, depending on the context, only one of the instruments. It was therefore suggested that the words "may refer to" would be a better formulation. In reply to these concerns it was pointed out that the *chapeau* of article 6 already provided that the definitions had to be read as required by the context. The Working Group therefore decided to retain the word "includes".

104. It was suggested, and the Working Group agreed, that the reference to "confirmation of guarantee" should be changed to "confirmation of undertaking" so as to also take

into account stand-by letters of credit which were in fact the more typical object of confirmations.

105. A view was expressed that it would be useful to make it clear that, in the event of an amendment to an undertaking, the definition of undertaking would extend to the terms and conditions included in the amendment and not just to the original instrument. It was suggested that words such as "and includes all the other terms and conditions to which it refers" would take this into account and also cover any terms and conditions that would be included in the instrument by incorporation. It was pointed out that the Working Group had discussed the matter at its twenty-first session (see A/CN.9/391, para. 44) and had decided that such a clarification was unnecessary on the basis that it was self evident that a reference to an undertaking was understood as a reference to the latest version of the undertaking.

106. The Working Group also discussed the question of whether the independence of an instrument was affected by the incorporation by reference to another instrument of the terms and conditions of that other instrument. It was pointed out in this regard that, in most instances, in particular in the case of confirmations, the terms and conditions were not on the face of the instrument but incorporated by reference to the original undertaking. The question was therefore raised whether, since, in article 3, independence was predicated on the undertaking being self-standing, an undertaking that made reference to other instruments should be regarded as not independent and therefore not within the scope of the draft Convention. The view was widely shared that while there might usefully be a clarification that, if an instrument by its terms and conditions referred to another instrument, it did not thereby lose its independence, such a clarification should not necessarily be made in subparagraph (a). It was pointed out that the issue was also relevant with regard to counter-guarantees and that it might be more useful to consider the matter when discussing other provisions of the draft Convention.

##### *Subparagraph (d) ("counter-guarantee")*

107. As had been raised earlier in the session (see paragraphs 83-85, above), the suggestion was made that a provision could usefully be added, perhaps in subparagraph (d) of the present article, to the effect that an undertaking did not lose its independence solely by virtue of containing a reference to other undertakings, as might be the case in a counter-guarantee or in a confirmation of an undertaking.

108. While there was no disagreement as to the substance of the proposed rule, the Working Group upon deliberation hesitated to add an express statement to that effect. It was felt that the point was evident from the text of the draft Convention and would be drawn easily by interpretation. The Working Group was also concerned that words such as "referring to the terms and conditions of another undertaking" might blur the matter since such words might not be subject to common interpretation or understanding. It was pointed out that the words might be read narrowly, thus perhaps not clearly taking into account a typical form of a confirmation of a stand-by letter of credit, in which the confirmation itself consisted only of a cover sheet appended to a copy of the original stand-by letter of credit. Any further



consideration of adding such text, it was suggested, should be pursued within the context of article 3 (see paragraph 130, below).

109. The Working Group then turned its attention to the formulation of subparagraph (d). It decided to delete the words in square brackets at the beginning of the text, "or similar instruments". The concern had been expressed that the meaning of those words was unclear and that they might blur the notion of the independence of the undertaking. The Working Group accepted and referred to the drafting group a suggestion to align the reference in subparagraph (d) to "demand and presentation of any specified document" with the more explicit text on the same point that would be included in article 2.

110. The Working Group also accepted a proposal to replace the words "indicating that payment ... has been demanded from ..." by the words "indicating, or from which it is to be inferred that ...". It was felt that the inclusion of such a formulation in the present provision, as well as in article 2, would meet the concern that had been expressed with regard to the use of the word "indicating", namely, that it might be read as requiring an actual statement in the demand that payment was due. Such a change, it was suggested, would make it clear without a doubt that the draft Convention encompassed simple-demand guarantees. Lastly, the Working Group agreed to the retention of the words "or made by", found in the latter portion of the present text in square brackets.

111. Subject to the above decisions, the Working Group found the substance of subparagraph (d) to be generally acceptable.

#### *Subparagraph (e) ("counter-guarantee")*

112. The Working Group found the substance of subparagraph (e) to be generally acceptable.

#### *Subparagraph (f) ("confirmation")*

113. Views were exchanged as to whether or not subparagraph (f) should retain the wording in its latter portion stating that the presentation of a demand for payment by the beneficiary to the confirmer did not make the beneficiary lose the right to demand payment from the guarantor/issuer in the event of rejection or non-payment. It was noted that the wording in question should encompass the situations where a demand was submitted to the confirmer, but was rejected, as well as the case in which the beneficiary decided to demand payment from the guarantor/issuer without having submitted a demand to the confirmer. It was further noted that the wording in question had been added in an attempt to reflect the decision at the twenty-first session that the provision should make it clear that, under the draft Convention, presentation to the confirmer did not extinguish the beneficiary's right to proceed with a demand against the issuer if the confirmer dishonoured (A/CN.9/391, para. 50). According to that decision, the provision was not intended to deal with issues that might properly be settled in the terms of the undertaking, such as the order in which the beneficiary was to exercise its right to demand payment from either the confirmer or the issuer.

114. While a degree of support was expressed for the formulation contained in the present text, a variety of reservations were expressed as to its inclusion and content. The view was expressed that the wording should be deleted as the rule contained therein, that the beneficiary had an option and a right to demand payment from either the guarantor/issuer or the confirmer, was self evident and it was therefore unnecessary to re-state it in subparagraph (f). A concern was expressed that stating the rule in subparagraph (f) might be misconstrued as providing a rule on the order for the presentation of the demand to the confirmer or to the guarantor/issuer. It was also suggested that the rule as formulated did not in fact address the two most common problems that arose in the context of confirmation. Those concerned the rights of the beneficiary where the confirmer received documents but refused to pay, and cases in which the beneficiary went directly to the guarantor/issuer to demand payment. Such an approach may be used by the beneficiary when, for example, the confirmer was insolvent, and there was a fear on the part of the beneficiary that the insolvency trustee might not return documents in the event of non-payment. It was noted that a question of the type that might arise after a rejection by the confirmer was whether a subsequent demand to the guarantor/issuer would be subject to the expiry date of the undertaking or to general prescription rules. It was further observed that a definition section was not the appropriate place to deal with matters relating to the rights of parties to an undertaking, and that, as presently formulated, the text might even be read erroneously as granting a right to the beneficiary to obtain a double payment.

115. In order to address the concerns that had been raised, proposals were made aimed at the deletion of all or various parts of the text reading "without, however, losing its right to demand payment from the guarantor/issuer in the event of [non-payment by the confirmer] [rejection by the confirmer of the demand or payment]". In the end, the Working Group decided that it would be useful to retain the basic statement that a demand for payment from the confirmer as such would not, under the draft Convention, strip the beneficiary of its right to demand payment from the guarantor/issuer. However, the Working Group also agreed to the deletion of the text beginning with the words "in the event", to the end of the subparagraph. It was felt that the formulation found in that text, no matter which of the two alternatives presented therein in square brackets were retained, was unclear, in addition to being unnecessary.

116. As regards the precise formulation of subparagraph (f), the Working Group agreed to the deletion of the word "independent" in the expression "independent undertaking" in the beginning of the text, as it was felt to be redundant. The Working Group considered, but was not inclined to accept a suggestion to replace the word "option" by the word "right", a proposal aimed at removing any possible inference that a confirmation might render optional the presentation of documents required to be presented pursuant to the undertaking that was the subject of the confirmation. While there was an inclination for retention of the word "option", the drafting group was asked to look into the matter, including the possibility of alignment of the text with similar formulations used in subparagraph (d) as well as in article 2. The Working Group also referred to the drafting group a suggestion to replace the words "without, however,

losing its right to demand payment" by the words "without prejudice to its right to demand payment".

117. Subject to the above changes, the Working Group found the substance of subparagraph (f) to be generally acceptable.

*Subparagraph (g) "confirmer"*

118. The Working Group found the substance of subparagraph (g) to be generally acceptable.

*Subparagraph (h) "document"*

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

*Subparagraph (i) ("issuance")*

120. The Working Group held a discussion on the meaning and effect of the phrase "leaves the sphere of control of the guarantor/issuer". It was stated at the outset that it was important to be specific as to the meaning of the phrase as, for example, the place of issuance could determine the applicable law. Differing views were expressed as to how to better clarify the point of issuance. One view was that, since the undertaking became irrevocable and fixed at the time it was transmitted to the recipient party, issuance should be related to the time of transmittal. Another view in the same direction was that issuance should be defined by the time of receipt of the instrument so as to take into account instances of theft or loss of the undertaking or other instances when the undertaking might leave the sphere of control of the guarantor/issuer without a positive expression of the wish to be bound by the instrument. Yet another proposal was that, in order to avoid misunderstanding as to issuance, it should be fixed at that time and place that had been agreed to by the parties.

121. Those proposals were objected to on the basis that tying issuance to either transmittal or receipt of the undertaking would subject issuance to even more questions concerning, for example, the point at which an undertaking would be considered to be transmitted or even received. Furthermore, it was pointed out, issuance could not be tied to the agreement of the parties as, in practice, these were not issues that the parties normally jointly stipulated.

122. Interest was expressed in exploring how the phrase "sphere of control of the guarantor/issuer" could be better clarified. It was pointed out that both the time and the place where issuance took place were important as the guarantor/issuer might make arrangements for the undertaking in one place of business but have it issued at another place of business. It was thus stated that what was important was not a place of business but the time and place at which the undertaking was no longer in the control of the guarantor/issuer. Taking this into account, the following formulation was suggested: "Issuance of an undertaking occurs at the time when and the place where that undertaking leaves the sphere of control of the guarantor/issuer." After deliberation, the Working Group agreed to the formulation along those lines and referred it to the drafting group.

123. A view was expressed that the definition of issuance brought out a gap that now existed related to the Working Group's decision on articles 1 and 27 with regard to the relationship between the place of issuance and the place of business of the guarantor/issuer. It was stated that this gap existed because the place of business of the guarantor/issuer need not in all instances be the place of issuance of the undertaking. It was pointed out, however, that this was a matter that was closely related to the decision the Working Group had already taken on articles 1 and 27, and should therefore be discussed in that context.

124. A concern was expressed that reference to "the guarantor/issuer" might lead to some confusion as to which guarantor/issuer was being referred to since the term was used to mean different parties to an undertaking depending on the context. It was stated that, in the context of issuance, it would be useful to clarify that the guarantor/issuer being referred to was the "respective" guarantor/issuer who was in control of the undertaking. A question was raised as to whether this would not mean that, in those instances where issuance by the guarantor, for example, depended on confirmation, the guarantor would be considered to have issued the undertaking once it left the guarantor's sphere of control even if the confirmer had not yet confirmed. It was pointed out, however, that this had more to do with the concept of effectiveness of the undertaking which was dealt with in article 7. After deliberation, the Working Group agreed to add a word such as "respective" before the words "guarantor/issuer" and referred the matter to the drafting group.

125. Subject to the agreed changes, the Working Group found the substance of subparagraph (i) to be generally acceptable.

### Chapter III. Effectiveness of undertaking

#### Article 7. (Issuance) (Establishment) of undertaking

##### Paragraph (1)

126. Differing views were expressed as to which of the two words, "issuance" or "establishment", should be adopted for the title of article 7 and for paragraph (1). A preference was expressed for the use of "issuance" for both the title and paragraph (1) on the basis that, while the term "issuance" had been defined in article 6(i) and had been used in other provisions of the draft Convention, the term "establishment" had not been defined. It was suggested that "establishment" had the same meaning in the context in which it was used in article 7(1) as that of "issuance" in article 7(2) and that the two words could therefore be used interchangeably. A contrary view, widely shared in the Working Group, was that the words had differing meanings as the subject matter of paragraph (1) was different from that of paragraph (2). It was stated that, while paragraph (1) dealt with the form of an undertaking, paragraph (2) dealt with the determination of when an undertaking became effective and whether or not an undertaking could be revoked. According to this view, it was more appropriate to use the word "establishment" in paragraph (1) given the subject matter of that paragraph. With respect to the title it was noted that it had been agreed to use "establishment" at a previous meeting of

the Working Group (see A/C.9/391, para. 61). Another proposal made in this regard was to change the title of the article to "form and effectiveness of undertaking", to use the word "issuance" in paragraph (1) and to retain paragraph (2) without any changes. In support of this proposal it was stated that "form and effectiveness of undertaking" was a more appropriate title as it better reflected the subject matter of the article.

127. The Working Group noted that the title of chapter III ("effectiveness of undertaking") was similar to that proposed for the title of article 7 and decided that the title of chapter III should be reassessed at a later point taking into account the content of the other articles in chapter III, which remained to be reviewed (see also paragraph 133, concerning a revision of the title, and paragraph 132, concerning the relocation to article 7 of the provision in article 6(i)). The Working Group agreed to retain the use of the word "issuance" in paragraph (1) as an appropriate word to express the concept involved, but it did not have sufficient time at the present session to consider the content of paragraph (2).

#### Consideration of draft articles presented by drafting group

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

128. The Working Group supported the addition of the words "an international" before the words "letter of credit" in paragraph (2); the purpose of the addition was to avoid a situation where a purely domestic letter of credit could become subject to the Convention pursuant to an express opt-in statement referred to in the provision.

##### *Article 2. Undertaking*

129. The Working Group accepted a suggestion to replace the word "indicating" in paragraph (1) by the words "indicating, or from which it is to be inferred".

##### *Article 3. Independence of undertaking*

130. The Working Group considered that the expression "undertaking" in article 3 covered all types of independent undertakings, including counter-guarantees and confirmations; that meaning obtained from the definition of "undertaking" in article 6(a). Thus, there was agreement in the Working Group that a counter-guarantee as defined in the Convention was independent from both the guarantee covered by the counter-guarantee as well as from the underlying obligation. Nevertheless, in order to make that meaning abundantly clear, the Working Group decided to include, after the words "any other undertaking" words along the lines of "including a guarantee to which the counter-guarantee relates" and appropriate analogous words expressing that principle in regard to confirmations.

131. The Working Group noted that the words "operational purview" might not be clearly understood in different

geographic areas and were difficult to translate. As a result, the Working Group considered replacing that expression with an expression along the lines of "the guarantor/issuer's normal sphere of operations". As to the proposed words, it was considered that the word "normal" might give rise to an unintended interpretation that the provision might also encompass operations which, while not customary in the banking practice, were normal for the particular guarantor/issuer. It was stressed that the intention was to refer to operations that were customary, usual or typical in the banking industry. In order to avoid the possibility of such a misunderstanding, the Working Group decided that the appropriate wording was "a guarantor/issuer's sphere of operations".

##### *Article 6. Definitions*

132. The Working Group accepted a suggestion to move subparagraph (i) to article 7, since in its modified form it was a rule of an operational character rather than a definition.

##### *Article 7. [Issuance][Establishment] of undertaking*

133. The Working Group agreed to amend the title to refer to issuance, form and effectiveness.

##### *Article 17. Payment or rejection of demand*

134. It was suggested that in article 17(4) there should be a reference to the provision in article 6(2) concerning the time period left to the guarantor/issuer for examining a demand for payment. Another suggestion was that the non-mandatory nature of article 17(4) should be expressly stated in order to avoid the unintended inference that the provision was mandatory. A further point was whether paragraph (4) should not be incorporated into a separate article. In regard to those suggestions, it was noted that paragraph (4) remained in square brackets pending further consideration by the Working Group and the suggestions could be taken up at a later stage.

##### *Article 19. Improper demand*

135. The Working Group noted that article 19(2)(b), (c) and (d) employed the expressions "underlying obligation" and "secured obligation" without there existing any intended difference in meaning and that an alignment of the expressions would be made.

##### *Article 21. Provisional court measures*

136. The Working Group noted that the words "funds of the guarantor/issuer or of the beneficiary" had been replaced by the words "the amount of the undertaking held by the guarantor/issuer or the proceeds of the undertaking paid to the beneficiary". Some reservations were expressed as to that change and it was agreed that the change could be reconsidered subsequently.

*Articles 26 (Choice of law) and 27  
(Determination of applicable law)*

137. The Working Group agreed that the expression "rights, obligations and defences relating to an undertaking are", which appeared in articles 26 and 27, should be replaced by "undertaking is"; the purpose of the modification was not to introduce any substantive change, but to facilitate expressing the substance and scope of the provision in the various languages.

### III. FUTURE WORK

138. The Working Group noted that its twenty-third session would be held from 9 to 20 January 1995 in New York. It was noted that, at that session, the Working Group would continue reviewing the articles of the draft Convention, from articles 7(2) to 27. It was further noted that, at that session, the Working Group would have to make a decision regarding chapter VI (jurisdiction), which decision would be made on the basis of an article-by-article review of chapter VI as it appeared in document A/CN.9/WG.II/WP.83.

## ANNEX

### ARTICLES OF THE DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT AS REVISED AT THE TWENTY-SECOND SESSION

#### Chapter I. Scope of application

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

(1) This Convention applies to an international undertaking referred to in article 2:

(a) if the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State, or

(b) if the rules of private international law lead to the application of the law of a Contracting State,

unless the undertaking excludes the application of the Convention.

(2) This Convention applies also to an international letter of credit other than a stand-by letter of credit if it expressly states that it is subject to this Convention.

(3) The provisions of articles [24 to 25 bis,] 26 and 27 apply irrespective of whether or not in any given case the Convention applies pursuant to paragraph (1) of this article.

##### Article 2. *Undertaking*

(1) For the purposes of this Convention, an undertaking is an independent commitment, usually referred to as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account

of any mature indebtedness undertaken by the principal/applicant or another person.

(2) The undertaking may be given:

(a) at the request or on the instruction of the customer ("principal/applicant") of the guarantor/issuer;

(b) on the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal/applicant") of that instructing party; or

(c) on behalf of the guarantor/issuer itself.

(3) Payment may be stipulated in the undertaking to be made in any form, including:

(a) payment in a specified currency or unit of account;

(b) acceptance of a bill of exchange (draft);

(c) payment on a deferred basis;

(d) supply of a specified item of value.

(4) The undertaking may stipulate that the guarantor/issuer itself is the beneficiary when acting in favour of another person.

##### Article 3. *Independence of undertaking*

For the purposes of this Convention, an undertaking is independent where the guarantor/issuer's obligation to the beneficiary is not subject to the existence or validity of an underlying transaction, or to any other undertaking (including guarantees to which counter-guarantees relate, and stand-by letters of credit or independent guarantees to which confirmations or counter-guarantees relate), or to any term or condition not appearing in the undertaking, or to any future, uncertain act or event except presentation of documents or another such act or event within a guarantor/issuer's sphere of operations.

##### Article 4. *Internationality of undertaking*

(1) An undertaking is international if the places of business, as specified in the undertaking, of any two of the following persons are in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer.

(2) For the purposes of the preceding paragraph:

(a) if the undertaking lists more than one place of business for a given person, the relevant place of business is that which has the closest relationship to the undertaking;

(b) if the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant for determining the international character of the undertaking.

#### Chapter II. Interpretation

##### Article 5. *Principles of interpretation*

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 independent guarantee and stand-by letter of credit practice.

##### Article 6. *Definitions*

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "undertaking" includes "counter-guarantee" and "confirmation of an undertaking";

(a bis) "guarantor/issuer" includes "counter-guarantor" and "confirmer";

(b) [deleted]

(c) [deleted]

(d) "counter-guarantee" means an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment under that other undertaking has been demanded from, or made by, the person issuing that other undertaking;

(e) "counter-guarantor" means the person issuing a counter-guarantee;

(f) "confirmation" of an undertaking means an undertaking added to that of the guarantor/issuer, and authorized by the guarantor/issuer, providing the beneficiary with the option of demanding payment from the confirmer instead of from the guarantor/issuer, upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the confirmed undertaking, without prejudice to the beneficiary's right to demand payment from the guarantor/issuer;

(g) "confirmer" means the person confirming an undertaking;

(h) "document" means a communication made in a form that provides a complete record thereof;

(i) [moved to article 7]

(j) [deleted]

### [Chapter III. Effectiveness of undertaking]

#### Article 7. Issuance, form and effectiveness of undertaking

(new 1) Issuance of an undertaking occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer concerned.

(1) An undertaking may be issued in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary.

### Chapter IV. Rights, obligations and defences

#### Article 17. Payment or rejection of demand

(1) Subject to paragraph (2) of this article, the guarantor/issuer shall pay against a demand made in accordance with the provisions of article 14. Following a determination that a demand for payment so conforms, payment shall be made promptly, unless the undertaking stipulates payment on a deferred basis, in which case payment shall be made at the stipulated time.

(1 bis) Any payment against a demand that is not in accordance with the provisions of article 14 does not prejudice the rights of the principal/applicant.

(2) Where the guarantor/issuer is shown facts that make the demand manifestly and clearly improper according to article 19 and, for that reason, payment would not be in good faith, it shall not make payment.

(3) If the guarantor/issuer rejects the demand, it shall promptly give notice thereof to the beneficiary by teletransmission or, if that

is not possible, by other expeditious means. Unless otherwise stipulated in the undertaking, the notice shall indicate the reason for the rejection.

[(4) The guarantor/issuer may not, as grounds for rejection of the demand, invoke any discrepancy in the documents not notified to the beneficiary as required by paragraph (3) of this article.]

#### Article 19. Improper demand

(1) A demand for payment is improper if:

(a) any document is not genuine or has been falsified;

(b) no payment is due on the basis asserted in the demand and the supporting documents; or

(c) judging by the type and purpose of the undertaking, the demand has no conceivable basis.

(2) For the purposes of paragraph (1)(c) of this article, the following are types of situations in which a demand has no conceivable basis:

(a) the contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;

(b) the underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;

(c) the underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) fulfillment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary.

#### Article 20. Set-off

Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer may discharge the payment obligation under the undertaking by availing itself of a right of set-off, except with any claim assigned to it by the principal/applicant.

### Chapter V. Provisional court measures

#### Article 21. Provisional court measures

(1) Where, on an application by the principal/applicant or the instructing party, it is shown that there is a high probability that a demand made, or expected to be made, by the beneficiary is improper, the court, on the basis of immediately available strong evidence, may issue a provisional order to the effect that the beneficiary does not receive payment or that the amount of the undertaking held by the guarantor/issuer or the proceeds of the undertaking paid to the beneficiary are blocked, taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious harm.

(2) [deleted]

(3) The court, when issuing a provisional order referred to in paragraph (1) of this article, may require the person applying therefor to furnish such form of security as the court deems appropriate.

(4) The court may not issue a provisional order of the kind referred to in paragraph (1) of this article based on any objection to

payment other than improper demand or use of the undertaking for an illegal purpose.

lated in the undertaking or agreed elsewhere, or it may be demonstrated by the terms and conditions of the undertaking.

## Chapter VII. Conflicts of laws

## Article 27. *Determination of applicable law*

### Article 26. *Choice of applicable law*

The undertaking is governed by the law designated by the guarantor/issuer and the beneficiary. Such designation may be stipu-

Failing a choice of law in accordance with article 26, the undertaking is governed by the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued.

# **B. Working paper submitted to the Working Group on International Contract Practices at its twenty-second session: independent guarantees and stand-by letters of credit: newly revised articles of draft Convention: note by the Secretariat (A/CN.9/WG.II/WP.83) [Original: English]**

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## INTRODUCTION

1. Pursuant to decisions taken by the Commission at its twenty-first and twenty-second sessions, the Working Group on International Contract Practices has devoted its thirteenth to twenty-first sessions to the preparation of a uniform law on independent guarantees and stand-by letters of credit. The reports of those sessions are found in documents A/CN.9/330, A/CN.9/342, A/CN.9/345, A/CN.9/358, A/CN.9/361, A/CN.9/372, A/CN.9/374, A/CN.9/388 and A/CN.9/391. The working papers discussing possible issues of the uniform law and presenting various draft versions of articles of a draft Convention on independent guarantees and stand-by letters of credit are found in documents A/CN.9/WG.II/WP.65, A/CN.9/WG.II/WP.67, A/CN.9/WG.II/WP.68, A/CN.9/WG.II/WP.70, A/CN.9/WG.II/WP.71, A/CN.9/WG.II/WP.73 and Add.1, A/CN.9/WG.II/WP.75, A/CN.9/WG.II/WP.76 and Add.1 and A/CN.9/WG.II/WP.80.

2. The present note contains newly revised articles 1 to 27 of the draft Convention, reflecting the changes agreed upon by the Working Group at the twentieth session with respect to articles 1 and 2(1), and 18 to 27, and at the twenty-first session with respect to articles 2(3) to 17. It may be recalled that at the twenty-first session the Working Group did not complete its review of article 17.

## DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

### Chapter I. Scope of application

#### Article 1. Scope of application

(1) This Convention applies to an international *undertaking* referred to in article 2 if it is issued in a Contracting State or the rules of private international law lead to the application of the law of a Contracting State, unless the undertaking excludes the application of the Convention.

(2) This Convention applies [also] to a [commercial letter of credit] [letter of credit other than a stand-by letter of credit] if it expressly states that it is subject to this Convention.

(3) The provisions of articles [21] [24] [26] to 27 apply irrespective of whether or not in any given case the Convention applies pursuant to paragraph (1) of this article.

#### Article 2. Undertaking

(1) (a) For the purposes of this Convention, an *undertaking* is an independent commitment given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating that payment is due because of a default in the performance of an obligation, or because of

another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the *principal/applicant* or another person.

(b) The *undertaking* may be designated as a demand guarantee or stand-by letter of credit or an equivalent undertaking, excluding insurance contracts, negotiable instruments and [subject to paragraph (2) of article 1,] commercial letters of credit.

(2) The undertaking may be given:

(a) at the request or on the instruction of the customer ("*principal/applicant*") of the *guarantor/issuer*;

(b) on the instruction of another bank, institution or person ("*instructing party*") that acts at the request of the customer ("*principal/applicant*") of that instructing party; or

(c) on behalf of the *guarantor/issuer* itself.

(3) Payment may be stipulated in the *undertaking* to be made in any form, including:

(a) payment in a specified currency or unit of account;

(b) acceptance of a bill of exchange [(draft)] for a specified amount;

(c) payment on a deferred basis;

(d) supply of a specified item of value.

(4) The *undertaking* may stipulate that the *guarantor/issuer* itself is the beneficiary when acting in favour of another person, or that one of its branches is the beneficiary, provided that in the latter case the undertaking expressly states that the Convention is to apply.

#### Article 3. Independence of undertaking

For the purposes of this Convention, an *undertaking* is independent where the *guarantor/issuer's* obligation to the beneficiary is not subject to the existence or validity of an underlying transaction, or to any other undertaking, or to any term or condition not appearing in the undertaking, or to any future, uncertain act or event [not] [except presentation of documents or another such act or event] falling within the *guarantor/issuer's* operational purview.

#### Article 4. Internationality of undertaking

(1) An *undertaking* is international if the places of business, as specified in the undertaking, of any two of the following persons are in different States: *guarantor/issuer*, beneficiary, *principal/applicant*, instructing party, confirmer.

(2) For the purposes of the preceding paragraph:

(a) if the undertaking lists more than one place of a given person, the relevant place is that which has the closest relationship to the undertaking;

(b) if the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant for determining the international character of the undertaking.

## Chapter II. Interpretation

### Article 5. Principles of interpretation

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 the international practice of independent guarantees and stand-by letters of credit.

### Article 6. Definitions

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "undertaking" [includes] [may refer to] "counter-guarantee" and "confirmation of guarantee", and "guarantor/issuer" [includes][may refer to] "counter-guarantor" and "confirmer";

(b) [deleted]

(c) [deleted]

(d) "counter-guarantee" means an undertaking given to the guarantor/issuer of another undertaking [or similar instrument] by its instructing party and providing for payment upon demand and presentation of any specified document indicating that payment under that other undertaking has been demanded from [, or made by,] the person issuing that other undertaking;

(e) "counter-guarantor" means the person issuing a counter-guarantee;

(f) "confirmation" of an undertaking means an independent undertaking added to that of the guarantor/issuer, and authorized by the guarantor/issuer, providing the beneficiary with the option of demanding payment from and, unless expressly stipulated otherwise, presenting any required documents to the confirmer instead of the guarantor/issuer, without, however, losing its right to demand payment from the guarantor/issuer in the event of [non-payment by the confirmer] [rejection by the confirmer of the demand for payment];

(g) "confirmer" means the person confirming an undertaking;

(h) "document" means a communication made in a form that provides a complete record thereof;

(i) "issuance" of an undertaking means that the undertaking leaves the sphere of control of the guarantor/issuer.

(j) [deleted]

## Chapter III. Effectiveness of undertaking

### Article 7. [Issuance] [Establishment] of undertaking

(1) An undertaking may be [issued][established] in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary.

(2) An undertaking is effective upon issuance, provided that it does not state a different time of effectiveness, and it is irrevocable unless, when issued, it is stipulated to be revocable.

### Article 8. Amendment

(1) An undertaking may not be amended except in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph (1) of article 7.

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, an amendment becomes effective when it is issued by the guarantor/issuer, if previously authorized by the beneficiary or consisting solely of an extension of the validity period of the undertaking; any other amendment becomes effective when the guarantor/issuer receives a notice of acceptance by the beneficiary.

(3) An amendment of an undertaking has no effect on the rights and obligations of the principal/applicant (or an instructing party) or of a confirmer of the undertaking unless such person consents to the amendment.

### Article 9. Transfer of beneficiary's right to demand payment

(1) The beneficiary's right to demand payment under the undertaking may be transferred only if so, and to the extent and in the manner, authorized in the undertaking.

(2) If an undertaking is designated as transferable without specifying whether or not the consent of the guarantor/issuer or another authorized person is required for the actual transfer, neither the guarantor/issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it.

### Article 9 bis. Assignment of proceeds

(1) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the undertaking.

(2) If the guarantor/issuer, or another person obliged to effect payment, has received a notice of the beneficiary in a form referred to in paragraph (1) of article 7 of the beneficiary's irrevocable assignment, payment to the assignee discharges the obligor, to the extent of its payment, from its liability under the undertaking.

### Article 10. Cessation of effectiveness of undertaking

(1) The undertaking ceases to be effective when:

(a) the guarantor/issuer receives from the beneficiary a statement of release from liability in a form referred to in paragraph (1) of article 7;

(b) the beneficiary and the *guarantor/issuer* agree on the termination of the *undertaking* in a form referred to in paragraph (1) of article 7;

(c) the amount available under the *undertaking* is paid, unless the *undertaking* provides for its automatic renewal or for an automatic increase of the amount available or otherwise provides for continuing effectiveness; or

(d) the validity period of the *undertaking* expires in accordance with the provisions of article 11.

(1 *bis*) Cessation of the effectiveness of the *undertaking* terminates the right of the beneficiary to demand payment under the *undertaking*, but does not affect other rights or obligations of the beneficiary or other parties created under the *undertaking* prior to the cessation of its effectiveness.

(2) Notwithstanding paragraph (1) of this article, the *undertaking* may stipulate, or the *guarantor/issuer* and the beneficiary may agree elsewhere, that return of the document embodying the *undertaking* to the *guarantor/issuer*, or a procedure functionally equivalent to the return of the document in the case of the issuance of the *undertaking* in non-paper form, either alone or in conjunction with one of the events referred to in subparagraphs (a) and (b) of paragraph (1) of this article, would be required for the cessation of effectiveness of the *undertaking*; retention of any such document by the beneficiary after the *undertaking* ceases to be effective [, or after full payment has been made,] does not preserve any rights of the beneficiary under the *undertaking*.

#### Article 11. Expiry

The validity period of the *undertaking* expires:

(a) at the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the *undertaking*, provided that, if the expiry date is not a business day at the place of the *guarantor/issuer*, or of another person or at another place stipulated in the *undertaking* for presentation of the demand for payment, expiry occurs on the first business day which follows;

(b) if expiry depends according to the *undertaking* on the occurrence of an event, when the *guarantor/issuer* receives confirmation that the event has occurred by presentation of the document specified for that purpose in the *undertaking* or, if no such document is specified, of a certification by the beneficiary of the occurrence of the event;

(c) if the *undertaking* does not state an expiry date, or if a stated expiry event has not yet been established by presentation of the required document, when six years have elapsed from the date of issuance of the *undertaking*.

### Chapter IV. Rights, obligations and defences

#### Article 12. Determination of rights and obligations

(1) Subject to the provisions of this Convention, the rights and obligations of the *guarantor/issuer* and the beneficiary are determined by the terms and conditions set forth in the *undertaking*, including any rules, general conditions or usages specifically referred to therein.

(2) In interpreting terms and conditions of the *undertaking* and in settling questions that are not addressed by the terms and conditions of the *undertaking* or by the provisions of this Convention, regard shall be had to generally accepted international rules and usages of [independent] guarantee or stand-by letter of credit practice.

#### Article 13. [Standard of conduct and] liability of guarantor/issuer

(1) In discharging its obligations under the *undertaking* and this Convention, the *guarantor/issuer* shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit.

(2) A *guarantor/issuer* may not be exempted from liability for its failure to act in good faith or for any grossly negligent conduct.

#### Article 14. Demand

Any demand for payment under the *undertaking* shall be made in a form referred to in paragraph (1) of article 7 and in conformity with the terms and conditions of the *undertaking*. In particular, any certification or other document required by the *undertaking* shall be presented, within the time of effectiveness of the *undertaking*, to the *guarantor* or *issuer* at the place where the *undertaking* was issued, unless another person or another place has been stipulated in the *undertaking*. If no certification or other document is required, the beneficiary, when demanding payment, is deemed to impliedly certify that the demand is not in bad faith or otherwise improper.

#### Article 16. Examination of demand and accompanying documents

(1) The *guarantor/issuer* shall examine the demand and any other, accompanying documents in accordance with the standard of conduct referred to in paragraph (1) of article 13. In determining whether documents are in facial conformity with the terms and conditions of the *undertaking*, and are consistent with one another, the *guarantor/issuer* shall have due regard to the applicable international standard of independent guarantee or stand-by letter of credit practice.

(2) Unless otherwise stipulated in the *undertaking* or elsewhere agreed by the *guarantor/issuer* and the beneficiary, the *guarantor/issuer* shall have reasonable time, but not more than seven [banking][business] days, in which to examine the demand and any other, accompanying documents and to decide whether or not to pay.

#### Article 17. Payment or rejection of demand

(1) Subject to paragraph (2) of this article, the *guarantor/issuer* shall pay against a demand made in accordance with the provisions of article 14. Following a determination that a demand for payment so conforms, payment shall be made

*promptly, unless the undertaking stipulates payment on a deferred basis, in which case payment shall be made at the stipulated time.*

(1 *bis*) Any payment against a demand that is not in accordance with the provisions of article 14 does not *prejudice* the rights of the *principal/applicant*.

(2) Where the *guarantor/issuer* is shown facts that make the demand manifestly and clearly improper according to article 19, it *[shall not make payment]* *[may nevertheless decide to make payment, provided it acts in conformity with paragraph (1) of article 13]*.

[*Note to the Working Group:* The remainder of article 17, which was not considered at the twenty-first session, is reproduced as it appeared in A/CN.9/WG.II/WP.80.]

(3) If the *guarantor or issuer rejects* the demand [on any ground referred to in paragraphs (1) and (2) of this article], it shall promptly give notice thereof to the beneficiary by teletransmission or, if that is not possible, by other expeditious means. Unless otherwise stipulated in the guaranty letter, the notice shall indicate the reason for the rejection.

(4) *Variant A* If the *guarantor or issuer* fails to comply with the provisions of article 16(2) or of paragraph (3) of this article, it is precluded from invoking any discrepancy in the documents not discovered or not notified to the beneficiary as required by those provisions.

*Variant B* The *guarantor or issuer* may not invoke any discrepancy in the documents not discovered within the time referred to in article 16(2) or not notified to the beneficiary as required by paragraph (3) of this article; if the *guarantor or issuer* in any other respect fails to comply with those provisions, the beneficiary may recover from the *guarantor or issuer* damages for loss suffered as a consequence of that failure.

*Variant C* Where the *guarantor or issuer* has failed to discover or notify a certain discrepancy in the documents as required by article 16(2) and paragraph (3) of this article and if compliance with those provisions would have enabled the beneficiary to make a conforming demand before the expiry of the guaranty letter, the *guarantor or issuer* shall pay the amount of the guaranty letter, plus interest for delay, upon a conforming demand made at the latest [five days] [promptly] after having been notified of that discrepancy.

*Variant D* If the *guarantor or issuer* fails to comply with paragraphs (1) and (1 *bis*) of this article or to discover or to notify any discrepancy in the documents as required by article 16(2) and paragraph (3) of this article, it is liable to the beneficiary for loss suffered as a direct result of such failure.]

## Article 19. Improper demand

(1) A demand for payment is improper if:

- (a) any document is forged;
- (b) no payment is due on the basis asserted in the demand and the supporting documents; or
- (c) judging by the type and purpose of the *undertaking*, the demand has no conceivable basis.

(2) The following are types of situations in which a demand has no conceivable basis:

- (a) the contingency or risk against which the *undertaking* was designed to secure the beneficiary has undoubtedly not materialized;
- (b) the underlying obligation of the *principal/applicant* has been declared invalid by a court or arbitral tribunal, *unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking*;
- (c) the secured obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;
- (d) fulfillment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary.

## Article 20. Set-off

Unless otherwise stipulated in the *undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary*, the *guarantor/issuer* [or another person authorized to effect payment] may discharge the payment obligation under the *undertaking* by availing itself of a right of set-off, except with any claim assigned to it by the *principal/applicant*.

## [Chapter V. Provisional court measures]

### Article 21. Provisional court measures

(1) Where, on an application by the *principal/applicant or the instructing party*, it is shown that there is a high probability that a demand made, or expected to be made, by the beneficiary is improper, the court may issue a provisional order to the effect that the beneficiary does not receive payment [or that funds of the *guarantor/issuer* or of the beneficiary are blocked], taking into account whether in the absence of such an order the *principal/applicant* would be likely to suffer serious harm.

(2) [deleted]

(3) The court, when issuing a provisional order referred to in paragraph (1) of this article, may require the person applying therefor to furnish such form of security as the court deems appropriate.

(4) The court may not issue a provisional order of the kind referred to in paragraph (1) of this article based on any objection to payment other than improper demand or use of the *undertaking* for an illegal purpose.

## Chapter VI. Jurisdiction

### Article 24. Choice of court or arbitration

*The guarantor/issuer and the beneficiary [one or more of whom have a place of business in a Contracting State,] may stipulate in the undertaking or agree elsewhere in a form referred to in paragraph (1) of article 7 that a court or the courts of a Contracting State have jurisdiction to settle any disputes that have arisen or which may arise in relation to the undertaking or that any such dispute shall be settled by arbitration. The chosen court or courts have exclusive jurisdiction unless otherwise stipulated or agreed.*

#### Article 24 bis. Jurisdiction of other courts

*Every court other than the chosen court or courts shall decline jurisdiction, except*

(a) *where the choice of court made by the guarantor/issuer and the beneficiary is not exclusive;*

(b) *where the choice of court is not made in accordance with article 24;*

(c) *for the purpose of provisional court measures;*

(d) *where a decision of the court designated in accordance with article 24 [is not capable of recognition and enforcement] [does not fulfil the conditions of recognition and enforcement in another Contracting State]; or*

[(e) *where the chosen court has declined to exercise jurisdiction*].

### Article 25. Determination of court jurisdiction

(1) *Unless otherwise stipulated in the undertaking or agreed elsewhere by the guarantor/issuer and the beneficiary in a form referred to in paragraph (1) of article 7, [and without prejudice to existing rules on jurisdiction in Contracting States or to arbitration under article 24,] the courts*

*of the Contracting State where the undertaking was issued have jurisdiction over disputes between the guarantor/issuer and the beneficiary relating to the undertaking.*

(2) *The courts of the Contracting State where the undertaking was issued [may entertain] [have jurisdiction over] applications by the principal/applicant or the instructing party in accordance with article 21 for provisional orders against the guarantor/issuer or the beneficiary.*

#### Article 25 bis. Relationship to other treaty arrangements

*If the guarantor/issuer and the beneficiary have their place of business in States that are bound by a treaty establishing rules of jurisdiction or providing for recognition and enforcement in a State of decisions given in another State, the provisions of that treaty shall supersede the corresponding provisions of articles 24, 24 bis and 25.*

## Chapter VII. Conflict of laws

### Article 26. Choice of applicable law

*The rights, obligations and defences relating to an undertaking are governed by the law designated by the guarantor/issuer and the beneficiary. Such designation may be stipulated in the undertaking or agreed elsewhere, or it may be demonstrated by the terms and conditions of the undertaking.*

### Article 27. Determination of applicable law

*Failing a choice of law in accordance with article 26, the rights, obligations and defences relating to an undertaking are governed by the law of the State where the undertaking was issued.*

## C. Report of the Working Group on International Contract Practices on the work of its twenty-third session (New York, 9-20 January 1995)(A/CN.9/408) [Original: English]

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## INTRODUCTION

1. Pursuant to a decision taken by the Commission at its twenty-first session,<sup>1</sup> the Working Group on International Contract Practices devoted its twelfth session to a review of the draft Uniform Rules on Guarantees being prepared by the International Chamber of Commerce (ICC) and to an examination of the desirability and feasibility of any future work relating to greater uniformity at the statutory law level in respect of guarantees and stand-by letters of credit. The Working Group recommended that work be initiated on the preparation of a uniform law, whether in the form of a model law or of a convention.

2. That recommendation was accepted by the Commission at its twenty-second session.<sup>2</sup> The Working Group devoted its thirteenth to twenty-second sessions to the preparation of

a uniform law (for the reports of those sessions, see A/CN.9/330, A/CN.9/342, A/CN.9/345, A/CN.9/358, A/CN.9/361, A/CN.9/372, A/CN.9/374, A/CN.9/388, A/CN.9/391 and A/CN.9/405). That work has been carried out on the basis of background working papers prepared by the Secretariat on possible issues to be included in the uniform law. Those background papers included: A/CN.9/WG.II/WP.63 (tentative considerations on the preparation of a uniform law); A/CN.9/WG.II/WP.65 (substantive scope of application, party autonomy and its limits, rules of interpretation); A/CN.9/WG.II/WP.68 (amendment, transfer, expiry and obligations of the guarantor); and A/CN.9/WG.II/WP.70 and A/CN.9/WG.II/WP.71 (fraud and other objections to payment, injunctions and other court measures, conflict of laws and jurisdiction). The draft articles of the uniform law, which the Working Group decided should, as a working assumption, be in the form of a draft Convention, were submitted by the Secretariat in documents A/CN.9/WG.II/WP.67, A/CN.9/WG.II/WP.73 and Add.1, A/CN.9/WG.II/WP.76 and Add.1, A/CN.9/WG.II/WP.80 and A/CN.9/WG.II/WP.83. The Working Group also had before it a proposal by the United

<sup>1</sup>Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para. 18.

<sup>2</sup>Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 244.



States of America relating to rules for stand-by letters of credit (A/CN.9/WG.II/WP.77).

3. The Working Group, which was composed of all States members of the Commission, held its twenty-third session in New York from 9 to 20 January 1995. The session was attended by representatives of the following States members of the Working Group: Austria, Bulgaria, Canada, Chile, China, Costa Rica, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Morocco, Nigeria, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Slovakia, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

4. The session was attended by observers from the following States: Algeria, Australia, Belize, Bosnia and Herzegovina, Cambodia, Colombia, Croatia, Czech Republic, Indonesia, Kuwait, Lebanon, Madagascar, Monaco, Romania, Swaziland, Sweden, Switzerland and Ukraine.

5. The session was attended by observers from the following international organizations: International Monetary Fund, Cairo Regional Center for International Commercial Arbitration, European Banking Federation, International Bar Association and International Chamber of Commerce.

6. The Working Group elected the following officers:

*Chairman:* Mr. Jacques Gauthier (Canada)

*Rapporteur:* Mrs. Valentina Tsoneva (Bulgaria).

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

(a) Provisional agenda (A/CN.9/WG.II/WP.84);

(b) Note by the Secretariat on independent guarantees and stand-by letters of credit; newly revised articles of the draft Convention (A/CN.9/WG.II/WP.83);

(c) Report of the Working Group on International Contract Practices on the work of its twenty-second session (A/CN.9/405).

8. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a draft Convention on independent guarantees and stand-by letters of credit.
4. Other business.
5. Adoption of the report.

## I. DELIBERATIONS AND DECISIONS

9. The Working Group discussed draft articles 7(2) to 16, 24, 25 and 25 *bis* as set forth in document A/CN.9/WG.II/WP.83, proposals made by the Secretariat on draft articles 24 *bis* and new article 25 *bis*, and draft articles 17 to 27 as set forth in the annex to document A/CN.9/405. The deliberations and conclusions of the Working Group relating to those draft articles of the draft Convention are set forth below in chapter III.

10. Following its approval of the substance of those articles, the Working Group referred the articles of the draft Convention it had discussed to a drafting group. The Working Group reviewed the articles after the review by the drafting group and approved the text of those articles as set forth in the annex to the present document, along with the articles that had been approved at the twenty-second session.

11. An observer of the International Chamber of Commerce (ICC) expressed the concern of ICC regarding the Working Group's decision to make available the draft Convention to cover commercial letters of credit, at the option of the parties. ICC expressed the view that the Convention had so far exclusively dealt with independent guarantees and stand-by letters of credit and that extending the scope at this late stage to cover commercial letters of credit, which in its opinion was done at the insistence of one delegation, was not advisable. In addition to these remarks, ICC also presented some comments on particular articles of the draft Convention.

12. In response, it was pointed out that the Working Group had considered the question of how to deal with commercial letters of credit in the draft Convention over a number of sessions. The Working Group had arrived at the decision to deal with the issue in article 1(2), in a way that allowed parties to commercial letters of credit to opt into the Convention, but, absent such an election by the parties, did not as such extend the Convention to cover commercial letters of credit. It was further pointed out that this was a decision of the Working Group by consensus and had not been urged on the Working Group by any one delegation. It was further noted that, during the course of the preparation of the draft Convention, the Working Group had always kept it prominently in mind that stand-by letters of credit would involve application of the Uniform Customs and Practice for Documentary Credits (UCP). For that reason, the Working Group had ensured that no provisions of the draft Convention were in conflict with UCP.

13. Regrets were also expressed that the comments by ICC on specific articles had not been provided to the Working Group at earlier points, at which time the comments would have been more usefully considered. ICC, however, notified the Working Group of its intention to participate more actively in the future in the work of the Commission and regretted the misunderstanding as to how the Working Group had made the decision on how to deal with commercial letters of credit.

## II. CONSIDERATION OF ARTICLES OF THE DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

### [Chapter III. Effectiveness of undertaking]

#### Article 7. Issuance, form and effectiveness of undertaking (continued)

##### Paragraph (2)

14. Views were exchanged as to the adequacy and clarity of the twin rule formulated in paragraph (2), which dealt

both with the "effectiveness" of an undertaking as well as with its "irrevocability". Questions were raised as to the clarity of the notion of "effectiveness", since it might inspire questions of a doctrinal nature on which legal systems might differ, such as whether the undertaking was of a contractual or non-contractual nature. A question was also raised as to the other aspect of paragraph (2), namely, the rule on irrevocability taking hold upon issuance. It was suggested that the rule bestowing irrevocability at the point of issuance might be referring to a premature point of time, since there could be cases in which the guarantor/issuer would wish to alter an undertaking prior to the beneficiary accepting it or perhaps even becoming aware of the undertaking. The view was expressed that the matter could be clarified by making the effectiveness of the undertaking clearly subject to acceptance by the beneficiary.

15. After considering questions of the type described above, the Working Group affirmed the substance of the approach in paragraph (2). In particular, the Working Group affirmed that the concept of "effectiveness" as used in the draft Convention was a narrow one, referring to the "guarantee period", i.e., the period of time during which the undertaking was available for a conforming demand for payment to be made by the beneficiary. It was noted that the term was not intended to take a position on doctrinal questions of the nature of the undertaking, but merely to answer the practical question, when the undertaking was available to the beneficiary to demand payment. Furthermore, it was pointed out, the rule on effectiveness was in line with the rule on issuance taking place when the undertaking left the sphere of control of the issuer, while still permitting the parties to stipulate a later commencement of availability for payment.

16. In view of that understanding of the limited scope of the reference to "effectiveness", the Working Group referred favourably to the drafting group a suggestion to forgo entirely use of the term "effectiveness", which appeared in articles 7(2) and 10, utilizing instead a descriptive formulation such as that presented earlier in A/CN.9/WG.II/WP.80 in a proposed definition in article 6(j) of "effectiveness" ("effectiveness" ... means that it ... is open for the beneficiary to make a conforming demand for payment"). Such an approach was deemed preferable to attempting to reintroduce a definition of "effectiveness", as had been earlier proposed for article 6 but not accepted by the Working Group.

17. As regards the separate concept of irrevocability, also dealt with in paragraph (2), the Working Group affirmed the rule that the undertaking assumed irrevocability at the moment of issuance, and that revocability therefore had to be determined upon issuance. It was noted that questions concerning possible changes in such an irrevocable undertaking would be dealt with in the rule in article 8 concerning amendment.

18. However, with a view to achieving greater clarity as to the distinct meaning of the reference to irrevocability, the Working Group accepted and referred to the drafting group a suggestion that the rules on effectiveness and on irrevocability should be dealt with in separate paragraphs. Such an approach gained support over a suggestion that the matter could be dealt with by a concise statement such as: "an

undertaking is effective and irrevocable upon issuance unless otherwise stipulated". It was also noted that differences of a drafting nature between the expression "upon issuance", used with respect to effectiveness, and the expression "when issued", used with respect to irrevocability, were not intended to have substantive import and would be avoided.

## Article 8. Amendment

### Paragraph (1)

19. A query was raised as to whether the effect of paragraph (1) was to allow oral amendments. It was pointed out that, if this was the case, then it was incorrect to speak in paragraph (2) of an amendment being "issued". A further query in this regard was whether a notice of acceptance of an oral amendment could also be made orally. It was pointed out, however, that the Working Group had agreed to allow oral amendments (A/CN.9/391, para. 65) only where such a form had been stipulated in the undertaking.

20. A suggestion was made that the current formulation of paragraph (1) was not clear as to whether it addressed only the form to which the amendment must conform to be effective or whether it also referred to other procedures to which the amendment must conform. In support of better clarifying the matter, it was stated that, in some instances, amendments to undertakings were made by means of procedures that were not stipulated in the undertaking and it was not clear whether these types of procedures were meant to be covered in paragraph (1). The prevailing view, however, was to maintain the current formulation of paragraph (1). The view was shared that the word "form" in this context was not intended to refer to any procedures that might be used to arrive at an amendment. After deliberation, the Working Group decided to retain paragraph (1) without changes, subject to alignment of the different language versions by the drafting group as regards the word "form".

### Paragraph (2)

21. A proposal was made for the deletion in paragraph (2) of the exemption that allowed amendments extending the validity period of the undertaking to take effect upon issuance, without any notice of acceptance required from the beneficiary. It was explained that the assumption behind the exemption was that such amendments were always to the advantage of the beneficiary. However, it was pointed out that it was not always the case that amendments to extend the validity period were to the advantage of the beneficiary. The primary practical example cited in this regard involved variable-interest-rate financial stand-bys, which, if extended, might deprive the beneficiary of electing a more advantageous fixed interest rate at the end of the initial validity period. Another example given was where the guarantor/issuer extended the validity period without the consent of the counter-guarantor, who then withdrew the counter-guarantee, thus exposing the beneficiary to risk of non-payment. It was stated that, in such situations, the beneficiary should be afforded the option of accepting or rejecting an extension. Furthermore, it was stated, making such amendments subject to acceptance by the beneficiary would provide certainty to the bank and the beneficiary as to their position, in particular since the beneficiary had a number of ways of

expressing consent, including by presenting a demand for payment in accordance with the terms of the amendment.

22. In response, it was pointed out that, without such an exemption, once an amendment to extend the validity period was made, it would be binding and irrevocable as against the guarantor/issuer, but the position as regards the beneficiary-guarantor/issuer relationship (and thus the exposure of the guarantor/issuer) would be unclear until the beneficiary reacted to the amendment. In this regard it was noted that, in practice, the bulk of the amendments made related to the extension of the period of validity and that, in most instances, the beneficiary would not be expected to actually express consent to the amendment in a formal manner. Moreover, the extension of the validity period could not be imposed upon an unwilling beneficiary since he could present a demand for payment within the original period. The view was thus expressed that to require the beneficiary always to express consent to such amendments in order for them to have effect would not be consistent with prevailing practice. It was further stated that, since parties to the undertaking had the option to agree on other rules regarding amendments, those parties who needed acceptance by the beneficiary of amendments extending the validity period could so stipulate in the undertaking.

23. In conclusion, the Working Group was reluctant to alter the approach set forth in paragraph (2). It was noted that the exemption was a narrow one limited only to those instances where an amendment had the sole effect of extending the period of validity and that this point might be made even clearer by more restrictive wording. It was further noted that those parties who wished to have such amendments take effect only upon acceptance by the beneficiary could so stipulate in the undertaking.

24. As a matter of drafting, the suggestion was made and referred to the drafting group that the text should clearly indicate that the non-mandatory nature of the rule set forth in paragraph (2) also applied to the words at the end of the paragraph ("any other amendment becomes effective when the guarantor/issuer receives a notice of acceptance by the beneficiary"). The suggestion was referred to the drafting group.

#### *Paragraph (3)*

25. The Working Group found the substance of paragraph (3) to be generally acceptable. A proposal to add a reference to the counter-guarantor did not gain support. It was pointed out that the Working Group had in earlier sessions discussed such a proposal and had decided that it was not necessary to make any specific reference to the counter-guarantor (see A/CN.9/372, para. 132).

#### *Article 9. Transfer of beneficiary's right to demand payment*

26. Suggestions were made with a view to making more precise the meaning of article 9. One suggestion was to use words along the lines of "open for a request for transfer". Another proposal was to refer specifically to obtaining the consent of the principal/applicant, unless it could be as-

sumed that a transfer was an amendment and therefore subject to the protection afforded to the principal/applicant by article 8(3). After deliberation, the Working Group affirmed the approach in the current text.

#### *Article 9 bis. Assignment of proceeds*

27. The Working Group exchanged views as to whether the terminology and scope of article 9 *bis* might be made more precise. The aim would be to make it clearer that the provision established a right independent of what might necessarily be available under applicable domestic law, without thereby excluding the application of that law with respect to aspects of the assignment not covered by the draft Convention.

28. Suggestions included: to refer specifically to continued applicability of domestic law; to refer in the title to "irrevocable" assignment, since this was the type of assignment of commercial significance; to avoid altogether the use of the term "assignment" so as to avoid confusion with the general law of assignment, and to use instead a term such as "payment order", or words to the effect that "the beneficiary may authorize a third party to receive payment"; to add a more explicit statement concerning the key obligation of the guarantor/issuer in the assignment context, which was to follow the payment instruction; and to add to paragraph (1) a reference to a requirement of form in accordance with article 7(1).

29. The Working Group then considered a proposed redraft of article 9 *bis* along the following lines, intended to reflect various proposals that had been made:

#### *"Article 9 bis. [Irrevocable] assignment of proceeds*

(1) Unless otherwise stipulated in the undertaking or elsewhere agreed, the beneficiary may notify the party obligated to pay of its irrevocable direction to pay to another person the proceeds to which it is or may be entitled.

(2) If the obligor agrees to pay the proceeds as directed which agreement is communicated to the person to be paid in the form referred to in paragraph (1) of article 7, the obligor is obligated to do so without regard to further instruction from the beneficiary.

(3) [Current article 9 *bis*, paragraph (2)]"

30. In support of the above proposal, it was emphasized that the intent was not to establish a new substantive rule as such, but to reflect and accord greater legal certainty to existing practice. It would do so by clarifying the twin requirements for effectuating assignment, i.e., notice from the beneficiary and acknowledgement by the guarantor/issuer on which, for example, such financing by an assignee of proceeds relied.

31. It was further suggested that the proposed text would usefully state clearly what was said to be the critical element in the assignment of proceeds, the obligation of the guarantor/issuer to implement a payment instruction the receipt of which has been acknowledged by the guarantor/issuer. In response to a concern that such a definitive statement of the

obligation to the assignee might contravene the rule on fraudulent demands for payment, it was pointed out that "proceeds" did not arise until the point of finality. One could not speak of there being "proceeds" at an earlier point, which might preclude blocking of payment of an improper demand.

32. After considering the preceding suggestions, the Working Group decided rather to retain the existing formulation. For example, it was felt that the current text took adequate account of the obligation of the guarantor/issuer, as well as of the continued applicability of domestic law. Accordingly, the Working Group decided that it was not necessary to add additional references to irrevocability, or to a form requirement in paragraph (1) with respect to a waiver of the right to assign proceeds. At the same time, the Working Group affirmed that the notice of assignment, in order to be reliable, needed to originate from the beneficiary, without thereby requiring physical delivery by the beneficiary, and that article 9 *bis* did not preclude partial assignment. Lastly, the drafting group was requested to consider possible clarification of the term "obligor".

#### Article 10. *Cessation of effectiveness of undertaking*

##### *Paragraph (1)*

##### *Subparagraphs (a) and (b)*

33. The Working Group found the substance of subparagraphs (a) and (b) to be generally acceptable.

##### *Subparagraph (c)*

34. A number of concerns were raised with regard to subparagraph (c). One such concern involved the possibility of automatic renewal of undertakings. Another concern was that, once the amount available under the undertaking had been paid, the automatic renewal should not be referred to as a renewal of the undertaking as such but as an increase in the amount payable. As a matter of drafting, it was also suggested that the second reference in the subparagraph to "amount available" should be changed to "amount paid" so as to clarify that partial payment had already been made. After deliberation, however, the prevailing view was to retain subparagraph (c) unchanged, subject to any drafting clarifications by the drafting group.

##### *Subparagraph (d)*

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

##### *Paragraph (1 bis)*

36. The Working Group agreed to delete paragraph (1 *bis*) on the understanding that the decision to forgo the use of the term "effectiveness" and instead to use a more descriptive formulation (see paragraph 16) rendered the paragraph redundant.

##### *Paragraph (2)*

37. The Working Group noted that the draft of paragraph (2) was in accordance with decisions taken by the

Working Group earlier (see A/CN.9/391, paras. 82-89) with regard to the issue of the effect of return of the documents embodying the undertaking. However, a number of suggestions aimed at improving the drafting were made. One such suggestion concerned the provision permitting the guarantor/issuer and the beneficiary to agree that return of the document embodying the undertaking would, by itself and independent of the expiry events in subparagraph (a) or (b), trigger the cessation of the undertaking, provided that the effectiveness of the undertaking had not ceased by virtue of subparagraph (c) or (d). It was suggested that the use of the words "either alone" did not make this sufficiently clear and that a formulation to the effect that "the undertaking ceased to be effective upon such return" would be preferable. Another suggestion along the same lines, also of a drafting nature, was to express better the decision that retention of the documents after payment of the undertaking or after its expiry did not preserve any rights of the beneficiary. It was suggested accordingly that the last phrase of paragraph (2) could read along the lines of "regardless of such stipulation, the undertaking always ceases to be effective when full payment is made according to paragraph (1)(c) of this article or upon expiry of the validity period in accordance with article 11". After deliberation, these suggestions were found to be generally acceptable and were referred to the drafting group.

38. With regard to the words in square brackets "[, or after full payment has been made]", the view was expressed that they could be deleted since this issue was already regulated by paragraph (1)(c). The prevailing view, however, favoured the current formulation as it was felt to clarify usefully that retention of the document after payment did not preserve any rights of the beneficiary.

#### Article 11. *Expiry*

##### *Chapeau*

39. A suggestion was made to add the words "unless otherwise stipulated" to the beginning of the *chapeau*. It was noted, however, that, while this may be of relevance to subparagraph (c), the effect of which would be to subject to party autonomy the rule providing for expiry of the undertaking after six years from the date of issuance if the undertaking did not set an expiry date, it could not relate to subparagraph (a) or (b). The prevailing view, however, was to leave the substance of this rule without any changes, in particular since the present formulation had been arrived at after extensive discussions by the Working Group (see A/CN.9/391, para. 97), including consideration of the question of undertakings of indefinite duration.

##### *Subparagraphs (a) and (b)*

40. The Working Group found the substance of subparagraphs (a) and (b) to be generally acceptable.

##### *Subparagraph (c)*

41. A suggestion was made that subparagraph (c) should be made subject to national law on the basis that, in some jurisdictions, undertakings that did not set an expiry date were considered void. However, this suggestion did not attract sufficient support. It was noted that subjecting the rule

in the draft Convention to national law would cause uncertainty by pointing to two possibilities, i.e., that an undertaking that was subject to the Convention would either expire after six years or be void *ab initio*. The Working Group therefore retained the substance of subparagraph (c) without change, recalling at the same time that undertakings of a long duration would still be possible under the draft Convention. This would be possible by setting a distant expiry date or by providing for automatic renewal.

#### Chapter IV. Rights, obligations and defences

##### Article 12. *Determination of rights and obligations*

###### Paragraph (1)

42. The Working Group found the substance of paragraph (1) to be generally acceptable.

###### Paragraph (2)

43. It was noted that the square brackets around the word "[independent]" would be deleted in line with earlier decisions to refer to "independent guarantees".

44. It was pointed out that there was a difference between articles 12(2), 13(1) and 16(1), in that, while article 12(2) referred to "accepted international rules and usages of [independent] guarantee or stand-by letter of credit practice", the reference in article 13(1) was to "generally accepted standards of international practice of independent guarantees or stand-by letters of credit" and the reference in article 16(1) was to "applicable international standards of independent guarantee or stand-by letter of credit practice". It was further pointed out that, while previous discussions made it clear that the reference in article 13(1) was meant to cover standards such as those contained in UCP 500 and in the URDG (see A/CN.9/391, para. 106), it was not clear that this was also the intention with regard to articles 12(2) and 16(1). A proposal was therefore made to align the language in those articles.

45. In response, it was stated that the difference arose owing to the difference in context of the three articles. It was pointed out that, while article 12(2) dealt with the interpretation of terms and conditions of the undertaking where the international rules and usages would assist in filling in any gaps in the undertaking, article 16 was more geared to ensuring the compliance of the guarantor/issuer with international standards of practice. However, the Working Group affirmed also that generally it was intended to refer to "international practice".

46. Another concern raised along the same lines was that, in the current article 5 (see A/CN.9/405, annex), the formulation "international independent guarantee and stand-by letter of credit practice" created ambiguity in that the word "international" could be interpreted to qualify the independent guarantee while it was meant to refer to international practice. The Working Group therefore decided to revert to the earlier formulation of article 5 as found in document A/CN.9/WG.II/WP.83 and which referred to "the international practice of independent guarantees and stand-by letters of credit".

47. Subject to any clarifications by the drafting group, the Working Group decided to maintain the substance of article 12(2) without change.

##### Article 13. *[Standard of conduct and] liability of guarantor/issuer*

48. The Working Group, in line with the discussion of the formulation of references to standards of international practice that had taken place in the context of article 12, affirmed the formulation of the reference to "international practice" found in paragraph (1).

49. Some questions were raised as to the effect and scope of the rule in article 13. One question was whether article 13 should be understood to apply not only to the guarantor/issuer-beneficiary relationship, but also to the relationship of the guarantor/issuer to the principal/applicant. The generally held understanding in the Working Group affirmed applicability also to the latter relationship, in so far as that relationship could be affected by conduct of the guarantor/issuer in discharging its obligations under the undertaking and the Convention. This was said to be indicated, for example, by the fact that the lowering of the standard of care by agreement, a possibility envisaged in article 13, involved the agreement of the principal/applicant.

50. Another question asked was whether article 13 might not raise difficulties of application in some legal systems where its concepts might be alien. For example, it was emphasized that there might be jurisdictions in which the lowering of the standard to exempt negligence short of gross negligence would not be countenanced, or in which the notion of the guarantor/issuer's negligence would be deemed irrelevant *vis-à-vis* the beneficiary demanding payment, or in which there would not be a tradition of relying on notions such as "good faith" or "gross negligence".

51. Suggestions to remedy those matters included deletion of the word "grossly" in paragraph (2), with the effect of precluding exemptions of liability for negligence. The suggestion was also made that in fact no provision needed to be made expressly for exemptions from simple negligence if this was agreed by the parties, since such an agreement would simply mean that a lower standard was being applied.

52. After deliberations, the prevailing view in the Working Group was to retain the existing text basically along its present lines, which had been decided upon earlier after detailed consideration (A/CN.9/374, para. 76). In affirming the existing approach, the Working Group noted that the present approach had its foundation in practice, since it was not uncommon for parties, for commercial reasons, to agree to undertakings with a lowered standard of examination of demands for payment.

##### Article 14. *Demand*

53. The Working Group found the substance of article 14 to be generally acceptable and referred it to the drafting group.

Article 16. *Examination of demand and accompanying documents*

Paragraph (1)

54. The question was raised as to the relevance of the standard enunciated in article 16 to the guarantor/issuer's relationship to the principal/applicant. The prevailing view was that article 16 could not be isolated from and had implications for that relationship. It was again affirmed that the provision should not be construed as preventing the principal/applicant and the guarantor/issuer from establishing agreed standards (see previous discussion in A/CN.9/391, para. 120).

55. Furthermore, the Working Group declined to accept a suggestion to delete the reference in the second sentence to a standard for examination of the demand, on the ground that the standard enunciated in article 13 was sufficient to cover the situation. It was noted that article 16 usefully stated the standard to be followed in the specific task of examination of documents, and a description of what was meant by the notion of "facial compliance". At the same time, it was pointed out that examinations of acts or events within the sphere of the guarantor/issuer could be considered to be governed by the general standard of care in article 13, if they were not considered covered by the standard for examination of documents.

56. The Working Group noted that the current draft implemented the view of the Working Group that the provision should be formulated so as to make clear that the demand itself, apart from any accompanying documents, should be considered a document for the purposes of the draft Convention (A/CN.9/391, para. 121).

57. Another question concerning the scope of article 16 was whether it applied to entities other than the guarantor/issuer that had the role of examining documents and deciding whether a demand should be paid. Wording proposed to the effect of such applicability included "the guarantor/issuer, or other person authorized to examine the demand".

58. It was pointed out that this was a form of the question that had been raised at other points, namely, the question of the applicability of certain of the rules to parties other than those specifically referred to. Such an extension had already been made expressly in articles 9 and 9 *bis*, and might be considered for other provisions, for example, articles 12(1), 13(1), 17(1), (2), (3) and (4), and 20.

59. Objections were raised to the inclusion of any reference to a third party in paragraph (1) since that might be read as if this rule created an obligation of that third party *vis-à-vis* the beneficiary. It was stated that this would go far beyond the scope of paragraph (1).

60. The Working Group preferred not to make an express statement to that effect, since the implications of such an express inclusion could not be fully considered at this stage.

Paragraph (2)

61. The Working Group resumed its consideration of the question of how exactly to express the rule concerning the

length of time to be allowed for the examination of the demand for payment and any accompanying documents (see A/CN.9/391, para. 122), in particular whether to use the expression "banking days" or the expression "business days". The latter expression, it was noted, took account of the fact that the draft Convention assumed the possibility of issuance by a non-bank entity. At the same time, the Working Group noted that the provision should not be construed as permitting the guarantor/issuer to set its business days without reference to the ordinary or general practice that prevailed. On the basis that the above understanding of the current text would be sufficiently clear, the Working Group decided not to adopt alternative formulations such as "its business days", or "days on which it is open for business".

62. A further possible clarification of the current text explored by the Working Group concerned the place at which the demand and accompanying documents must arrive in order for the seven-day period to begin to run. Proposals to address this aspect were motivated by a concern that otherwise the beneficiary would be unclear as to how much time could be taken to examine the demand, particularly when the demand was presented to a person other than the guarantor/issuer.

63. One view was that the provision should state explicitly that the time period would begin to run upon receipt of the demand by the guarantor/issuer or some other person designated to examine the demand. It was pointed out that such an approach would clarify that the time period should not begin to run against the guarantor/issuer when he might not have yet even received the demand, which was said to be particularly important in view of the preclusion effect of article 17(4). The question was raised with regard to that approach as to whether there would be excessive uncertainty as to how much time was permitted for the demand to reach the guarantor/issuer.

64. Another view was that clarity for the beneficiary could best be achieved were the provision to say that the time period began upon submission of the demand at the place where according to article 14 the demand had to be made. Thus the period might begin to run even if the submission were made to a bank that merely remitted the demand to the guarantor/issuer. To this effect, a text along the following lines was proposed: "the demand and any accompanying documents shall be examined within ...". The Working Group was reminded that such a formulation would permit the parties to set a longer time period if they felt such an adjustment to be necessary.

65. A proposal was also made to the effect that it would be best to keep paragraph (2) stated in a general and flexible manner, for example, along the lines "... reasonable time, from the time of a demand being made in accordance with article 14".

66. A further proposal was to model the provision more closely on the relevant portions of articles 13 and 14 of UCP. Some hesitation was expressed, however, as it was felt that this would not provide significant added clarity. For example, the question was raised whether the UCP provisions, which operate also as interbank rules, could be interpreted to provide for an accumulation of seven-day periods



by each of the banks mentioned, thus leaving uncertainty as to when payment could be expected.

67. After considering the above proposals, the Working Group took the view that a formulation along the present lines should be retained. It was felt that the existing approach was sufficiently flexible to take account of the widely varying circumstances encountered in practice, and that it would be compatible with UCP if the latter were incorporated by the parties. It was noted, however, that the exact formulation of article 16 might in particular be considered further at a later stage.

#### Article 17. *Payment or rejection of demand*

##### *Paragraphs (1) and (1 bis)*

68. The Working Group found the provisions of paragraphs (1) and (1 bis) to be generally acceptable.

##### *Paragraph (2)*

69. As had been the case in previous sessions, the view was expressed that the current formulation of paragraph (2) was inappropriate as it placed the guarantor in the situation of having to ascertain the authenticity of any allegations that a principal/applicant may make that a demand was improper, which allegations may sometimes be contained in a large number of documents. It was stated that such a requirement would involve the guarantor/issuer in disputes regarding the underlying transaction and thus jeopardize the independence of the instrument. The view was expressed that such a provision shifted more obligations onto the guarantor/issuer than was currently the case in commercial practice, which could impact on the acceptability of the draft Convention. It was therefore suggested to provide the guarantor/issuer with the discretion to make payment in case of doubt that the demand was improper.

70. In response, it was stated that the basic philosophy underlying paragraph (2) was sound since the obligation not to make payment on an improper demand was only applicable under very restrictive circumstances. It must be not only manifest and clear that the demand was improper as defined in article 19, but also that payment under such circumstances would not be in good faith. It was stated that to provide an option to pay under such circumstances would make the guarantor/issuer a knowing participant in an improper demand. However, the view was expressed that words such as "is shown facts" in paragraph (2) might give the impression that the guarantor/issuer was under some obligation to investigate any allegations made. It was proposed that a formulation that better captured the intention of the Working Group could read along the following lines: "where, in the view of the guarantor/issuer, a demand is manifestly and clearly improper as defined in article 19, such that making the payment would not be in good faith, the guarantor/issuer shall not make payment to the beneficiary".

71. The Working Group expressed support for such a formulation. A further proposal, designed to protect the guarantor/issuer against liability for rejecting an apparently fraudulent demand, was to also provide that the obligation not to make payment would not be mandatory unless the

principal/applicant agreed to seek the determination of a court or arbitral tribunal regarding the improper demand or to reimburse or indemnify the guarantor/issuer if the beneficiary sued. Those proposals were referred to the drafting group.

72. A query was made as to whether paragraph (2) covered the case of innocent third parties. It was explained that, in some jurisdictions, if the party requesting payment was a third party who had taken up the instrument for value but was innocent of fraud on the instrument, then the guarantor/issuer was under an obligation to make payment. It was pointed out, however, that using the words "payment to the beneficiary" in paragraph (2) would exclude payment to such third parties from the operation of the paragraph.

##### *Paragraphs (3) and (4)*

73. Differing views were expressed as to the decision to be taken by the Working Group on the retention or deletion of paragraph (4), which precluded rejection of a demand on grounds not properly notified to the beneficiary. Support for deletion was expressed from the viewpoint that a strict exclusion rule such as that found in paragraph (4) was overly burdensome on the guarantor/issuer. It was further stated that, though such a rule might be of relevance with regard to commercial letters of credit, it was not appropriate at least with regard to guarantees and should be left to national law. It was further stated that the sanction imposed by the rule was disproportionate and that it might encourage beneficiaries to make spurious claims.

74. Contrary views, however, were expressed in support of retention of the provision. It was pointed out that the rule reflected current practice with regard to stand-by letters of credit. Furthermore, it was stated, the rule was important in that it provided discipline and rigour to the undertaking, thus investing the undertaking with the necessary degree of finality. It was also suggested that deleting the paragraph would give rise to inconsistency between the draft Convention and (UCP), and would also leave a gap in the draft Convention as there would be no sanction to a breach of article 16(2).

75. After deliberation, the prevailing view in the Working Group was in favour of deletion of paragraph (4). The Working Group agreed, however, that such a deletion did not prejudice the right of parties to apply an exclusionary rule such as that found in UCP. The Working Group also accepted and referred to the drafting group a proposal that article 16(2) should require the guarantor/issuer to notify the beneficiary within seven days in case of rejection of the demand and that such a notice would take effect upon dispatch. The Working Group also agreed that providing for notice of rejection in article 16(2) rendered paragraph (3) of article 17 unnecessary. Paragraph (3) was, therefore, deleted.

#### Article 19. *Improper demand*

76. The Working Group noted that the present formulation reflected its decision that applicability of subparagraph (a) should not depend on the beneficiary having been itself involved in the falsification of a document (A/CN.9/388, para. 17), a factor that had been cited in a number of judicial

decisions. It was noted that a significant factor in those cases, absent in the types of undertakings covered by the draft Convention, was the presence of documents whose commercial value survived the falsification unimpaired.

77. Without seeking to change the substance of rules in the existing text of the draft Convention, the Working Group referred to the drafting group a proposal aimed at simplifying and clarifying the provisions on the response of the guarantor/issuer to improper demands. According to that proposal, the provisions obligating the guarantor/issuer to refuse payment in the defined circumstances would be congregated in article 19, in particular paragraph (2) of article 17. This reordering of the provisions would obviate the need to use or define the term "improper demand". Article 17 would be further reduced in size, since it had been agreed that the rule in paragraph (3) of article 17 would be dealt with in an agreed addition to paragraph (2) of article 16, to reflect the requirement of notification of rejection (see paragraph 75, above). A further suggestion of a drafting nature was to reorder the articles of the draft Convention so that the provisions in article 20 concerning set-off would immediately follow article 17.

78. Suggestions for a title for such a reordered article 19 included, for example, "defences to payment" and "exceptions to payment", although the concern was expressed that such expressions might have an overly technical meaning in some jurisdictions. Another suggestion was "fraud and abuse", without however defining those terms. The matter was referred to the drafting group.

#### Article 20. *Set-off*

79. The Working Group found the substance of article 20 to be generally acceptable, and referred it to the drafting group, in particular for consideration of the suggestion to relocate it.

### Chapter V. [Provisional court measures]

#### Article 21. *Provisional court measures*

##### *Paragraph (1)*

80. The Working Group noted that the decision to delete the phrase "improper demand" in article 19 would require a similar deletion in paragraph (1), to be replaced by a cross-reference to the elements in article 19(1) that triggered a duty of non-payment.

81. A view was expressed that the test of "high probability" for the granting of provisional measures would be considered as too low in some jurisdictions and that it should rather be formulated along the lines of "manifest and clear". The Working Group was reluctant, however, to change its earlier decision to make the test one of "high probability", in particular since, if the test were set too high, the court would in essence be making a final determination of the issue.

82. With regard to the last phrase of paragraph (1), regarding the balancing of interests in the determination of whether to issue a provisional measure, it was pointed out that, in

some jurisdictions, the court would also have to take into account the likely harm to be suffered by the guarantor/issuer and the beneficiary upon issuance of provisional measures, and that this was not adequately reflected in the current text. It was pointed out, however, that the understanding of the Working Group when this issue was discussed earlier was that the formulation in paragraph (1) did not preclude the interests of the beneficiary being taken into account (see A/CN.9/405, para. 41).

##### *Paragraph (3)*

83. A query was raised as to whether the import of paragraph (3) was that it would be the obligation of the beneficiary to provide security. In response, it was pointed out that the principal/applicant, being the party making the application for provisional measures, would be the party providing the security.

##### *Paragraph (4)*

84. The Working Group agreed that the import of paragraph (4) was that provisional measures were not available in cases of insolvency or bankruptcy of the principal/applicant, since those were not instances of an improper demand.

85. The suggestion was made that the reference in paragraph (4) to "an illegal purpose" was not clear as the phrase had a very broad meaning in some jurisdictions. It was suggested that a better formulation would be to make reference to "a criminal purpose", which would exclude matters regulated by other areas of law such as, for example, a situation where a guarantee would relate to a transaction that might subsequently be ruled to be in contravention of anti-trust laws. In this regard, a proposal was made that reference would have to be made to international criminal acts as the draft Convention dealt with instruments of an international character. However, this was objected to on the basis that such a phrase would be unclear as to what constituted international criminal acts and would also exempt criminal acts of a national character from the application of paragraph (4).

86. The proposal to use the words "criminal purpose" themselves was questioned. The view was expressed that the phrase was itself too broad since, in some jurisdictions, such matters as anti-trust and securities violations were considered criminal acts. A proposal was made for the deletion of the reference to "illegal purpose" in paragraph (4) on the basis that the paragraph would only be applicable in a very limited number of cases, since, in accordance with paragraph (1), provisional court measures could only be granted upon an application of the principal/applicant. This proposal, however, did not gain support, although it was recognized that, for reasons given in support of the proposal, the practical scope of application of the provision was rather limited. Another proposal was to replace the reference to "illegal purpose" with the term "public order". This was also objected to, on the basis that the Working Group had discussed such a formulation in earlier sessions and found it to be too broad. Yet another proposal was to delete paragraph (4) in its entirety on the basis that it was superfluous. It was pointed out, however, that such a deletion would lead to the erroneous implication that provisional measures could be granted for claims of non-conformity.

87. After deliberation and consideration of the various proposals, the Working Group decided to replace the words "an illegal purpose" with the words "criminal purpose" and referred the matter to the drafting group.

## Chapter VII. Conflict of laws

### Article 26. *Choice of applicable law*

88. The Working Group noted that the draft Convention did not regulate questions of capacity to issue undertakings, a matter left to the applicable national law.

89. The drafting group was requested to implement a suggestion that paragraph (3) of article 1, which provided for application of chapter VII even when the Convention as such did not apply to a given undertaking, should make it clear that such application was nevertheless confined to the sphere of international undertakings.

90. Various proposals were made with a view to clarifying article 26. The suggestions discussed included replacement of the word "demonstrated" by "implicit", although the Working Group was reminded that the latter word had earlier been considered insufficiently precise. Another suggestion was to avoid the word "designation", as this might inadvertently raise theoretical questions as to the legal nature of the undertaking. A further suggestion was to refer to the possibility of demonstration of a choice of law from the "circumstances" of the case, an addition that did not attract sufficient support.

91. The Working Group agreed that article 26 took cognizance of and recognized that in practice the designation of applicable law was typically a unilateral decision of the guarantor/issuer indicated in the terms of the undertaking, and not necessarily a matter of specific negotiation and agreement with the beneficiary.

92. Affirming the substance of the rule in the existing text, the Working Group referred article 26 to the drafting group for further refinement, for example, by stating the provision more simply, in one sentence.

93. The Working Group considered whether to add a reference to form in accordance with article 7(1), as regards agreements outside the undertaking ("agreements elsewhere"). In considering article 26, the Working Group noted that the provision enabled the draft Convention to take account of ad hoc agreements concerning applicable law, which might be reached after a dispute had arisen. It was further observed that such agreements might or might not be considered amendments of the undertaking, depending upon whether they involved a change made in a stipulation in the undertaking. The Working Group agreed not to add a specific reference to a form requirement in accordance with article 7.

94. The Working Group also took the occasion to affirm that the text did not preclude the parties from subjecting only select aspects of the undertaking to the chosen law, and similar practices sometimes referred to as *dépeçage*.

### Article 27. *Determination of applicable law*

95. The Working Group examined further its choice made earlier that the connecting factor for determination of the applicable law in the absence of a choice by the parties should be the place of business of the guarantor/issuer at which the undertaking was issued (A/CN.9/405, para. 52). The concern was expressed that such a formulation would not provide sufficient clarity when an undertaking was notified or advised to the beneficiary by an entity unaffiliated to the guarantor/issuer, or when an undertaking happened to be issued at a location remote from a place of business of the guarantor/issuer. It was said to be potentially unclear how to apply to such a case the definition of issuance set forth in article 7, which provided that issuance took place when the undertaking left the sphere of control of the guarantor/issuer.

96. Alternative approaches suggested included using a connecting factor other than issuance, such as "law of place of business of the guarantor/issuer that has the closest connection to the undertaking", or to track the formulation in article 27 of the Uniform Rules for Demand Guarantees (URDG) with a view to greater clarity when multiple entities were involved in issuance. It was stated, however, that the URDG provision, which referred to the "branch" that issued when the guarantor/issuer had more than one place of business, still left room for questions, in particular when an entity that was not a branch of the guarantor/issuer was involved somehow in the issuance, for example, by acting as an advising bank.

97. The view was further expressed that the uncertainty being discussed suggested that it might be preferable to refer to receipt of the undertaking as the key event in issuance. In response, it was stated that abandonment of the formulation "leaving the sphere of control of the guarantor/issuer" was not warranted, since that expression did not mean that issuance took place only when there was no possibility whatsoever left of recall of the undertaking. For example, it was pointed out that, even when a courier was involved, the possibility existed for a guarantor/issuer to cancel delivery instructions. Rather, the rule should be understood, it was stated, to mean leaving the normal sphere of operations of the guarantor/issuer. Furthermore, it was stated that, since the element of the guarantor/issuer's will was necessary for issuance, the loss of an undertaking instrument by the guarantor/issuer should not be considered to constitute valid issuance in the sense of paragraph (1).

98. After considering the various views expressed, the Working Group retained in essence the existing formulation, linking determination of applicable law to place of issuance. It was felt that this was the clearest possible factor, and it took adequate account of the various possibilities that might arise in issuance. It was noted that the existing approach in article 27 was in line with the prevailing assumption in practice and the underlying notions of applicability of regulatory and supervisory authority, for example, with respect to capital-adequacy matters. It was furthermore pointed out that a reference to place of issuance in article 27 would be consistent with the approach followed elsewhere in the draft Convention, in particular in articles 1, 4 and 7.

## Chapter VI. Jurisdiction

99. As had been decided at the twenty-second session (A/CN.9/405, para. 48), the Working Group proceeded to a review of a possible chapter on jurisdiction, now that it had completed its review of the other portions of the draft Convention.

100. In order to assist the Working Group in reaching a decision both as to the basic question of whether to include a chapter on jurisdiction, as well as the possible contents of such a chapter, the Secretariat presented draft articles on certain issues suggested by the deliberations at the twenty-second session. The Secretariat reported that provisions proposed flowed from consultations that had taken place at earlier stages with the Hague Conference on Private International Law, and that they were also prepared taking into account interventions made by the Hague Conference at earlier sessions.

101. Differing views continued to be expressed as to whether such a chapter should be included, or if included, made subject to the right of reservation by Contracting States. Among the grounds cited for refraining from including the chapter were that it was not traditional for a substantive-law convention to include jurisdiction provisions, that there was a possibility that the Hague Conference would embark on a general international convention on jurisdiction and recognition and enforcement, and that the draft Convention should therefore not enter into the field of jurisdiction.

102. In support of retaining chapter VI, it was stated that, with the proposed additional provisions, the principal concerns expressed at previous sessions had been addressed. In particular, the concern as to the completeness of chapter VI would be offset by the proposed additional provisions on recognition and enforcement of judgments and on *lis pendens*. It was pointed out that, as had been suggested, the proposed new provisions were patterned after the system found in the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993). The Working Group noted that that Convention was an example of a substantive-law Convention containing provisions on jurisdiction.

103. In accordance with the agreed procedure, the Working Group deferred a decision on whether to retain chapter VI until completion of the review of the draft provisions of the chapter, on which it was about to embark.

104. The Working Group noted that, if chapter VI were retained, the drafting group would revise the text of article 1(3), which provided for application of chapter VI even when the Convention as such did not apply to a given undertaking, to make it clear that such application would be nevertheless confined to the sphere of international undertakings as defined in article 2.

### Article 24. Choice of court or arbitration

105. The view was expressed that the provision should make it clear that it referred to disputes between the guarantor/issuer and the beneficiary, which were the only disputes that those parties could cover in their dispute settlement

agreement. The view was also expressed that the provision should not address the question of exclusivity of jurisdiction of the chosen court.

106. An objection was raised as to inclusion of the form requirement in accordance with article 7(1) as regards an agreement by the parties outside of the undertaking. It was suggested that this requirement might run counter to the extent of discretion accorded to judges in some legal systems.

107. A number of interventions were made in support of deleting the limitation of the scope of the provision to cases involving at least one party with a place of business in a contracting State. It was recalled in response, however, that the matter involved the extent to which a State would be willing to commit judicial resources to cases not involving parties not covered by the draft Convention.

### Article 24 bis. Jurisdiction of other courts

108. The following redraft of article 24 bis was considered by the Working Group, as a possible alternative to the text appearing in document A/CN.9/WG.II/WP.83:

"(1) Every court other than the court or courts chosen in accordance with article 24 shall decline jurisdiction, except:

(a) Where the choice of court made by the guarantor/issuer and the beneficiary is not exclusive;

(b) For the purpose of provisional court measures.

[(2) Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established [in accordance with article 24 or 25]. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of the court.]"

109. The Working Group noted that the proposed new text did not contain the provision formerly found in subparagraph (d) of the version in document A/CN.9/WG.II/WP.83. It was pointed out that subparagraph (d), which had provided for an exception to exclusivity where a decision of the chosen court was incapable of recognition and enforcement, would no longer be necessary if the proposed new article 25 bis, which provided a recognition and enforcement scheme, were added.

110. As regards the deletion of subparagraph (e) of the earlier text, which provided for an exception to exclusivity where the chosen court declined jurisdiction, it was suggested that reinstatement of that provision might have to be contemplated if the Working Group deleted the limitation in article 24 to parties from contracting States (see paragraph 107, above).

111. It was proposed to specify in paragraph (1)(b) that it referred to provisional court measures pursuant to article 21. In response, it was suggested that such a limitation would be unwarranted, since the provision dealt with a consensual

attribution of jurisdiction by the parties. It was further stated that such a limitation did, however, have a role to play in article 25, which involved determination of jurisdiction in the absence of a choice by the parties, and a reference to article 21 had therefore been included in paragraph (2) of that provision.

112. In response to a question raised regarding paragraph (1)(b), it was pointed out that an exception to exclusivity of jurisdiction of the chosen court so as to permit issuance by other courts of provisional measures reflected an approach found in other multilateral conventions, including the Hamburg Rules.

113. The Working Group noted that paragraph (2) contained a provision on *lis pendens*, concerning the deference of courts when an action was pending in courts of other Contracting States.

114. A suggestion of a drafting nature was to refer to the "court first seized" at the end of paragraph (2).

#### Article 25. *Determination of court jurisdiction*

115. The concern was expressed that the existing formulation would leave a gap in cases in which the undertaking was not issued in a Contracting State. Support was expressed for the retention of the text deferring to existing rules on jurisdiction in Contracting States or to arbitration under article 24.

#### New Article 25 bis. *Recognition and enforcement*

116. The Working Group considered the following proposal for an additional provision with the above title, to be inserted before the existing article 25 bis:

"Recognition and enforcement of any decision given by a court with jurisdiction in accordance with article 24 or 25 that is no longer subject to ordinary forms of review may be sought in any Contracting State unless:

(a) Recognition and enforcement would be contrary to public policy of that State;

(b) The decision was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence;

(c) The decision is irreconcilable with a decision given in that State in a dispute between the same parties; or

(d) The decision is irreconcilable with an earlier decision given in another State involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition and enforcement in the State where recognition and enforcement of the later decision is being sought."

117. No comments were made as to the above provision, beyond the clarification that it would apply to the enforcement of provisional measures.

#### Article 25 bis. *Relationship to other treaty arrangements*

118. It was observed that uncertainty might result as regards the interface of the current provision with similar provisions in international agreements such as the 1968 Brussels Convention and the 1988 Lugano Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters. It was suggested that the matter might be stipulated clearly by parties that wish to give primacy to those Conventions, since otherwise the present draft Convention could be considered a specialized convention of the type to which those Conventions would otherwise defer.

119. Upon completion of its review of the proposed text for the articles of a chapter on jurisdiction, opinion continued to be divided as to whether to retain the chapter. The Working Group decided in that light to forgo retention of the chapter.

#### Consideration of draft articles submitted by the drafting group

##### Article 7. *Issuance, form and irrevocability of undertaking*

120. The Working Group agreed to a reformulation of paragraph (2) that would focus more on the undertaking than the present text, which spoke in terms of the demand for payment as a result of the departure from the use of the term "effectiveness". A formulation along the lines of "from the time of issuance of an undertaking, a demand for payment may be made in accordance with the terms and conditions of the undertaking, unless the undertaking stipulates a different time" was accepted and referred to the drafting group.

121. On paragraph (3), the Working Group agreed to move the words "upon issuance" to follow the word "irrevocable", on the basis that the current formulation could be taken to mean that, once issued, an undertaking could not later be amended to make it revocable.

##### Article 8. *Amendment*

122. A proposal was made for the deletion of subparagraph (2)(b), the effect of which modification would be to provide that any amendment would only be valid if consented to or previously authorized by the beneficiary. In support of the proposal, it was stated that the current formulation allowed for unilateral amendments by the guarantor/issuer regarding validity of the extension period and that the text also set rules regarding the form of the amendment and consent which were matters that were better left to prevailing practice. It was pointed out that, in practice, various forms of consent were recognized, including consent manifested by action. The Working Group was therefore urged to limit paragraph (2) to a statement that consent was required.

123. The Working Group was reluctant, however, to change its earlier decision that amendments solely extending the validity period did not need the specific consent of the beneficiary and also its decision to maintain the form requirements in the article (see paragraphs 20 and 23, above). At the same time, the Working Group expressed a preference for the earlier formulation of subparagraph (2)(b),

which referred to an amendment "consisting solely of an extension of the validity period of the undertaking". It was felt that the proposed words "on its face" might encompass situations where the amendment would seem not to extend the validity period but have the effect in substance of extending the period.

124. It was pointed out that differences with regard to stand-by letters of credit practice would be accommodated since parties were free under the draft Convention to incorporate UCP, which provided a consent requirement for all amendments, without specifying a particular form requirement for the consent.

#### Article 10. *Cessation of right to demand payment*

125. As was the case with regard to article 7(2) (see paragraph 120, above), it was suggested that the drafting group should attempt to find a formulation also for article 10 that focused more on the undertaking rather than on demand for payment.

#### Article 16. *Examination of demand and accompanying documents*

126. With regard to paragraph (2), the Working Group agreed to move the second reference, "unless otherwise stipulated in the undertaking", with the added words "or elsewhere agreed", to the beginning of the second sentence so as to make it clear that such stipulations would also apply to the means of transmission.

#### Article 19. *[Obligation not to make payment]*

127. It was noted that paragraph (1) of article 19 had been reformulated to reflect the decision of the Working Group to avoid the use of the term "improper demand" (see paragraph 77, above). At the same time, paragraph (1) was placed in square brackets because there remained outstanding issues to be discussed concerning the proposed approach, which involved the integration of paragraph 17(2) into article 19.

128. In that regard, a number of concerns were raised regarding the new formulation of paragraph (1), in particular the last phrase in the paragraph, whose import was that the obligation not to make payment was not applicable if the principal/applicant refused to indemnify the guarantor/issuer or to obtain the determination of a court or arbitral tribunal regarding the non-payment. One concern was that such a proviso would have the effect of giving the guarantor/issuer the option to make payment even in cases where the demand was manifestly and clearly improper and therefore payment would be in bad faith. It was said that this would run counter to the obligation of the guarantor/issuer to act in good faith in accordance with article 13 of the draft Convention. It was also pointed out that some of the words in the proviso such as "to obtain the determination of a court" were not clear as to what exactly was expected of the principal/applicant. The suggestion was made that the principle of the proviso could simply be that any principal/applicant who sought non-payment for fraud would be deemed to have agreed to indemnify the guarantor/issuer for the consequences of the non-payment.

129. In response, it was stated that the intention of the proviso was to ensure that judicial determination would be sought and that the guarantor/issuer would be indemnified for any consequences of a non-payment on the basis that the demand was manifestly and clearly improper and payment would be in bad faith. The Working Group agreed that the principle of good faith was fundamental to the draft Convention and that the proviso needed to be reformulated so as to make clear the obligation of the guarantor/issuer not to make any payments that would, in essence, be in bad faith. It was pointed out that the proviso was also not clear as to cases in which the principal/applicant requested the non-payment on the basis that the demand was improper. Such a request, it was pointed out, was a typical element in the majority of cases in practice, and it was therefore desirable to make it clear that, in those cases, the principal/applicant had an obligation to indemnify the beneficiary.

130. After deliberation, the Working Group requested the drafting group to prepare a formulation maintaining the obligation of the guarantor/issuer not to make payment in cases of a manifestly and clearly improper demand where payment would therefore be in bad faith, while also providing the guarantor/issuer with the right to be indemnified for any consequences of non-payment or to request the principal/applicant to take steps to obtain a judicial or arbitral determination to the effect that non-payment was justified.

### III. FUTURE WORK

131. The Working Group took note of the expectation that, at its twenty-eighth session (Vienna, 2-26 May 1995), the Commission would devote the first two weeks to consideration of the draft Convention and the remainder of the session to considering the other two legal texts on its agenda, including the draft UNCITRAL Model Law on Electronic Data Interchange, and the draft practice notes on preparation of arbitral proceedings, as well as other business.

## ANNEX I

### ARTICLES OF THE DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT AS REVISED AT THE TWENTY-SECOND AND TWENTY-THIRD SESSIONS\*

#### CHAPTER I. SCOPE OF APPLICATION

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

(1) This Convention applies to an international undertaking referred to in article 2:

- (a) If the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State, or
  - (b) If the rules of private international law lead to the application of the law of a Contracting State,
- unless the undertaking excludes the application of the Convention.

\*For presentation to the Commission, the articles in the present text have been renumbered, taking into account the deletions and additions made to the text by the Working Group at various stages. Following the draft articles is a chart indicating the correspondence between the present and the former article numbers.



(2) This Convention applies also to an international letter of credit other than a stand-by letter of credit if it expressly states that it is subject to this Convention.

(3) The provisions of articles 21 and 22 apply to international undertakings as defined in article 2 irrespective of whether or not in any given case the Convention applies pursuant to paragraph (1) of this article.

#### *Article 2. Undertaking*

(1) For the purposes of this Convention, an undertaking is an independent commitment, usually referred to as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person.

(2) The undertaking may be given:

(a) at the request or on the instruction of the customer ("principal/applicant") of the guarantor/issuer;

(b) on the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal/applicant") of that instructing party; or

(c) on behalf of the guarantor/issuer itself.

(3) Payment may be stipulated in the undertaking to be made in any form, including:

(a) payment in a specified currency or unit of account;

(b) acceptance of a bill of exchange (draft);

(c) payment on a deferred basis;

(d) supply of a specified item of value.

(4) The undertaking may stipulate that the guarantor/issuer itself is the beneficiary when acting in favour of another person.

#### *Article 3. Independence of undertaking*

For the purposes of this Convention, an undertaking is independent where the guarantor/issuer's obligation to the beneficiary is not subject to the existence or validity of an underlying transaction, or to any other undertaking (including stand-by letters of credit or independent guarantees to which confirmations or counter-guarantees relate), or to any term or condition not appearing in the undertaking, or to any future, uncertain act or event except presentation of documents or another such act or event within a guarantor/issuer's sphere of operations.

#### *Article 4. Internationality of undertaking*

(1) An undertaking is international if the places of business, as specified in the undertaking, of any two of the following persons are in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer.

(2) For the purposes of the preceding paragraph:

(a) if the undertaking lists more than one place of business for a given person, the relevant place of business is that which has the closest relationship to the undertaking;

(b) if the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant for determining the international character of the undertaking.

### CHAPTER II. INTERPRETATION

#### *Article 5. Principles of interpretation*

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 the international practice of independent guarantees and stand-by letters of credit.

#### *Article 6. Definitions*

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "undertaking" includes "counter-guarantee" and "confirmation of an undertaking";

(b) "guarantor/issuer" includes "counter-guarantor" and "confirmer";

(c) "counter-guarantee" means an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment under that other undertaking has been demanded from, or made by, the person issuing that other undertaking;

(d) "counter-guarantor" means the person issuing a counter-guarantee;

(e) "confirmation" of an undertaking means an undertaking added to that of the guarantor/issuer, and authorized by the guarantor/issuer, providing the beneficiary with the option of demanding payment from the confirmer instead of from the guarantor/issuer, upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the confirmed undertaking, without prejudice to the beneficiary's right to demand payment from the guarantor/issuer;

(f) "confirmer" means the person confirming an undertaking;

(g) "document" means a communication made in a form that provides a complete record thereof.

### CHAPTER III. FORM AND CONTENT OF UNDERTAKING

#### *Article 7. Issuance, form and irrevocability of undertaking*

(1) Issuance of an undertaking occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer concerned.

(2) An undertaking may be issued in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary.

(3) From the time of issuance of an undertaking, a demand for payment may be made in accordance with the terms and conditions of the undertaking, unless the undertaking stipulates a different time.

(4) An undertaking is irrevocable upon issuance, unless it stipulates that it is revocable.

### Article 8. Amendment

(1) An undertaking may not be amended except in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph (1) of article 7.

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, an undertaking is amended upon issuance of the amendment if:

(a) The amendment has previously been authorized by the beneficiary; or

(b) If the amendment consists solely of an extension of the validity period of the undertaking;

if any amendment does not fall within subparagraphs (a) and (b) of this paragraph, the undertaking is amended only when the guarantor/issuer receives a notice of acceptance of the amendment by the beneficiary in a form referred to in paragraph (1) of article 7.

(3) An amendment of an undertaking has no effect on the rights and obligations of the principal/applicant (or an instructing party) or of a confirmer of the undertaking unless such person consents to the amendment.

### Article 9. Transfer of beneficiary's right to demand payment

(1) The beneficiary's right to demand payment under the undertaking may be transferred only if so, and to the extent and in the manner, authorized in the undertaking.

(2) If an undertaking is designated as transferable without specifying whether or not the consent of the guarantor/issuer or another authorized person is required for the actual transfer, neither the guarantor/issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it.

### Article 10. Assignment of proceeds

(1) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the undertaking.

(2) If the guarantor/issuer or another person obliged to effect payment has received a notice of the beneficiary in a form referred to in paragraph (1) of article 7 of the beneficiary's irrevocable assignment, payment to the assignee discharges the obligor, to the extent of its payment, from its liability under the undertaking.

### Article 11. Cessation of right to demand payment

(1) The right of the beneficiary to demand payment under the undertaking ceases when:

(a) The guarantor/issuer has received a statement of the beneficiary of release from liability in a form referred to in paragraph (1) of article 7;

(b) The beneficiary and the guarantor/issuer have agreed on the termination of the undertaking in a form referred to in paragraph (1) of article 7;

(c) The amount available under the undertaking has been paid, unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking;

(d) The validity period of the undertaking expires in accordance with the provisions of article 12.

(2) The undertaking may stipulate, or the guarantor/issuer and the beneficiary may agree elsewhere, that return of the document embodying the undertaking to the guarantor/issuer, or a procedure functionally equivalent to the return of the document in the case of the issuance of the undertaking in non-paper form, is required for the cessation of the right to demand payment, either alone or in conjunction with one of the events referred to in subparagraphs (a) and (b) of paragraph (1) of this article. However, in no case shall retention of any such document by the beneficiary after the right to demand payment ceases in accordance with subparagraphs (c) or (d) of paragraph (1) of this article preserve any rights of the beneficiary under the undertaking.

### Article 12. Expiry

The validity period of the undertaking expires:

(a) at the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the undertaking, provided that, if the expiry date is not a business day at the place of business of the guarantor/issuer at which the undertaking is issued, or of another person or at another place stipulated in the undertaking for presentation of the demand for payment, expiry occurs on the first business day which follows;

(b) if expiry depends according to the undertaking on the occurrence of an act or event not within the guarantor/issuer's sphere of operations, when the guarantor/issuer receives confirmation that the act or event has occurred by presentation of the document specified for that purpose in the undertaking or, if no such document is specified, of a certification by the beneficiary of the occurrence of the act or event;

(c) if the undertaking does not state an expiry date, or if the act or event on which expiry is stated to depend has not yet been established by presentation of the required document, when six years have elapsed from the date of issuance of the undertaking.

## CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

### Article 13. Determination of rights and obligations

(1) Subject to the provisions of this Convention, the rights and obligations of the guarantor/issuer and the beneficiary are determined by the terms and conditions set forth in the undertaking, including any rules, general conditions or usages specifically referred to therein.

(2) In interpreting terms and conditions of the undertaking and in settling questions that are not addressed by the terms and conditions of the undertaking or by the provisions of this Convention, regard shall be had to generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice.

### Article 14. Standard of conduct and liability of guarantor/issuer

(1) In discharging its obligations under the undertaking and this Convention, the guarantor/issuer shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit.

(2) A guarantor/issuer may not be exempted from liability for its failure to act in good faith or for any grossly negligent conduct.

### Article 15. Demand

Any demand for payment under the undertaking shall be made in a form referred to in paragraph (1) of article 7 and in conformity

with the terms and conditions of the undertaking. In particular, any certification or other document required by the undertaking shall be presented, within the time that a demand for payment may be made to the guarantor/issuer at the place where the undertaking was issued, unless another person or another place has been stipulated in the undertaking. If no certification or other document is required, the beneficiary, when demanding payment, is deemed to impliedly certify that the demand is not in bad faith or otherwise improper.

*Article 16. Examination of demand and accompanying documents*

(1) The guarantor/issuer shall examine the demand and any other, accompanying documents in accordance with the standard of conduct referred to in paragraph (1) of article 14. In determining whether documents are in facial conformity with the terms and conditions of the undertaking, and are consistent with one another, the guarantor/issuer shall have due regard to the applicable international standard of independent guarantee or stand-by letter of credit practice.

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer shall have reasonable time, but not more than seven business days, in which to examine the demand and any other, accompanying documents and to decide whether or not to pay, and if the decision is not to pay, to issue notice thereof to the beneficiary. Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, such notice shall be made by teletransmission or, if that is not possible, by other expeditious means and shall indicate the reason for the decision not to pay.

*Article 17. Payment of demand*

(1) Subject to article 19 the guarantor/issuer shall pay against a demand made in accordance with the provisions of article 14. Following a determination that a demand for payment so conforms, payment shall be made promptly, unless the undertaking stipulates payment on a deferred basis, in which case payment shall be made at the stipulated time.

(2) Any payment against a demand that is not in accordance with the provisions of article 14 does not prejudice the rights of the principal/applicant.

*Article 18. Set-off*

Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer may discharge the payment obligation under the undertaking by availing itself of a right of set-off, except with any claim assigned to it by the principal/applicant.

*Article 19. [Obligation not to make payment]*

[(1) (a) If, in the view of the guarantor/issuer, it is manifest and clear that:

- (i) any document is not genuine or has been falsified;
- (ii) no payment is due on the basis asserted in the demand and the supporting documents; or
- (iii) judging by the type and purpose of the undertaking, the demand has no conceivable basis,

and for that reason payment would not be in good faith, payment shall not be made to the beneficiary.

(b) In such event, [where the principal/applicant brings to the attention of the guarantor/issuer the presence of one of the elements in subparagraph (a),] the principal/applicant shall [, unless otherwise stipulated in the undertaking or agreed elsewhere by the guarantor/issuer and the beneficiary]:

- (i) indemnify the guarantor/issuer against any claim or liability resulting from non-payment, and,
- (ii) if requested by the guarantor/issuer, apply for a judicial or arbitral determination that non-payment is justified.]

(2) For the purposes of paragraph (1)(a)(iii) of this article, the following are types of situations in which a demand has no conceivable basis:

(a) The contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;

(b) The underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;

(c) The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) Fulfilment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary.

## CHAPTER V. PROVISIONAL COURT MEASURES

*Article 20. Provisional court measures*

(1) Where, on an application by the principal/applicant or the instructing party, it is shown that there is a high probability that, with regard to a demand made, or expected to be made, by the beneficiary, one of the elements referred to in paragraph (1) of article 19 is present, the court, on the basis of immediately available strong evidence, may issue a provisional order to the effect that the beneficiary does not receive payment or that the amount of the undertaking held by the guarantor/issuer or the proceeds of the undertaking paid to the beneficiary are blocked, taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious harm.

(2) The court, when issuing a provisional order referred to in paragraph (1) of this article, may require the person applying therefor to furnish such form of security as the court deems appropriate.

(3) The court may not issue a provisional order of the kind referred to in paragraph (1) of this article based on any objection to payment other than those referred to in paragraph (1)(a)(i), (ii), or (iii) of article 19, or use of the undertaking for a criminal purpose.

## CHAPTER VII. CONFLICT OF LAWS

*Article 21. Choice of applicable law*

The undertaking is governed by the law the choice of which is:

- (a) Stipulated in the undertaking or demonstrated by the terms and conditions of the undertaking; or
- (b) Agreed elsewhere by the guarantor/issuer and the beneficiary.

*Article 22. Determination of applicable law*

Failing a choice of law in accordance with article 21, the undertaking is governed by the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued.

## ANNEX II

## RENUMBERING OF ARTICLES OF THE DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

<i>Article number in renumbered text (annex to present document)</i>	<i>Former article number</i>	<i>Article number in renumbered text (annex to present document)</i>	<i>Former article number</i>
1	1	10	9 bis
2	2	11	10
3	3	12	11
4	4	13	12
5	5	14	13
6(a)	6(a)	15	14
6(b)	6(a bis)	16	16
6(c)	6(d)	17(1)	17(1)
6(d)	6(e)	17(2)	(1 bis)
6(e)	6(f)	18	20
6(g)	6(h)	19	19
7(1)	7(new 1)	20(1)	21(1)
7(2)	7(1)	20(2)	20(3)
7(3)	7(2)	20(3)	20(4)
7(4)	7(3)	21	26
8	8	22	27
9	9		

**D. Draft Convention on Independent Guarantees and Stand-by Letters of Credit: note by the Secretariat: draft final clauses for the draft Convention on Independent Guarantees and Stand-by Letters of Credit (A/CN.9/411) [Original: English]**

The present note contains, for consideration by the Commission, a draft of final clauses to be included in the draft Convention on Independent Guarantees and Stand-by Letters of Credit.

## FINAL CLAUSES

*Article A. Depositary*

The Secretary-General of the United Nations is the depositary of this Convention.

*Article B. Signature, ratification, acceptance, approval, accession*

(1) This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until ... [the date two years from the date of adoption].

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

(3) This Convention is open to 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 C. Application to territorial units*

(1) If a 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 one or more of them, and may at any time substitute another declaration for its earlier declaration.

(2) These declarations are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the place of business of the guarantor/issuer or of the beneficiary is located in a territorial unit to which the Convention does not extend, this place of business is considered not to be in a Contracting State.

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

*Article D. Effect of declaration*

(1) Declarations made under article [C] at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations 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 which makes a declaration under article [C] may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary.

#### *Article E. Reservations*

No reservations may be made to this Convention.

#### *Article F. Entry into force*

(1) This Convention enters into force on the first day of the month following the expiration of one year from the date of the deposit of the [fifth] instrument of ratification, acceptance, approval or accession.

(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the [fifth]

instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.

(3) This Convention applies only to undertakings issued on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (a) or the Contracting State referred to in subparagraph (b) of paragraph (1) of article 1.

#### *Article G. Denunciation*

(1) A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period 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... one thousand nine hundred and ninety-..., 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 the present Convention.

## II. ELECTRONIC DATA INTERCHANGE

### A. Report of the Working Group on Electronic Data Interchange on the work of its twenty-eighth session (Vienna, 3-14 October 1994) (A/CN.9/406) [Original: English]

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## INTRODUCTION

1. At its twenty-fourth session (1991), the Commission agreed that the legal issues of electronic data interchange (EDI) would become increasingly important as the use of EDI developed and that the Commission should undertake work in that field. The Commission agreed that the matter needed detailed consideration by a Working Group.<sup>1</sup>

2. Pursuant to that decision, the Working Group on International Payments devoted its twenty-fourth session to identifying and discussing the legal issues arising from the increased use of EDI. The report of that session of the Working Group suggested that the review of legal issues arising out of the increased use of EDI had demonstrated that among those issues some would most appropriately be dealt with in the form of statutory provisions (A/CN.9/360, para. 129). As regards the possible preparation of a standard communication agreement for world-wide use in international trade, the Working Group decided that, at least currently, it was not necessary for the Commission to develop a standard communication agreement. However, the Working Group noted that, in line with the flexible approach recommended to the Commission concerning the form of the final instrument, situations might arise where the preparation of model contractual clauses would be regarded as an appropriate way of addressing specific issues (A/CN.9/360, para. 132). The Working Group reaffirmed the need for close cooperation between all international organizations active in the field. It was agreed that the Commission, in view of its universal membership and general mandate as the core legal body of the United Nations system in the field of international trade law, should play a particularly active role in that respect (A/CN.9/360, para. 133).

3. At its twenty-fifth session (1992), the Commission considered the report of the Working Group on International Payments on the work of its twenty-fourth session (A/CN.9/360). In line with the suggestions of the Working Group, the Commission agreed that there existed a need to investigate further the legal issues of EDI and to develop practical rules in that field. It was agreed, along the lines suggested by the Working Group, that, while some issues would most appropriately be dealt with in the form of statutory provisions, other issues might more appropriately be dealt with through model contractual clauses. After discussion, the Commission endorsed the recommendation contained in the report of the Working Group (A/CN.9/360, paras. 129-133), reaffirmed the need for active cooperation between all international organizations active in the field and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange.<sup>2</sup>

4. At its twenty-sixth session (1993), the Commission had before it the report of the Working Group on Electronic Data Interchange on the work of its twenty-fifth session (A/CN.9/373). The Commission noted that the Working Group had started discussing the content of a uni-

form law on EDI and expressed the hope that the Working Group would proceed expeditiously with the preparation of that text.<sup>3</sup>

5. The Working Group on Electronic Data Interchange held its twenty-seventh session in New York, from 28 February to 11 March 1994. At that session, the Working Group discussed draft articles 1-10 as set forth in a note by the Secretariat (A/CN.9/WG.IV/WP.60). The Secretariat was requested to prepare, on the basis of the deliberations and conclusions of the Working Group, a set of revised articles 1 to 10, with possible variants, on the issues discussed.

6. At its twenty-seventh session (1994), the Commission had before it the reports of the Working Group on the work of its twenty-sixth and twenty-seventh sessions (A/CN.9/387 and A/CN.9/390). As to the time schedule for completion of the current work of the Working Group, the view was expressed that it might be difficult to complete the current work within one year and submit the model statutory provisions to the Commission at its next session since a number of issues, such as scope of application and party autonomy, still remained to be resolved, and that, at any rate, the Commission might not have sufficient time available on the agenda of its next session to consider the rules. The prevailing view, however, was that a draft set of basic, "core" provisions could be completed by the Working Group at its twenty-eighth or twenty-ninth session, in particular since it had been decided that the relationships between EDI users and public authorities, as well as consumer transactions, should not be the focus of the model statutory provisions (A/CN.9/390, para. 21). It was pointed out that further provisions could be added at a later stage, in particular since that was an area of rapid technological development.<sup>4</sup>

7. The Working Group on Electronic Data Interchange, which was composed of all States members of the Commission, held its twenty-eighth session at Vienna, from 3 to 14 October 1994. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Canada, Chile, China, Costa Rica, Denmark, Ecuador, Egypt, France, Germany, Hungary, India, Iran (Islamic Republic of), Japan, Mexico, Morocco, Poland, Russian Federation, Saudi Arabia, Singapore, Spain, Sudan, Thailand, Togo, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

8. The session was attended by observers from the following States: Algeria, Australia, Bosnia and Herzegovina, Brazil, Colombia, Czech Republic, Finland, Indonesia, Peru, Romania, Sweden, Switzerland, Turkey, Ukraine and Venezuela.

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

(a) *United Nations bodies:* Inter-Agency Procurement Services Office; United Nations Industrial Development Organization (UNIDO).

<sup>1</sup>Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17 (A/46/17), paras. 314-317.

<sup>2</sup>Ibid., Forty-seventh Session, Supplement No. 17 (A/47/17), paras. 140-148.

<sup>3</sup>Ibid., Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 265-267.

<sup>4</sup>Ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 198-201.



(b) *Intergovernmental organizations*: Central Office for International Carriage by Rail; Hague Conference on Private International Law; Islamic Centre for Development of Trade (Organization of the Islamic Conference); League of Arab States.

(c) *Other international organizations*: Banking Federation of the European Community; Federación Latinoamericana de Bancos (FELABAN); International Chamber of Commerce (ICC); Society for Worldwide Interbank Financial Telecommunication.

#### 10. The Working Group elected the following officers:

*Chairman*: Mr. José-María Abascal Zamora (Mexico);

*Rapporteur*: Mr. Abdolhamid Faridi Araghi (Islamic Republic of Iran).

11. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.61), a note by the Secretariat containing a revised draft of uniform rules on the legal aspects of electronic data interchange (EDI) and related means of data communication (A/CN.9/WG.IV/WP.60) and a note by the Secretariat containing a newly revised draft of articles 1 to 10 of model statutory provisions on the legal aspects of electronic data interchange (EDI) and related means of data communication (A/CN.9/WG.IV/WP.62).

#### 12. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of model statutory provisions on the legal aspects of electronic data interchange (EDI) and related means of data communication.
4. Other business.
5. Adoption of the report.

### I. DELIBERATIONS AND DECISIONS

13. The Working Group discussed draft articles 11-15 and draft articles 1-10 as set forth in the notes by the Secretariat (A/CN.9/WG.IV/WP.60 and A/CN.9/WG.IV/WP.62, respectively).

14. As the Working Group concluded its deliberation of the draft articles, a drafting group established by the Secretariat proposed a draft revised version of the model statutory provisions reflecting the deliberations and decisions that had taken place. As a result of a decision taken by the Working Group (see paragraph 77, below), the revised text was in the form of a draft model law (hereinafter referred to as "the draft Model Law"). The deliberations and conclusions of the Working Group are set forth below in chapter II. The text of the draft Model Law as prepared by the drafting group and, with some modifications, approved by the Working Group is set forth in the annex to the present report.

## II. CONSIDERATION OF THE DRAFT MODEL STATUTORY PROVISIONS ON THE LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF DATA COMMUNICATION

### Chapter III. Communication of data [Records]

#### Article 11. Acknowledgement of receipt

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

"(1) Where, on or before sending a data [message], or by means of that data [message], the [sender] [originator] has requested an acknowledgement of receipt, but the [sender] [originator] has not requested that the acknowledgement be in a particular form, any request for an acknowledgement may be satisfied by any communication or conduct of the addressee sufficient to indicate to the [sender] [originator] that the message has been received.

"(2) If, on or before transmitting a data message, or by means of that data message, the [sender] [originator] has requested an acknowledgement of receipt [and stated that the data message is to be of no effect until an acknowledgement is received], the addressee may not rely on the message, for any purpose for which it might otherwise seek to rely on it, until an acknowledgement has been received by the [sender] [originator].

"(3) If the [sender] [originator] does not receive the acknowledgement of receipt within the time limit [agreed upon, requested or within reasonable time], it may, upon giving prompt notification to the addressee to that effect, treat the data message as though it had never been received.

"(4) An acknowledgement of receipt, when received by the [sender] [originator], is [conclusive] [presumptive] evidence that the related data message has been received and, where confirmation of syntax has been required, that the data message was syntactically correct. Whether a functional acknowledgement has other legal effects is outside the purview of these Rules."

#### Paragraph (1)

16. The Working Group found the substance of paragraph (1) to be generally acceptable.

#### Paragraphs (2) and (3)

17. The view was expressed that paragraph (2) should be deleted. It was stated that, while such a provision might appropriately be included in a contractual agreement between trading partners implementing EDI, it was not needed as a statutory rule. In response, it was recalled that paragraph (2), as other draft provisions embodied in chapter III, might be regarded as a default rule for parties that were not bound by a trading-partners agreement, and might be particularly useful in the context of open EDI. The prevailing view was that a rule along the lines of paragraph (2) was generally acceptable.

18. The discussion focused on the scope of the rule contained in paragraph (2). Differing views were expressed as to whether the wording between square brackets ("and stated that the data message is to be of no effect until an acknowledgement is received") should be retained. In favour of deletion, it was stated that the rule contained in paragraph (2) should apply to the most comprehensive range of situations in order to enhance the commercial value of a system of acknowledgement of receipt. A contrary view was that the use of functional acknowledgements was a business decision to be made by EDI users and that the model statutory provisions should not attempt to promote any such procedure. It was stated that the scope of the provision should be made considerably narrower, not only by retaining the words between square brackets but also by adding to those words a proviso to the effect that paragraph (2) would apply only if the originator had specified that the acknowledgement should be received by a certain time. The prevailing view was that it was appropriate for the model statutory provisions to contain a rule addressing the situation covered by the words between square brackets. However, it was widely felt that a separate provision should be prepared to address the more common situation where an acknowledgement was requested, without any statement being made by the originator that the data record would be of no effect until an acknowledgement had been received.

19. With respect to paragraph (3), the view was expressed that the text should be deleted, since it merely repeated a provision already contained in paragraph (2). In response, it was stated that, while paragraphs (2) and (3) might address two aspects of the same factual situation, both provisions were needed to clarify the legal implications of that situation, which were different for the addressee and for the originator. The provision contained in paragraph (3) was needed to establish the point in time when the originator of a data record who had requested an acknowledgement of receipt would be relieved from any legal implication of sending that data record if the requested acknowledgement had not been received. As an example of a factual situation where a provision along the lines of paragraph (3) would be particularly useful, it was stated that the originator of an offer to contract who had not received the requested acknowledgement from the addressee of the offer might need to know the point in time after which it would be free to transfer the offer to another party. As to the scope of the provision contained in paragraph (3), it was widely felt that it should parallel the scope of the provision contained in paragraph (2). As to the formulation of paragraph (3), it was suggested that, before the originator could treat the data record as though it had never been received, the addressee should be given reasonable time to send the requested acknowledgement.

20. A number of concerns were expressed with respect to the possible interplay of paragraph (3) with other paragraphs of draft article 11. A concern was expressed as to the possible effect of a notification under paragraph (3) that the data record would be treated as though it had never been received in a situation where the originator had already stated under paragraph (2) that the data record was of no effect until an acknowledgement was received. It was stated that, in such a situation, it would be unnecessary to treat the data record "as though it had never been received" since it was already of

no effect as a result of the original statement made by the originator. It was suggested that, under those circumstances, the only possible meaning of a notification under paragraph (3) would be to establish an additional time period within which the addressee could acknowledge receipt. It was stated that such a provision would result in an overly complex mechanism. Another concern was expressed that acknowledgement by any communication or conduct of the addressee under paragraph (1) might be inappropriate in the context of paragraph (3).

21. A number of draft texts were proposed as possible substitutes for paragraphs (2) and (3). In order to accommodate the above-mentioned suggestions and concerns, the Working Group entrusted a small working party with the task of producing a single revised draft of paragraphs (2) and (3) for continuation of the discussion. The revised text as considered by the Working Group was as follows:

"(2) If on or before transmitting a data [record] [message], or by means of that data [record] [message], the originator has requested an acknowledgement of receipt, and has stated that the data [record] [message] is conditional on receipt of that acknowledgement, then that data [record] [message] is of no legal effect until the acknowledgement is received as specified.

"(3) If on or before transmitting a data [record] [message], or by means of that data [record] [message], the originator has requested an acknowledgement of receipt, but has not made the data [record] [message] conditional upon receipt of that acknowledgement, the following rules apply if the originator does not receive the requested acknowledgement:

"(a) The originator may give prompt notice to the addressee

"(i) that no acknowledgement has been received;

"(ii) setting forth a [further reasonable] time by which acknowledgement must be received [time being of the essence]; and

"[(iii) stating that unless the requested acknowledgement is given accordingly, then the data [record] [message] will be treated as though it had never been transmitted.]

"(b) If the acknowledgement is not received within the time specified in subparagraph (a)(ii), the originator may treat the data [record] [message] as though it had never been transmitted, or otherwise proceed in accordance with its rights.

"(c) In the absence of the originator's receipt of the acknowledgement, the addressee [may not rely upon the data [record] [message] and] assumes the risk that the originator may treat the data [record] [message] [as though it had never been transmitted under] [in accordance with] paragraph (3)(b)."

#### *New paragraph (2)*

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

*New paragraph (3)**Opening words*

23. It was noted that the proposed text did not address the situation where the originator requested that an acknowledgement of receipt should be received from the addressee within a specified time period. It was generally felt that additional language should be added to the opening words along the following lines: "within the time specified or agreed or, if no time has been specified or agreed, within reasonable time".

*Subparagraph (a)*

24. The view was expressed that the provision might overly burden the originator by providing that it should give notice to the addressee prior to considering the data record as though it had never been transmitted. In response, it was stated that the purpose of the provision was not to create any obligation binding on the originator, but merely to establish means by which the originator, if it so wished, could clarify its status in cases where it had not received the requested acknowledgement. It was generally agreed that, in order to clarify that the procedure established under subparagraph (a) was at the discretion of the originator, the word "prompt" should be deleted.

*Subparagraphs (a)(i) and (ii)*

25. As a matter of drafting, it was generally felt that wording such as "time being of the essence" should be avoided, since it was only reflective of common law and might not carry the same significance under other legal systems. With respect to the words "further reasonable" between square brackets in subparagraph (a)(ii), a view was that the additional time specified in the notice did not need to be "reasonable" since such a notice could only be sent after expiry of the time within which the addressee had failed to respond to the initial request for an acknowledgement. After discussion, the Working Group adopted the substance of subparagraph (a)(i) and decided that the text of subparagraph (a)(ii) should read along the following lines: "setting forth a specified time, which must be reasonable, by which the acknowledgement must be received".

*Subparagraphs (b) and (c)*

26. The discussion focused on subparagraph (c). A number of concerns were expressed with respect to the formulation of the provision. As a matter of logic, it was stated that it was inappropriate to provide that the addressee "may not rely" on a data record. The addressee would, in most conceivable circumstances, be free to rely or not to rely on any given data record, provided that it would bear the risk of the data record being unreliable. A discussion took place as to what the substance of the risk incurred by the addressee might be. A concern was expressed that the proposed text of subparagraph (c) made it insufficiently clear whether the risk was that the originator who had not received the requested acknowledgement might, without giving further notice to the addressee, automatically treat the data record as though it had never been transmitted, or whether the risk was merely that the originator could send a notice establish-

ing a time limit for the receipt of the requested acknowledgement. A suggestion was made to redraft subparagraph (c) as follows: "In the absence of the originator's receipt of the acknowledgement, the addressee proceeds at its own risk". The suggestion was objected to on the grounds that it did not make it sufficiently clear that the originator could not treat the data record as though it had never been transmitted unless a notification was sent under subparagraph (a). It was stated that, should the provision contained in subparagraph (c) create the risk that a data record could be treated automatically as though it had never been transmitted, this would run counter to the decision to limit the scope of paragraph (2) to situations where the data record was conditional on receipt of the acknowledgement. It was stated in response that there existed a need to cover the most common situation, where no such condition had been specified, and that a limitation of the risk incurred by the addressee to the mere receipt of a notice under subparagraph (a) would deprive subparagraph (c) of most of its significance.

27. After discussion, the Working Group decided to delete both subparagraphs (a)(iii) and (c). The Working Group also decided that the text of subparagraph (b) should read along the following lines:

"(b) If the acknowledgement is not received within the time specified in subparagraph (a)(ii), the originator may, upon notice to the addressee, treat the data record as though it had never been transmitted, or otherwise proceed in accordance with its rights."

*Paragraph (4)*

28. Differing views were expressed as to whether the paragraph should be retained. In favour of deletion, it was stated that presumptions as to the receipt of a data record would either be established by trading partners-agreements, or should be left for determination by competent courts. The prevailing view, however, was that a provision along the lines of paragraph (4) was needed to create certainty and would be particularly useful in the context of electronic communication between parties that were not linked by a trading-partners agreement.

29. With respect to the words between square brackets ("[conclusive] [presumptive]"), there was general agreement that the presumption established should be of a rebuttable character. It was suggested that the provision should be limited to establishing "prima facie evidence". That suggestion was objected to on the grounds that a reference to prima facie evidence would insufficiently reflect the intent of the Working Group to establish a presumption that would be binding on the parties unless evidence to the contrary was produced. After discussion, the Working Group decided that reference should be made to "presumptive evidence".

30. As regards the confirmation of syntax and syntactical correctness of a data record, a concern was expressed that the word "syntax" was ambiguous, since it did not make it clear whether the provision was referring simply to grammar or to communication protocols and other technical requirements known as "data syntax" in the context of computer-to-computer communication. It was stated that, should the use of the word "syntax" be construed as a reference to

grammar, the provision might be misinterpreted as dealing with the content of the data record. It was also stated that such a provision would, at any rate, not be applicable to telegram, telex and telecopy. Support was expressed for the deletion of the last part of the first sentence of paragraph (4). The prevailing view, however, was that a reference to technical requirements was needed, in view of the practical importance and the widespread use of such requirements in electronic communication. After discussion, the Working Group decided that the reference to technical requirements should be rephrased in media-neutral terms to avoid ambiguity.

31. There was general agreement that the provision contained in the second sentence of the paragraph was superfluous and should be deleted.

32. With a view to accommodating the above-mentioned concerns, it was proposed that paragraph (4) should be replaced by the following:

"(4) When the [sender] [originator] receives an acknowledgement of receipt, that acknowledgement is presumptive evidence that the related trade data message was received by the addressee. When the received acknowledgement states that the related trade data message met technical requirements, either agreed upon or set forth in applicable standards, the acknowledgement is presumptive evidence that those requirements have been met."

33. After discussion, the Working Group adopted the substance of the proposal and referred the text of draft article 11 to the drafting group.

## Article 12. Formation of contracts

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

"(1) *In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data [records] [messages]. Where a contract is formed by means of data [records] [messages], it shall not be denied validity or enforceability on the sole ground that the contract was concluded by such means.*

"[(2) A contract concluded by means of data [records] [messages] is formed at the time when [, and at the place where] the data [record] [message] constituting acceptance of an offer is received by its addressee or deemed to be received under article 13.]"

### Title

35. The view was expressed that the title insufficiently reflected the content of the provisions contained in the draft article, since those provisions dealt not only with the issue of contract formation but also with the form in which an offer and an acceptance might be expressed. The Working Group generally agreed that the matter needed to be considered by the drafting group.

### Paragraph (1)

36. Differing views were expressed as to whether a rule along the lines of paragraph (1) was necessary. One view was that paragraph (1) should be deleted. In support of that view, it was argued that paragraph (1) was superfluous since it merely stated the obvious, namely that an offer and an acceptance, as any other expression of will, could be communicated by any means, including data records. It was observed that there might be no need to restate, in the context of contract formation, a principle already embodied in other model statutory provisions, such as draft articles 5 *bis*, 9 and 10, all of which established the legal effectiveness of data records. In addition, it was stated that paragraph (1) might have the harmful effect of overruling otherwise applicable provisions of national law, which might prescribe specific formalities for the formation of certain contracts. Such forms included notarization and other requirements for writings, and might respond to considerations of public policy, such as the need to protect certain parties or to warn them against specific risks.

37. The prevailing view, however, was that paragraph (1) should be retained. It was stated that, in certain jurisdictions, it was not obvious that contracts could be concluded by electronic means; and that the fact that electronic messages might have legal value as evidence and produce some effects, as provided in draft articles 9 and 10, did not necessarily mean that they could be used for the purpose of concluding valid contracts. In addition, it was stated that paragraph (1) was not intended to interfere with national law on the formation of contracts but rather to promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means.

38. As to the exact formulation of paragraph (1), a number of concerns were expressed. One concern was that paragraph (1) did not make it clear whether it covered only the cases in which both the offer and the acceptance were communicated by electronic means or also cases in which only the offer or only the acceptance was communicated electronically. In order to alleviate that concern, it was suggested that the words "by means of data records" should be replaced by language along the following lines: "by an offer or acceptance in a data record". Another concern was that the expression "on the sole ground" might not fulfil its intended purpose since, in cases where a contract concluded electronically would be denied validity or enforceability, it could be argued that the denial was not based on the sole ground that the contract had been concluded electronically but on additional grounds as well. In order to address that concern, it was suggested that a new paragraph (2) should be inserted along the following lines: "The fact that a contract is formed by an offer or acceptance in a data record shall not be taken to be the sole reason for denying the legal validity or enforceability of the contract if it is shown that, in the particular case in question, the consequence of recording the offer or acceptance in a data record is that the record may be unreliable or that, in any other respect, the conditions in article 6(1) are not met". Yet another concern was that the current formulation did not sufficiently clarify the way in which other formal requirements, such as the payment of a stamp duty, might apply.

39. After discussion, the Working Group adopted the substance of paragraph (1), which was referred to the drafting group. In order to address the above-mentioned concern that paragraph (1) should not overrule provisions of applicable law that might be regarded as essential in certain countries for public policy reasons, the Working Group decided to add a new paragraph along the lines of paragraph (2) in draft articles 6, 7 and 8, which provided that an enacting State could exclude the application of paragraph (1) in certain instances to be specified in the instrument enacting the model statutory provisions.

#### Paragraph (2)

40. Differing views were expressed as to whether paragraph (2) should be retained. In support of retention, it was stated that paragraph (2) was intended to address the uncertainty prevailing in many legal systems as to the time and place of conclusion of contracts, in cases where the offer and the acceptance might be exchanged electronically. It was also stated that the rule contained in paragraph (2) reflected similar rules in international instruments such as the United Nations Convention on Contracts for the International Sale of Goods, and in many national laws.

41. The prevailing view, however, in line with a view that had already prevailed at the twenty-sixth session of the Working Group (see A/CN.9/387, para. 151), was that paragraph (2) should be deleted, since it unnecessarily interfered with the law applicable to the formation of contracts. It was felt that a provision along the lines of paragraph (2) might exceed the aim of the draft model statutory provisions, which should be limited to providing that electronic communications would achieve the same degree of legal certainty as paper-based communications. It was also felt that, in many instances, the combination of existing rules on the formation of contracts with the provisions contained in draft article 13 would produce effects similar to those which had been expected from paragraph (2) by its proponents.

#### Article 13. Time and place of receipt of a data [record] [message]

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

*"(1) Unless otherwise agreed between the [sender] [originator] and the addressee of a data [record] [message] and [unless otherwise provided by other applicable law], a data [record] [message] is deemed to be received by its addressee*

*"(a) [subject to subparagraph (b) of this article,] at the time when the data [record] [message] enters the information system of, or designated by, the addressee in such a way that it can be retrieved by the addressee or when the data [record] [message] would have entered the information system and been capable of being retrieved if the information system of the addressee had been functioning properly.*

*"[(b) if the data [record] [message] is in such a form that it requires translation, decoding or other processing in order to become intelligible by the addressee, at the*

*time when such processing is completed or at the time when such processing could reasonably be expected to be completed.]*

*"(2) Unless otherwise agreed between the [sender] [originator] and the addressee of a data [record] [message] and [unless otherwise provided by other applicable law], a data [record] [message] is deemed to be received by its addressee at the place where the addressee has its place of business; where the addressee has more than one place of business, the data [record] [message] is deemed to be received at the place of business with the closest relationship to the content of the data [record] [message]."*

#### Paragraph (1)

##### Opening words

43. It was generally agreed that the proviso within square brackets ("unless otherwise provided by other applicable law") should be deleted, since deviation by other law from the rules established under draft article 13 would introduce uncertainty as to the time and place of receipt of data records.

44. In the context of the discussion of the opening words in paragraph (1), the view was expressed that draft article 13 should not only contain provisions regarding the time and place of receipt of data messages but that it should equally address the issue of dispatch. A treatment of the issue of dispatch of data records was said to be particularly important for those countries where a communication would normally be binding on its sender as of the time of its dispatch. It was observed that provisions establishing the time of dispatch of data records would be particularly important in view of the decision made by the Working Group to delete draft article 12(2) regarding the time and place of formation of contracts by electronic means. General support was expressed in favour of that view.

##### Subparagraph (a)

45. The substance of subparagraph (a) was found to be generally acceptable. A suggestion, which received general support, was that the provision should be amended to address the situation where the addressee had designated an information system, which might or might not be an information system of the addressee, and the data record reached an information system of the addressee that was not the designated system. In such a situation, it was suggested that the designated information system should prevail. While it was suggested that such a situation would, in many instances, be covered by an agreement between the originator and the addressee, it was generally felt that an additional provision was needed to address the situation where the addressee unilaterally designated a specific information system for the receipt of a message. A proposal was made to include wording along the following lines: "if the addressee has designated a specific information system for receipt of a specific data record but the data record is sent to another information system of the addressee, the data record is not deemed to be received until the data message is actually

accessed by the addressee". The substance of the proposal was found to be generally acceptable.

46. A number of concerns were expressed with regard to subparagraph (a). One concern was that the meaning of the expression "information system" was not clear, since in some instances it appeared to be indicating a communications network, and in other instances an electronic mailbox or even a telecopier. In addition, it was stated that it was not clear whether the information system had to be located on the premises of the addressee or on other premises. In order to address that concern, it was suggested to define the term "information system" in draft article 2. Another concern was that subparagraph (a) did not contain specific provisions as to how the designation of an information system should be made, or whether a change could be made after such a designation by the addressee. Yet another concern was expressed regarding the use of the words "functioning properly". It was suggested that such a wording might inadequately cover the situation, for example, of a telecopier which, although not malfunctioning, was always busy and thus was not accessible. The view was expressed that a provision was needed to make it clear that, in order to be treated as functioning properly, a system should be accessible.

#### *Subparagraph (b)*

47. Various concerns were expressed regarding subparagraph (b). One concern was that a reference to the data record being made "intelligible" was imprecise and that it might create a more stringent requirement than currently existed in a paper-based environment, where a message could be considered to be received even if it was not intelligible for the addressee. Another concern was that the reference to "translation" was inappropriate outside an EDI environment, since it might be misconstrued to suggest that a text written in a foreign language had to be translated before it could be regarded as received under subparagraph (b). A further concern was that subparagraph (b) did not take into account the situation where information was sent and not intended to be intelligible to the addressee. As an example of such a situation, it was said that encrypted data could be transmitted to a depository for the sole purpose of retention in the context of intellectual property rights protection.

48. While it was widely felt that subparagraph (b) should be deleted, it was also felt that an attempt should be made to refine the formulation of the provision to state precisely what was said to be an important addition to the concept of receipt in the context of EDI, namely that the addressee might need time to be able to decode and understand the received data record or any relevant part of that data record.

#### *Paragraph (2)*

49. Differing views were expressed as to whether paragraph (2) should be retained. In support of deletion, it was stated that paragraph (2) was superfluous, since the place of receipt was already implicit in paragraph (1), in that a data record would be presumed to be received at the place it would have reached at the time of its receipt under paragraph (1). In that connection, it was observed that, at any rate, the text of paragraph (2) would need to be redrafted to

avoid inconsistency with paragraph (1). Another view was that the provision contained in paragraph (2) was inappropriate, since it indirectly established a conflict-of-laws rule, which might not be acceptable as a general rule, particularly in view of the fact that it was based on a fictitious determination of the place of receipt of data records. A further view was that paragraph (2) should be deleted since it introduced an unnecessary distinction between the presumed place of receipt and the place actually reached by a data record at the time of its receipt under paragraph (1). Such a distinction could be misinterpreted as allocating to the originator the risk of any loss or alteration of the data record between the time of its receipt under paragraph (1) and the time when it reached its place of receipt under paragraph (2). A concern was also expressed that paragraph (2) would be inappropriate for telegram or telex and that, should the provision be retained, it should be limited in scope to cover only computerized transmissions of data records.

50. The prevailing view, however, was that paragraph (2) should be retained. It was recalled, in line with the views expressed at the twenty-sixth session of the Working Group (A/CN.9/387, para. 161), that a principal reason for including a rule on the place of receipt of a data record would be to address a circumstance characteristic of electronic commerce that might not be treated adequately under existing domestic or international law, namely, that very often the information system of the addressee where the data record was received, or from which the data record was retrieved, was located in a jurisdiction other than that in which the addressee itself was located. Thus, the rationale behind the provision was to ensure that the location of an information system would not be the dispositive element, but rather that there should be some reasonable connection between the addressee and what was deemed to be the place of receipt, and that that place could be readily ascertained by the originator. It was stated that the provisions contained in paragraph (2) did not establish a rule on the apportionment of risks between the originator and the addressee in case of damage or loss of a data record between the time of its receipt under paragraph (1) and the time when it reached its place of receipt under paragraph (2). Paragraph (2) merely established a presumption regarding a legal fact, to be used where other applicable law (e.g., the law on formation of contract or a conflict-of-laws rule) required determination of the place of receipt of a data record.

51. As to the exact formulation of paragraph (2), a number of suggestions were made: to delete the words "unless otherwise provided by other applicable law" between square brackets, for the reason given for their deletion from paragraph (1) (see paragraph 43, above); to introduce language to avoid a possible inconsistency between paragraphs (1) and (2); to replace the words "is deemed" by the words "is presumed" so as to make it clear that the legal presumption that was being created would be rebuttable; to define the time of dispatch along the following lines: "A data record is deemed to be dispatched when it leaves the immediate control of the originator"; to limit the scope of application of paragraph (2) to computerized transactions; to replace the reference to "the content of the data record" by a reference to "the underlying transaction", which was said to be more in line with other existing international instruments; and, subject to the decision to be taken at a later stage as to the



scope of application of the model statutory provisions in the context of draft article 1, to introduce language excluding matters of administrative, criminal and data-protection law from the scope of paragraph (2).

52. In order to address the above-mentioned suggestions and concerns, the Working Group entrusted a small working party with the task of producing a revised draft of article 13 for continuation of the discussion. The revised text of draft article 13 as considered by the Working Group was as follows:

*"Article 13. Time and place of dispatch and receipt of a data record"*

"(1) Unless otherwise agreed between the [sender] [originator] and the addressee of a data [record] [message], dispatch of a data [record] [message] occurs when the data [record] [message] reaches a communications system outside the control of the originator.

"(2) Unless otherwise agreed between the [sender] [originator] and the addressee of a data [record] [message], the time of receipt of a data [record] [message] is determined by the following:

"(a) if the addressee has designated an information system for the purpose of such data records, receipt occurs at the time when the message enters the designated information system;

"(b) if the addressee has not designated an information system, receipt occurs when the data [record] [message] enters an information system of the addressee;

"(c) notwithstanding subparagraph (a), if a data [record] [message] is not sent to the designated information system but to another information system of the addressee, receipt occurs when the data [record] [message] is retrieved by the addressee;

"(d) in a case within subparagraph (a) or (b), if the information system is not functioning properly, a data [record] [message] is received when the data [record] [message] would have entered the information system and been capable of being retrieved had the information system been functioning properly;

"(e) in a case within subparagraph (a) or (b), if the data [record] [message] requires decoding or other processing to be usable by the addressee, receipt occurs at the time when such processing is completed or when such processing could reasonably be expected to be completed, whichever is earlier.

"This paragraph applies notwithstanding that the place where the information system is located may differ from the place where the data [record] [message] is received under paragraph (3).

"(3) Unless otherwise agreed between the [sender] [originator] and the addressee of a computerized transmission of a data [record] [message], a data [record] [message] is received at the place where the addressee has its place of business. Where the addressee has more than one place of business, the place of business for purposes of this paragraph is that which has the closest connection with the underlying transaction.

"(4) Paragraph (3) shall not apply to the determination of place of receipt for the purpose of any administrative, criminal or data protection laws."

*New paragraph (1)*

53. A concern was expressed that a message should not be considered to be dispatched if it reached the information system of the addressee but failed to enter it. In order to address that concern, it was suggested that the word "reaches" should be replaced by the word "enters", while it was recognized that the time of entry could not be easily determined. For reasons of consistency with the terminology used in other paragraphs of draft article 13, it was suggested that the word "time of" should be inserted before the word "dispatch" and that the words "communications system" should be replaced by the words "information system". As to the term "information system", it was suggested that it might need to be defined in draft article 2. In response to a concern expressed, it was explained that paragraph (1) did not address situations in which a malfunctioning of the information system of the originator was involved since in such cases the originator would normally be aware of the fact that dispatch did not occur. After discussion, the Working Group approved the substance of new paragraph (1) and referred the above-mentioned suggestions to the drafting group. The Working Group also decided to consider the issue of a possible definition of "information system" in the context of the forthcoming discussion of draft article 2.

*New paragraph (2)*

*Subparagraphs (a), (b) and (c)*

54. It was noted that both subparagraphs (a) and (c) dealt with the situation in which the addressee had designated an information system. For that reason, the Working Group decided to combine subparagraphs (a) and (c). The Working Group approved the substance of subparagraphs (a), (b) and (c), subject to review by the drafting group.

*Subparagraph (d)*

55. A number of concerns were expressed with regard to subparagraph (d). One concern was that subparagraph (d) might be interpreted as placing on the addressee the burdensome obligation to maintain its system functioning at all times. In response, it was pointed out that subparagraph (d) was merely intended to address the situation in which the addressee might have wilfully or negligently caused the malfunctioning of its information system. It was recalled that that problem had been identified by the Working Group at its twenty-sixth session (see A.CN.9/387, para. 154) and that subparagraph (d) was in line with the principle of observance of good faith in international trade, which was embodied in draft article 3. In that connection, the view was expressed that the originator should be protected in cases where the information system of the addressee would not function at all or would function improperly, but not in cases where receipt was impossible because the information system of the addressee was occupied. Another concern expressed was that subparagraph (d) might introduce some



uncertainty since it was predicated upon the concept of malfunctioning, the exact meaning of which was not clear. Furthermore, the view was expressed that subparagraph (d) would be contrary to rules of national laws adopting the theory of receipt, under which a contract could not be formed if the acceptance of the offer had not reached the offeror because of malfunctioning of its information system. In view of the above concerns, the Working Group decided to delete subparagraph (d).

#### *Subparagraph (e)*

56. For reasons already expressed in the context of the discussion of subparagraph (b) of paragraph (1) of the draft prepared by the Secretariat (see paragraph 47, above), the view was expressed that the rule contained in subparagraph (e) was not appropriate. It was stated that subparagraph (e) would be contrary to certain rules of national laws under which receipt of a message occurred at the time when the message reached the sphere of the addressee, irrespective of whether the message was usable by the addressee. In addition, it was stated that subparagraph (e) would run counter to trade usages, under which certain encoded messages were deemed to be received even before they were usable. The Working Group noted that the issue might need to be reopened in the context of future deliberations on acknowledgement of receipt under draft article 11 and decided to delete subparagraph (e).

#### *New paragraph (3)*

57. The Working Group found the substance of new paragraph (3) to be generally acceptable. However, a suggestion was made that the wording of the paragraph might need to be refined to make it clearer that the provision referred to both actual and contemplated underlying transactions. Another suggestion was that the principal place of business should be taken into consideration, in case there was no underlying transaction. Yet another suggestion was that, in order to bring new paragraph (3) in line with article 10 of the United Nations Convention on Contracts for the International Sale of Goods, language should be added to the effect that the place of habitual residence should be taken into consideration if the addressee had no place of business. The Working Group adopted the substance of the suggestions and referred the matter to the drafting group.

#### *New paragraph (4)*

58. The Working Group found the substance of new paragraph (4) to be generally acceptable.

### *Article 14. Storage of data [records] [messages]*

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

"(1) Where it is required by law that certain information be retained as a record, that requirement shall be satisfied if the information is kept in the form of data [records] [messages] provided that the requirements contained in paragraphs (2) and (3) of this article are satisfied.

"[(2) Data [records] [messages] shall be stored unaltered by the [sender] [originator] in the transmitted format and by the addressee in the format in which they are received.]

"[(3) Data [records] [messages] shall be kept readily accessible and shall be capable of being reproduced in a human readable form and, if required, of being printed. Any operational equipment required in this connection shall be made available by the person storing information in the form of data [records] [messages]."

#### *General remarks*

60. There was general agreement in the Working Group that draft article 14 served a useful purpose. As to its location in the model statutory provisions, the view was expressed that it should not be included in chapter III, a purpose of which was to provide a set of default rules for optional use by parties using modern means of communication. Instead, draft article 14 should be moved to chapter II, which established a set of substitute rules for existing statutory requirements that were considered to be obstacles to the development of modern trade. Another suggestion was that, since draft article 14 did not deal with "form requirements", it could be placed in a separate chapter. After discussion, the Working Group decided to move draft article 14 to chapter II, the title of which would need to be reconsidered.

61. As regards the structure of draft article 14, a number of concerns were expressed. One concern was that the proviso in paragraph (1) and paragraphs (2) and (3) were redundant to the extent that they were repeating conditions already contained in draft article 6(1)(a). In order to address that concern, the suggestion was made to combine paragraphs (1), (2) and (3) in a single paragraph along the lines of paragraph (1), but with a different proviso that would read as follows: "provided that the conditions in article 6(1)(a) are satisfied and the information is stored unaltered by the originator and the addressee".

#### *Paragraph (1)*

62. A concern was expressed that the words "certain information" might be unclear under certain national laws and might not sufficiently indicate the general purpose of draft article 14. A related concern was that the word "information" might need to be defined in draft article 2. It was suggested that the words should be replaced by a reference to "certain documents or information". As a matter of drafting, it was suggested that the word "retained" was sufficiently clear and that the words "as a record" should be deleted.

#### *Paragraph (2)*

63. A concern was expressed that it might not be appropriate to require that information should be stored unaltered, since usually messages had to be decoded, compressed or converted in order to be stored. In order to address that concern, it was suggested that reference should be made not to messages having to be stored unaltered, but rather to

messages having to be stored "in the format in which they were transmitted or in a format which accurately reflects the transmitted information". Another concern was that paragraph (2), to the extent that it required both the originator and the addressee to store messages, ran contrary to trade usages.

### *Paragraph (3)*

64. A concern was expressed that paragraph (3) failed to cover all the information that might need to be stored, which included, apart from the message itself, certain transmittal information that might be necessary for the identification of the message. Another concern was that paragraph (3) did not address a situation frequently encountered in practice, namely storage of information not by the originator or the addressee but by intermediaries.

65. In order to address the above-mentioned suggestions and concerns, the Working Group entrusted a small working party with the task of producing a revised draft of article 14 for continuation of the discussion. The revised text of draft article 14 as considered by the Working Group was as follows:

"(1) Where it is required by law that certain documents, records, or information be retained, that requirement shall be satisfied by data [records] [messages] retained under the following conditions:

"(a) [parallel the conditions in Article 6(1)],

"(b) the data [record] [message] is stored in the transmitted format or in a format which can be demonstrated to represent accurately the transmitted information; and

"(c) transmittal information associated with the data [record] [message] including, but not limited to sender, recipient[s] and date and time of transmission, is retained, except where unavailable due to communications system operations not controlled by the person to whom the retention requirement applies.

"(2) A person may satisfy its retention obligations by using the services of an intermediary, provided the above conditions are satisfied."

### *New paragraph (1)*

66. It was explained that subparagraphs (a), (b) and (c) were intended to set out the conditions under which the obligation to store data records that might exist under applicable law would be met. With regard to subparagraph (b), it was emphasized that the message did not need to be retained unaltered as long as the information stored accurately reflected the data record as it was sent. With regard to subparagraph (c), it was pointed out that it was intended to address the concern that, while some transmittal information was important and had to be stored, other transmittal information could be excepted without the integrity of the data records being compromised.

### *Opening words*

67. A concern was expressed that the words "where it is required by law" in the *chapeau* might create the impression

that all areas of law were covered, including certain areas where a provision along the lines of draft article 14 would be inappropriate, e.g., accountancy, money laundering and supervisory law. In order to address that concern, it was suggested that a limitation in scope similar to the limitation introduced in new paragraph (4) of draft article 13 (see paragraph 52, above) should be included in draft article 14. The Working Group was agreed that the issue might need to be reconsidered in the context of the discussion of draft article 1.

### *Subparagraphs (a) and (b)*

68. The Working Group found the substance of subparagraphs (a) and (b) to be generally acceptable.

### *Subparagraph (c) and new paragraph (2)*

69. The concern was expressed that the exception contained at the end of subparagraph (c) might appear to encourage bad practice or wilful misconduct, to the extent that a person required to store data records could be excused from that obligation on the ground that the information system of the chosen intermediary was operating in such a way that it did not retain transmittal information. In response to that concern, it was pointed out that subparagraph (c), by imposing the retention of the transmittal information associated with the data record, was creating a standard that was higher than most standards existing as to the storage of paper-based communications. In addition, it was stated that a clear distinction should be drawn between those elements of transmittal information that were important for the identification of the message and the very few elements of transmittal information (e.g., communication protocols) which were of no value with regard to the data record and which, typically, would automatically be stripped out of an incoming EDI message by the receiving computer before the data record actually entered the information system of the addressee. Another concern was that subparagraph (c) might impose ambiguous obligations since the distinction between transmittal information and data records was not sufficiently clear. Yet another concern was that subparagraph (c) might appear to require storage of information that ordinarily would not have to be stored under the applicable national law. Yet another concern was that subparagraph (c) failed to provide that the person obliged to store data records would be allowed to use the services of other third parties and not only of intermediaries as defined in draft article 2.

70. In order to address those concerns, the Working Group requested the small working party to revise subparagraph (c) and new paragraph (2). The revised text as considered by the Working Group was as follows:

"(c) transmittal information associated with the data record including, but not limited to sender, recipient[s], and date and time of transmission, is retained.

"(2) An obligation of an addressee to retain information in accordance with paragraph (1) shall not extend to any part of such information which is transmitted for communications control purposes but which does not enter the information system of or designated by the addressee.

"(3) A person may satisfy its retention obligations by using the services of an intermediary, provided the above conditions are satisfied."

71. While the substance of the revised text was found to be generally acceptable, it was pointed out that a provision should be included in new paragraph (3) allowing for the storage of data records through any third party.

72. The Working Group approved the revised substance of draft article 14 and referred it to the drafting group.

### Article 15. Liability

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

"[(1) Each party shall be liable for damage arising directly from failure to observe any of the provisions of the uniform rules except in the event where the party is prevented from so doing by any circumstances which constitute an impediment beyond that party's control and which could not reasonably be expected to be taken into account at the time when that party engaged in sending and receiving data [records] [messages] or the consequences of which could not be avoided or overcome.]

"[(2) If a party engages any intermediary to perform such services as the transmission, logging or processing of a data [record] [message], the party who engages such intermediary shall be liable for damage arising directly from that intermediary's acts, failures or omissions in the provision of the said services.]

"[(3) If a party requires another party to use the services of an intermediary to perform the transmission, logging or processing of a data [record] [message], the party who requires such use shall be liable to the other party for damage arising directly from that intermediary's acts, failures or omissions in the provision of the said services.]"

74. It was generally felt that draft article 15 as a whole should be deleted. In line with remarks made at the twenty-sixth session of the Working Group (A/CN.9/387, para. 170), it was noted that, with the possible exception of draft articles 10 and 11, the model statutory provisions did not seem, at least at this stage, to introduce duties additional to those existing under the applicable law and the contractual arrangements of the parties. It was agreed that, while the issues of liability and allocation of risk in electronic communications might need to be reconsidered in the context of future work, it would be premature to engage in a general debate on those issues in the context of this project. After discussion, the Working Group decided to delete draft article 15.

### Title of model statutory provisions

75. The reference in the title to "model statutory provisions" gave rise to a review by the Working Group of its earlier decision to formulate a legal text in the form of statutory provisions (A/CN.9/390, para. 16). The Working Group reaffirmed its decision that the form of the text should be

that of a model law (A/CN.9/390, para. 17). It was widely felt that the use of the term "model statutory provisions" might raise uncertainties as to the legal nature of the instrument. It was recalled that the use of the term "model statutory provisions" had been decided in order to reflect that the text contained a variety of provisions relating to existing rules scattered throughout various parts of different national laws in a typical enacting State, and that it had been felt at the previous session that such provisions would not necessarily be incorporated as a whole or together by an enacting State in any one particular place in its statutes. While some support was expressed for the retention of the term "model statutory provisions", the widely prevailing view was that the term "model law" should be preferred. It was widely felt that, as a result of the course taken by the Working Group as its work progressed towards the completion of the text, the model statutory provisions could be regarded as a balanced and discrete set of rules, which could also be implemented as a whole in a single instrument.

76. A number of misgivings were expressed as to the remainder of the title. They included: discomfort with the words "the legal aspects", which were described as being too vague for the title of a legislative text and, alternatively, were said to create the mistaken impression that the text dealt with all the legal issues that might be related to the use of EDI; the use of the word "communication", which was felt to be too narrow and appeared to limit the scope of the text to cover only situations where information was transmitted, to the exclusion of cases where it was merely stored; and the possible inadequacy of the reference at the end of the title to "related means of data communication".

77. Various proposals were made aimed at addressing those concerns, while reflecting the common understanding that the title should take into account various possible technologies and combinations of technologies, along with the essential element of durable recording. Those proposals included the use of expressions such as: "electronic commerce"; "legal aspects of electronic communication and retention of information"; "EDI and other means of electronic commerce"; "legal aspects of EDI". None of the suggested wordings was found to be fully satisfactory. After discussion, the Working Group adopted the following title: "Draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication".

## Chapter I. General provisions

### Footnote to chapter I

78. The text of the footnote to chapter I as considered by the Working Group was as follows:

"\*These statutory provisions do not override any rule of law intended for the protection of consumers".

79. A concern was expressed that, as a matter of legislative drafting, the use of footnotes was inappropriate. The Working Group, however, recalling the decision made at its previous session (see A/CN.9/390, para. 36), decided that the form of the footnote should be maintained. The Working Group found the substance of the footnote to be generally acceptable.

### Article 1. Sphere of application

80. The text of draft article 1 as considered by the Working Group was as follows:

*"Sphere of application"*

"These *statutory provisions* apply to [commercial] information in the form of a data [record]."

\*\*\*The Commission suggests the following text for States that might wish to limit the applicability of these *statutory provisions* to international data [records]:

"These *statutory provisions* apply to a data [record] as defined in paragraph (1) of article 2 where the data [record] relates to international trading interests."

81. Divergent views were expressed with respect to the use of the notion of "commercial information". One view was that any reference to "commerce" or "trade" should be avoided. In support of that view, it was stated that such a reference might raise difficulties, since certain common-law countries, as well as certain civil-law countries, did not have a discrete body of commercial law, and it was not easy or usual in such countries to distinguish between the legal rules that applied to "trade" transactions and those that applied more generally. It was stated that previous UNCITRAL legal texts had avoided unnecessary references to such notions as "trade" or "commerce", while the UNCITRAL Model Law on International Commercial Arbitration, which contained such references, also provided a definition of the term "commercial". It was recalled that the same concern had been expressed at the previous session of the Working Group (A/CN.9/390, paras. 23-26). It was stated that, while the Working Group, at its previous sessions, had decided that the focus of the text should not be on the relationships between EDI users and public authorities (A/CN.9/390, para. 21), no decision had been made to render the draft Model Law inapplicable to such relationships.

82. The prevailing view, however, was that the draft Model Law should somehow be limited in scope to the commercial area. It was stated that such a limitation would appropriately reflect the general mandate of the Commission with respect to international trade law. It was also stated that the draft Model Law had been prepared against the background of trade relationships and might not be appropriate for other kinds of relationships. It was widely felt, however, that the use of the term "commercial" might make it necessary to define that notion in the draft Model Law and that such a definition should, for reasons of consistency, be modelled on the footnote to article 1 of the UNCITRAL Model Law on International Commercial Arbitration. It was also felt that nothing in the draft Model Law should prevent an implementing State to extend the scope of the draft Model Law to cover uses of EDI and related means outside the commercial sphere. It was agreed that that point should be expressed clearly in the implementation guide to be prepared at a later stage.

83. As to how the limitation to the commercial area should be formulated, the view was expressed that limiting the scope of the draft Model Law to "commercial information" was inappropriate. It was stated that, while it should be made clear that the rules were intended to apply in the area

of commercial law, it would be inappropriate and impractical to further limit the scope to "commercial information". The following text was proposed as a substitute for draft article 1: "This law is part of commercial law. It applies to any kind of information in the form of a data record". After discussion, the proposal was adopted by the Working Group, which also decided to include a footnote along the lines of the footnote to article 1 of the UNCITRAL Model Law on International Commercial Arbitration.

*Footnote to article 1*

84. While the view was expressed that the scope of the draft Model Law should be limited to the area of international trade, the Working Group, recalling the decision made at its previous session, decided that the text should be maintained.

85. At the close of its deliberation of draft article 1, the Working Group decided to proceed with draft article 3 and to revert its attention to the definitions contained in draft article 2 after it had completed its review of the other draft articles (see paragraphs 132-156, below).

### Article 3. Interpretation of the model statutory provisions

86. The text of draft article 3 as considered by the Working Group was as follows:

*"Variant A"*

(1) In the interpretation of these *statutory provisions*, regard is to be had, [where appropriate], to their international character and to the need to promote uniformity in their application and the observance of good faith.

(2) Questions concerning matters governed by these *statutory provisions* which are not expressly settled in them are to be settled in conformity with the general principles on which these *statutory provisions* are based.

*"Variant B"*

*In the interpretation of these statutory provisions, regard is to be had to their purpose of giving effect to principles formulated internationally, which are intended to facilitate the use of technological developments in methods of communicating and holding information, and the need to promote uniformity in the application of those principles."*

87. General preference was expressed in favour of variant A. The view was expressed, however, that the substance of variant B might need to be reflected either in a preamble to the draft Model Law or in an implementation guide to be prepared at a later stage. A concern was expressed that the text of variant B might better reflect that the provisions of the draft Model Law, while resulting from an international inspiration, did not have a built-in international character. With a view to accommodating that concern, it was generally agreed that the words "international character" in the text of variant A should be replaced by the words "interna-

tional source". After discussion, the Working Group approved the substance of Variant A and referred the text to the drafting group.

#### Article 4. [deleted]

#### Article 5. Variation by agreement

88. The text of draft article 5 as considered by the Working Group was as follows:

*"[As between parties involved in generating, storing, communicating, receiving or otherwise processing data [records], and except as otherwise provided in these statutory provisions, their corresponding rights and obligations may be determined by agreement.]"*

89. There was general support for the principle of party autonomy, on which draft article 5 was based. It was generally felt, however, that, in line with views expressed in the context of the previous session (A/CN.9/390, para. 75), certain difficulties might arise if the principle of party autonomy was broadly stated along the lines of draft article 5. It was stated that the draft Model Law might, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. It was recalled that such well-established rules were normally of a mandatory nature since they generally reflected decisions of public policy. A concern was thus expressed that an unqualified statement regarding the freedom of parties to derogate from the model statutory provisions might be misinterpreted as allowing parties, through a derogation to the model statutory provisions, to derogate from mandatory rules adopted for reasons of public policy. It was thus suggested that, at least in respect of the provisions contained in chapter II and in draft article 14, the draft Model Law should be regarded as stating the minimum acceptable form requirement and should, for that reason, be regarded as mandatory, unless they expressly stated otherwise. It was also recalled that, at the previous session of the Working Group, considerable support had been expressed in favour of a proposal that party autonomy should only apply to the provisions of chapter III (A/CN.9/390, para. 76). After discussion, the Working Group adopted that proposal and referred the text of draft article 5 to the drafting group.

#### Incorporation by reference

90. In the context of the discussion of draft article 5, a proposal was made to include in the draft Model Law a provision to the effect of ensuring that certain terms and conditions that might be incorporated in a data record by means of a mere reference would be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of the data record. It was stated that the issue of incorporation by reference of certain terms into EDI messages was crucial to EDI users and that there existed an important need for certainty in the use of that method. It was said that, arguably, EDI was inherently a system of incorporation by reference since EDI messages were meaningless, and of little contractual value, without the incorporation by reference of the relevant communication

standards. The proposal was met with considerable interest in the Working Group. It was decided that the issue would be discussed in detail by the Working Group at a future session.

## Chapter II. Form requirements

#### Article 5 bis.

91. The text of draft article 5 bis as considered by the Working Group was as follows:

*"Information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is recorded as a data [record]."*

92. Differing views were expressed as to whether draft article 5 bis should be retained. In favour of deletion, it was stated that draft article 5 bis was superfluous since the principle of non-discrimination against data records was already embodied in draft articles 6-9, and adding a general rule could only create confusion as to the purpose of those draft articles. It was suggested that, should a general statement along the lines of draft article 5 bis be regarded as necessary, it should be included in the legislative guide to enactment to be prepared at a later stage or, at the most, in a footnote to chapter II. It was stated in response that a general provision stating the fundamental principle that data records should not be discriminated against was essential. The prevailing view was that the thrust of draft article 5 bis, which embodied the fundamental principle that data records should not be discriminated against, should be retained. It was widely felt that such a principle should find general application and that its scope should not be limited to evidence or other matters covered in draft articles 6-9.

93. Various concerns and suggestions were expressed with regard to the formulation of draft article 5 bis. One concern was that the provision might make it insufficiently clear that it was intended to override rules of applicable national law prescribing the use of a writing or an original. It was suggested that the text of draft article 5 bis should specify that it applied "notwithstanding" any statutory requirements for a writing or an original. Another suggestion was that, in order to prevent a data record from being denied enforceability on the grounds that it was unreliable, wording along the following lines should be inserted in the provision: "The fact that information is recorded as a data record shall not be taken to be the sole reason for denying the legal effectiveness, validity or enforceability of that record if it is shown that, in the particular case in question, the consequence of recording the information as a data record is that the record may be unreliable or that, in any other respect, the conditions in article 6(1) are not met". That proposal was objected to on the grounds that it could be misinterpreted as suggesting that data records were inherently unreliable. Yet another suggestion was that a new paragraph should be added along the lines of draft articles 6(2) and 7(2), allowing enacting States to exclude the application of draft article 5 bis in certain instances to be specified when implementing the draft Model Law. As a matter of drafting, it was suggested that the word "information" should be replaced by the words "a record", or "information in a data record", or "a data record and information therein".

94. After discussion, the Working Group decided that the substance of draft article 5 *bis* should remain unchanged and referred the drafting suggestions to the drafting group.

**Article 6. [Functional equivalent] [Requirement] of "writing"**

95. The text of draft article 6 as considered by the Working Group was as follows:

"(1) Where any rule of law requires information to be presented in writing, or provides for certain consequences if it is not, that requirement shall be satisfied in relation to a data [record] containing the requisite information if

"(a) the information can be [reproduced] [displayed] in [visible and intelligible] [legible, interpretable] [durable] form; and

"(b) the information is preserved as a record.

"(2) The provisions of this article do not apply to the following situations: [...]"

*Paragraph (1)*

*Opening words*

96. The Working Group approved the substance of the opening words of paragraph (1). It was suggested that, in addition to cases where applicable law required information "to be presented in writing", draft article 6 should address cases where the law required information "to be" in writing. It was generally agreed that wording to that effect should be inserted in the provision.

*Subparagraph (a)*

97. The Working Group considered the various terms that appeared in subparagraph (a) within square brackets. Differing views were expressed with respect to the word "durable". Under one view, the word should be retained since durability should be regarded as an inherent characteristic of paper. The prevailing view, however, was that the focus of a provision establishing the functional equivalent of a writing should not be on durability, particularly in view of the fact that draft article 6 relied on the notion of "data record" as defined in draft article 2, which already implied a degree of durability. After discussion, the Working Group decided to delete the word "durable". In the context of that discussion, a proposal was made that a reference to the accuracy and reliability should be introduced as an element of the functional equivalent of writing. That proposal did not receive sufficient support.

98. With respect to the words "reproduced" and "displayed", one view was that the word "reproduced" was preferable since it expressed better the concepts of durability and reproducibility that were said to be inherent in paper communications. Another view was that the term "displayed" should be preferred since it reflected more clearly the idea that data records might be converted into a different form and not merely copied, as the term "reproduced" might suggest. Yet another view was that neither word expressed the

necessary characteristic that a data record should be accessible or retrievable. It was generally felt that words such as "accessible" or "retrievable" were preferable.

99. With respect to the words "visible", "intelligible", "legible" and "interpretable", the view was expressed that none of those words constituted an objective test to be applied when determining what should be regarded as an equivalent of "writing". It was stated that all of those words would create uncertainty since whether a data record was visible, intelligible, legible or interpretable depended on the person who might have to read them. It was proposed that subparagraph (a) should be replaced by the following: "the information is retrievable in perceivable form". In response, it was stated that the word "perceivable" should also be avoided since it appeared to create a subjective test. In that connection, the concern was expressed that such formulation might fail to cover data records that might not be in a retrievable or perceivable form, e.g. keys in smart cards. Another proposal was that subparagraph (a) should be replaced by the following: "the information can be displayed in a form which is accessible for subsequent reference". While support was expressed in favour of the proposal, it was generally felt that the proposed text needed to be refined in order to avoid creating confusion between the form in which a data record was displayed and the form in which it was stored. After discussion, the Working Group decided that subparagraph (a) should read along the following lines: "the information is accessible so as to be usable for subsequent reference".

*Subparagraph (b)*

100. The concern was expressed that subparagraph (b) was superfluous since it repeated the notion of preservation which was inherent in data records as defined in draft article 2. While it was generally agreed that retaining subparagraph (b) might not be necessary, it was recalled that the preservation of information was one of the minimum requirements for a data record to satisfy the requirements of writing, and that it should therefore be implied by the rule contained in draft article 6. It was agreed that the drafting group, after finalizing its redraft of subparagraph (a), should consider whether subparagraph (b) was necessary or not.

*Paragraph (2)*

101. The Working Group found the substance of paragraph (2) to be generally acceptable.

**Article 7. [Functional equivalent] [Requirement] of "signature"**

102. The text of draft article 7 as considered by the Working Group was as follows:

"(1) Where a rule of law requires information to be signed, or provides for certain consequences if it is not, that requirement shall be satisfied in relation to a data [record] containing the requisite information if

"[(a) a method [of authentication] identifying the originator of the data [record] and indicating the originator's approval of the information contained therein has



been agreed between the *originator* and the addressee of the data [record] and that method has been used; or]

"(b) a method [of authentication] is used to identify the *originator* of the data [record] and to indicate the *originator's* approval of the information contained therein; and

"(c) that method was as reliable as was appropriate for the purpose for which the data [record] was [generated or communicated] [made], in the light of all circumstances [, including any agreement between the *originator* and the addressee of the data [record]].

"(2) The provisions of this article do not apply to the following situations: [...]."

#### Paragraph (1)

##### Subparagraph (a)

103. It was widely felt that the purpose of draft article 7 was to encourage the use of electronic signature, where signature was required by applicable law, but not to allow parties to substitute their own terms for public policy requirements set by the applicable national law. After discussion, the Working Group decided that subparagraph (a) should be deleted.

##### Subparagraphs (b) and (c)

104. The Working Group approved the substance of subparagraphs (b) and (c) and referred the bracketed language to the drafting group.

#### Paragraph (2)

105. The Working Group found the substance of paragraph (2) to be generally acceptable.

#### Article 8. [Functional equivalent] [Requirement] of "original"

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

"(1) Where a rule of law requires information to be presented in the form of an original record, or provides for certain consequences if it is not, that requirement shall be satisfied in relation to a data [record] containing the requisite information if:

"(a) that information is displayed to the person to whom it is to be presented; and

"(b) there exists a reliable assurance as to the integrity of the information between the time the *originator* first composed the information in its final form, as a data [record] or as a record of any other kind, and the time that the information is displayed.

"(2) Where any question is raised as to whether subparagraph (b) of paragraph (1) of this article is satisfied:

"(a) the criteria for assessing integrity are whether the information has remained complete and, apart from the addition of any endorsement, unaltered; and

"(b) the standard of reliability required is to be assessed in the light of the purpose for which the relevant record was made and all the circumstances.

"(3) The provisions of this article do not apply to the following situations: [...]."

#### Paragraph (1)

107. The Working Group found the substance of paragraph (1) to be generally acceptable.

#### Paragraph (2)

108. While there was agreement in the Working Group on the substance of paragraph (2), the concern was expressed that paragraph (2) in its present formulation might cover elements of information associated with a data record, in addition to endorsements subsequent to the creation of a data record. It was stated that such elements, e.g., information regarding the history of the transmission or the storage of a data record, should not be regarded as material under draft article 8, particularly in view of the fact that, in the context of paper-based communications, they would not be necessary for the admission of a document in court as an original. It was suggested to revise paragraph (2) along the following lines:

"(2) For the purpose of paragraph (1):

"(a) the criteria for assessing integrity are whether the information has remained complete and whether any material alterations have been made to the information; and

"(b) (subparagraph (b) would remain unchanged).

"(3) For the purpose of this article, any alteration is material other than:

"(a) any endorsement made for the purpose of transferring any rights or obligations which form part of the information; or

"(b) any alteration made for the purpose of recording, storing or communicating the information in the form of a data record, or which is a necessary consequence of any procedure for protecting the security and integrity of the information."

109. A concern was expressed that the opening words of the proposed text would render paragraph (2) applicable to paragraph (1) as a whole, and not only to subparagraph (b) of paragraph (1) as envisaged in the current text. It was stated that the reference in the new paragraph (3) to any alteration being material might create impediments to the free admissibility of a data record as an original. In response, it was stated that such an objection might be accommodated by retaining the opening words in the original text. In addition, it was pointed out that the original text provided for only one category of permissible alterations, i.e., endorsements. The effect of that provision was that, under the



current text, any alteration might result in a data record being considered unreliable and thus being denied the character of an original. In addition, it was observed that the proposed text would enhance the admissibility of a data record as an original, to the extent that it added a new category of permissible alterations, namely, alterations made in the course of storing or transmitting data records. The prevailing view, however, was that the proposed text might affect the balance of the existing text, which had been achieved after considerable discussion in the Working Group. After discussion, the Working Group decided that the substance of paragraph (2) should remain unchanged.

#### Paragraph (3)

110. The Working Group found the substance of paragraph (3) to be generally acceptable.

#### Article 9. Admissibility and evidential value of a data [record]

111. The text of draft article 9 as considered by the Working Group was as follows:

"(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to prevent the admission of a data [record] in evidence

"(a) on the grounds that it is a data [record]; or,

"(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not an original document.

"(2) Information presented in the form of a data [record] shall be given due evidential weight. In assessing the evidential weight of a data [record], regard shall be had to the reliability of the manner in which the data [record] was generated, stored or communicated, to the reliability of the manner in which the information was authenticated and to any other relevant factor.

"(3) Subject to any other rule of law, where subparagraph (b) of paragraph (1) of article 8 is satisfied in relation to information in the form of a data [record], the information shall not be accorded any less weight in any legal proceedings on the grounds that it is not presented in the form of an original record."

112. The concern was expressed that the "best evidence rule" embodied in subparagraph (b) and referred to in paragraph (3) of draft article 9 could raise a great deal of uncertainty in legal systems in which such a rule was unknown. It was therefore suggested that it might be necessary to put subparagraph (b) in a footnote, so as to allow certain States to enact the model statutory provisions without subparagraph (b). While there was agreement in the Working Group that the concern was legitimate, it was felt that it could be satisfactorily met by a clarification in a guide to enactment which was to be prepared at a later stage.

113. After discussion, the Working Group approved the substance of draft article 9 unchanged and referred it to the drafting group.

#### Chapter III. Communication of data [Records] (continued)

#### Article 10. [Effectiveness] [Obligations binding on the originator] of a data [record]

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

"(1) As between the originator and the addressee, an originator is [deemed] [presumed] to have approved the [content] [communication] of a data [record] if it was [issued] [transmitted] by the originator or by another person who had the authority to act on behalf of the originator in respect of that data [record].

"[(2) As between the originator and the addressee, a data [record] is [deemed] [presumed] to be that of the originator if the addressee properly applied a procedure previously agreed with the originator for verifying that the data [record] was the data [record] of the latter.]

"[(3) An originator who is not [deemed] [presumed] to have approved the data [record] by virtue of paragraph (1) or (2) of this article is [deemed] [presumed] to have done so by virtue of this paragraph if:

"(a) the data [record] as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to the authentication procedure of the originator; or

"(b) the addressee verified the authentication by a method which was reasonable in the circumstances.]

"[(4) The originator and the addressee of a data [record] are permitted to agree that an originator may be [deemed] [presumed] to have approved the data [record] although the authentication is not [commercially] reasonable in the circumstances.]

"[(5) Where an originator is [deemed] [presumed] to have approved the content of a data [record] under this article, it is [deemed] [presumed] to have approved the content of the data [record] as received by the addressee. However, where a data [record] contains an error, or duplicates in error a previous [record], the originator is not [deemed] [presumed] to have approved the content of the data [record] by virtue of this article in so far as the data [record] was erroneous, if the addressee knew of the error or the error would have been apparent, had the addressee exercised reasonable care or used any agreed procedure of verification.]

"[(5) bis Paragraph (5) of this article applies to an error or discrepancy in an amendment or a revocation message as it applies to an error or discrepancy in a data [record]].

"[(6) The fact that a data [record] is [deemed] [presumed] to be effective as that of the originator does not impart legal significance to that data [record].]"

### Paragraph (1)

#### General remarks

115. There was agreement in the Working Group that the main purpose of paragraph (1) was to set out the conditions under which a data record could be attributed to its originator, and not to deal with the approval of the content of the communication by the originator. In order to align the language of paragraph (1) with that purpose, it was suggested to replace the words "to have approved the [content] [communication] of a data [record]" with language along the following lines: "to be that of the originator". As to the exact formulation of paragraph (1), a suggestion was made that the terms "actual or apparent" should be added after the term "authority", in order to protect the interests of an addressee who had relied on the apparent authority of another person to act on behalf of the originator, whether that authority was actual or not.

#### "[deemed] [presumed]"

116. It was generally felt that the term "deemed" was preferable since it was in line with the ordinary law of agency in accordance to which an authorized agent could bind, and not merely be presumed to bind, the principal.

#### "[issued] [transmitted]"

117. The term "transmitted" was widely supported in the Working Group on the ground that it better conveyed the notion that the issue of the attribution of the data record to the originator involved the communication of a data record from an originator to an addressee.

118. The Working Group approved the substance of paragraph (1) and referred the proposals to the drafting group.

### Paragraph (2)

#### General remarks

119. Various concerns were expressed with respect to paragraph (2) in general. One concern was that paragraph (2) in its present formulation might make it insufficiently clear that a data message could be attributed to the originator if the addressee applied agreed authentication procedures and such application resulted in the proper verification of the originator as the source of the message. Another concern was expressed that paragraph (2) might, in effect, duplicate paragraph (4).

#### "[deemed] [presumed]"

120. Differing views were expressed as to which term was preferable. One view was that the term "deemed" should be preferred. It was stated that paragraph (2) was, in fact, intended to provide a rule of estoppel under which an addressee would be protected in cases where there existed evidence that the apparent originator had not sent the message. It was suggested that, if the provision was to be interpreted in the nature of an estoppel, the word "deemed" should be preferred and paragraph (2) would need to be restructured. It was stated that, in any case, the provision in

paragraph (2) should expressly state that it applied only where the addressee had relied on the procedure it applied for verifying that the message was that of the originator. The prevailing view was that the structure of paragraph (2) should be maintained. The prevailing view was that expressing paragraph (2) in the form of a "deem" provision might be too onerous on the originator, since it would result in the originator having to prove fraud in order to establish that it did not send the message, a burden of proof that might be too difficult to meet. It was stated that the purpose of paragraph (2), which was to provide some protection for the addressee if the apparent originator did not send the message, could be fulfilled by a rebuttable presumption indicated by the term "presumed". After discussion, the Working Group decided to retain the word "presumed".

#### "properly applied a procedure previously agreed"

121. A number of concerns and suggestions were expressed with regard to the words "properly applied a procedure previously agreed". One concern was that the words "properly applied" made it insufficiently clear that paragraph (2) should only apply where the procedure which had been applied had produced a positive result. Another concern was that paragraph (2) should cover not only the situation where an authentication procedure had been agreed upon by the originator and the addressee but also situations where an originator, unilaterally or as a result of an agreement with an intermediary, identified a procedure and agreed to be bound by a data message that met the requirements corresponding to that procedure. In order to meet that concern, a number of suggestions were made. One suggestion was to insert after the term "originator" language along the following lines: "if it is identified as such in any manner previously declared by the addressee to be sufficient or the addressee properly verified that the message was that of the originator." Another suggestion was to insert after the word "agreed" the words "or adopted by". As a matter of drafting, another concern was that it might be too cumbersome to refer to a "procedure", which might be interpreted as necessarily implying an elaborate process on the part of the addressee. In order to meet that concern, it was suggested to add to the term "procedure" the terms "technique or practice".

122. After discussion, the Working Group approved the substance of paragraph (2) and referred the above-mentioned suggestions and concerns to the drafting group.

### Paragraph (3)

#### Opening words

123. The Working Group noted that the opening words of paragraph (3) would have to be revised by the drafting group in order to reflect decisions taken with respect to paragraphs (1) and (2).

#### Subparagraphs (a) and (b)

124. Differing views were expressed as to whether subparagraph (a) should be retained. One view was that subparagraph (a) should be deleted on the grounds that it

seemed illogical to provide for a rebuttable presumption in a case where it was clear that the originator had not authorized or sent the message. In addition, it was pointed out that such a provision would be inappropriate since it would run counter to the ordinary law of agency. The prevailing view, however, was that paragraph (3) was an important provision and should be retained, to cover cases in which the originator by its negligence had allowed a third party to gain access to its authentication procedures. It was pointed out that there was a need to protect an addressee who had relied on a message and the appearance that it was sent by the originator since there was considerable uncertainty in the various legal systems in that regard.

125. With respect to the exact formulation of subparagraph (a), it was generally felt that, for reasons expressed in the context of the discussion of paragraph (2) (see paragraph 120, above), the word "presumed" should be retained. A concern was expressed that, under the current formulation of paragraph (3), an originator might be bound by a data message even where the addressee did not properly apply the authentication procedure. With a view to addressing that concern, it was suggested that paragraph (3) should include wording limiting its effect, in situations where the agreed procedure was not used by the addressee, to cases where the authentication procedure, had it been applied, would have resulted in the rejection of the message. A proposal was made to insert at the end of paragraph (3) language along the lines of the last sentence of paragraph (5), in order to prevent the protection of an addressee who, in fact, was, or should have been, aware of the actual origin of the message. General support was expressed in favour of that suggestion.

126. A number of drafting proposals were made. One proposal was to insert after the word "access to" the words "or otherwise compromise", since gaining access to the authentication procedure of the addressee was only one of many ways of rendering the authentication procedures of the originator ineffective. Another proposal was to substitute for the words "authentication procedure of the originator" the words "applicable authentication procedures", so as to cover authentication procedures of third-party service providers.

127. After discussion, the Working Group approved the substance of paragraph (3) and referred the proposals to the drafting group.

#### *Paragraph (4)*

128. It was generally felt that paragraph (4) was unnecessary and should be deleted.

#### *Paragraph (5)*

129. Differing views were expressed as to whether paragraph (5) should be retained. In support of deletion, it was stated that, in case of a discrepancy in a data message between the message as sent and the message as received, any protection afforded to the addressee (e.g., where an originator disavowed part of the content of a data message) should be made conditional on the message being attributable to the

originator under other provisions of draft article 10 and the addressee having reasonably relied on the message. It was observed that that was not the case in the present formulation of paragraph (5) and that, in addition, it might seem illogical to provide for a rebuttable presumption that the originator sent the message since paragraph (5) was predicated on the premise that the originator did not send the message. The prevailing view, however, was that paragraph (5) was useful and should be retained. In support of retention, it was stated that paragraph (5) was intended to preclude the originator from disavowing the message once it was sent, unless the addressee knew, or should have known, that the data message was not that of the originator. It was also stated that paragraph (5) was intended to deal with errors in the content of the message arising from errors in transmission. The Working Group approved the substance of paragraph (5) and referred it to the drafting group for the necessary revisions so as to be brought in line with paragraphs (1), (2) and (3) as approved by the Working Group.

#### *Paragraph (5 bis)*

130. The Working Group noted that paragraph (5 bis) originated from article 5 of the UNCITRAL Model Law on International Credit Transfers, which provided that a rule along the lines of paragraph (5) applied to errors or discrepancies in revocations of, or amendments to, payment orders. Differing views were expressed as to whether paragraph (5 bis) should be retained. In favour of retention, it was stated that paragraph (5 bis) served a useful purpose in that it clarified whether errors in revocations or amendments of data records were to be treated as data records. The widely prevailing view, however, was that paragraph (5 bis) was superfluous since a revocation or amendment of a data record was clearly a data record under draft article 2, if sent electronically, and not a data record if sent in the form of a paper communication. After discussion, the Working Group decided to delete paragraph (5 bis), on the assumption that it would be made clear in the definition of "data record" contained in draft article 2 that amendments and revocations of data records were covered. The matter was referred to the drafting group.

#### *Paragraph (6)*

131. Differing views were expressed as to whether paragraph (6) should be retained. In support of deletion, it was argued that the meaning of the term "legal significance" was not clear and could raise uncertainty. The view was also expressed that draft article 10 did, in fact, deal with the legal significance of a data record. The prevailing view, however, was that the principle embodied in paragraph (6), namely that the attribution of the authorship of the message to the originator should not interfere with the legal consequences of the message, to be determined by applicable law, was important and should be retained. The Working Group approved language along the following lines: "Once a data record is deemed or presumed to be that of the originator, any further legal effect will be determined by this Law and other applicable law", and referred paragraph (6) to the drafting group.

## Chapter I. General provisions (*continued*)

### Article 2. Definitions

132. The text of draft article 2 as considered by the Working Group was as follows:

"For the purposes of these *statutory provisions*:

"(a) 'Data [*record*]' means information [*generated*], stored or communicated by electronic, optical or analogous means including, but not limited to, electronic data interchange (EDI), *electronic mail*, telegram, telex or telecopy;

"(b) 'Electronic data interchange (EDI)' means the [*computerized transmission*] [*electronic interchange*] of structured data between independent [*computer*] [*information*] systems;

"(c) 'Originator' of a data [*record*] means a person other than one acting as an intermediary with respect to that data [*record*], on whose behalf the data [*record*] purports to have been generated, stored or communicated;

"(d) 'Addressee' of a data [*record*] means a person other than one acting as an intermediary with respect to that data [*record*], who is intended by the originator to receive the data [*record*];

"(e) 'Intermediary', with respect to a particular data [*record*], means a person who, as an ordinary part of its business, engages in receiving data [*records*] and forwarding such data [*records*] to their addressees or to other intermediaries. [An intermediary may, in addition, provide such services as, [*inter alia*], formatting, translating, recording, preserving and storing data [*records*]].

"[(f) 'Record']

"Variant A

*means the form in which information is preserved for subsequent reference.*

"Variant B

*means a representation of data that is susceptible of accurate reproduction at a later time.*

"Variant C

*means a durable representation of information, either in, or capable of being converted into, a perceivable form.]"*

*Subparagraph (a) (definition of "data [*record*] [*message*])"*

133. Differing views and concerns were expressed regarding the choice to be made by the Working Group between the terms "data record" and "data message". On the one hand, the concern was expressed that the word "message" might suggest the exclusion of data that was merely stored, while on the other hand the word "record" might be read as excluding data that was communicated. Another concern was expressed that the word "record" might cause some uncertainty in some languages and it was suggested that it should be replaced by the word "message". After deliberation, the Working Group decided to retain the term "data message", which was understood to encompass the case of

computer-generated records that were not intended for communication. It was understood that other provisions of the draft Model Law might need to be adjusted to cover such records more explicitly.

134. The view was expressed that language should be added in the definition of "data message" to make it clear that it covered the case of revocation or amendment of a data message (see paragraph 130, above). It was generally felt that, provided that the revocation or amendment was itself contained in a data message, it would be covered by the existing definition. It was decided, however, that that point should be clearly indicated in the guide to enactment of the draft Model Law, to be prepared at a later stage.

135. After discussion, the Working Group adopted the substance of the definition of "data message" and referred it to the drafting group.

*Subparagraph (b) (definition of "electronic data interchange (EDI)")*

136. The Working Group agreed that subparagraph (b) should be brought in line with the concept of "EDI" used by the Economic Commission for Europe (ECE) in the context of UN/EDIFACT (Rules for Electronic Data Interchange for Administration, Commerce and Transport).<sup>5</sup> The following text was proposed: "EDI means the electronic transfer from computer to computer of commercial information using an agreed standard to structure the message or data". It was noted that, in view of the Working Group decision not to limit the application of the draft Model Law to commercial or any other type of information (see paragraph 83, above), there was no need to refer to "commercial or administrative" data as in the EDIFACT definition of EDI. A concern was expressed that the word "electronic" might be inappropriate in view of the possible future development of computers based on non-electronic techniques. It was widely felt, however, that such possible developments were sufficiently covered by the definition of "data message" and that no attempt should be made to introduce in the draft Model Law a definition of "EDI" that would deviate from established uses. After discussion, the Working Group adopted the substance of the proposal and referred it to the drafting group.

*Subparagraph (c) (definition of "originator")*

137. The Working Group noted that the text of the subparagraph reflected decisions that had been made at its previous session (A/CN.9/390, paras. 53-58). It then proceeded to consider further various elements of the definition, largely from the standpoint of drafting.

<sup>5</sup>The following definition of EDI was approved by the Working Party on Facilitation of International Trade Procedures (WP.4), at its fortieth session, on 23 September 1994:

"Electronic Data Interchange (EDI): The electronic transfer from computer to computer of commercial or administrative transactions using an agreed standard to structure the transaction or message data".

(See Report of the fortieth session of the Working Party on Facilitation of International Trade Procedures (TRADE/WP.4/189, para. 36); Report of the fiftieth session of the Meeting of Experts on Data Elements and Automatic Data interchange (TRADE/WP.4/GE.1/97, para. 98); International Standardization Affecting Trade Interchange — ISO Liaison Meeting Report Attachment (TRADE/WP.4/R.1087/Add.1, para. 3.1.3).)

*"originator"*

138. The concern was expressed that, in some languages, it might be more appropriate to use the term "sender" rather than the term "originator". In order to meet that concern, the suggestion was made to add the term "sender" to the term "originator". It was generally felt, however, that such an addition would run counter to a decision already taken at the previous session (A/CN.9/390, para. 54) and, if adopted, might seriously compromise the economy of the text. It was agreed that the concept of "originator" should be retained.

*"person"*

139. With respect to the notion of "person" used in the draft definition, a number of concerns were expressed. One concern was that in some languages the term "person" did not make it sufficiently clear that both natural persons and legal entities were meant. In order to address that concern, the suggestion was made to add after "person" the words "or legal entity", or to include in draft article 2 a definition of the term "person". Another concern was that the use of the term "person" might not be sufficient so as to indicate that messages that were generated automatically by computers without direct human intervention were covered by subparagraph (c). It was therefore suggested that the words "or device" should be added next to the term "person".

140. In response to those concerns and suggestions, it was recalled that the same discussion had taken place at the previous session of the Working Group (A/CN.9/390, para. 57). It was noted that the notion of "person" had been used in previous UNCITRAL texts, apparently without giving rise to difficulties. It was also noted that, should the model statutory provisions deviate from the use of the notion of "person" or introduce a definition of the notion of "person", difficulties might arise with respect to the interpretation of other UNCITRAL texts. The view was expressed that, in most legal systems, the notion of "person" was used to designate the subjects of rights and obligations and was consistently interpreted as covering both natural persons and corporate bodies. With regard to the possible reference to a "device", there was general agreement that the draft Model Law should be so drafted that it could not be misinterpreted as allowing for a computer to be made the subject of rights and obligations. It was recalled that messages that were generated automatically by computers without direct human intervention should be clearly regarded as "originating" from the legal entity on behalf of which the computer was operated. It was observed that the words "on whose behalf" sufficiently indicated that a device might generate, store or communicate data messages.

141. While it was generally felt that no addition was necessary with regard to the term "person" in the text of the model statutory rules, it was agreed that it would be useful to elaborate on this matter in the guide to enactment to be prepared at a later stage.

*"on whose behalf"*

142. The view was expressed that the words "on whose behalf" might be interpreted as excluding the originator itself. In order to avoid such misinterpretation, it was agreed

that the words "by whom or" should be inserted before the words "on whose behalf".

*"stored"*

143. The concern was expressed that use of the word "stored" might have the unintended effect of covering the addressee or an intermediary who might store information on behalf of the originator. It was therefore suggested that the term "stored" should be deleted. While some support was expressed in favour of the suggestion, the prevailing view was that the substance of the text should remain unchanged in that respect, since the term "stored" was important to indicate that a message did not have to be communicated in order to fall within the scope of the draft Model Law.

144. After discussion, the Working Group found the substance of subparagraph (c) to be generally acceptable, subject to the above-mentioned addition (see paragraph 142, above) and it referred the matter to the drafting group.

*Subparagraph (d) (definition of "addressee")*

145. The Working Group approved the substance of subparagraph (d) unchanged.

*Subparagraph (e) (definition of "intermediary")*

146. Differing views were expressed as to whether the definition of "intermediary" should be retained. In support of deletion, it was argued that the definition of "intermediary" was no longer necessary since, after the decision of the Working Group to substitute in draft article 14 for "intermediary" the words "any third party", there was no reference in the text to "intermediary". In addition, it was pointed out that such a deletion would be in line with a decision made at a previous session that the focus of the draft Model Law should be on the relationship between the originator and the addressee, and not on the relationship between either the originator or the addressee and any intermediary. Moreover, it was observed that, if a clarification of the meaning of "intermediary" was considered to be necessary, it could be included in the guide to enactment.

147. The prevailing view, however, was that the definition of "intermediary" was important and should be retained. It was stated that the term "intermediary" did appear in the text in the context of subparagraphs (c) and (d) of draft article 2, where it was needed to establish the necessary distinction between originators or addressees and third parties. In addition, it was generally agreed that a set of rules on electronic communications could not ignore the paramount importance of intermediaries in that field, a reason for which the Working Group decided that, contrary to its earlier decision regarding draft article 14, a reference to "intermediary" should also be reintroduced in that draft article.

148. With regard to the exact formulation of subparagraph (e), a number of concerns and suggestions were expressed.

*"as an ordinary part of its business"*

149. Differing views were expressed as to whether the expression "as an ordinary part of its business" should be

retained. One view was that it should be retained in order to indicate that, since the focus of the draft Model Law should be on business transactions, a person who merely forwarded or stored data on an occasional or circumstantial basis should not fall within the definition of an intermediary for the purpose of the draft Model Law. Another view was that the expression "as an ordinary part of its business" should be deleted. It was stated that the expression might lend itself to circumvention. It was pointed out that in its present formulation subparagraph (e) would fail to cover intermediaries, merely on the ground that transmitting, storing and receiving services might be an incidental and not an ordinary part of their business. The prevailing view was that the definition of "intermediary" should be sufficiently broad to cover any person, other than the originator and the addressee, who performed any of the functions of an intermediary. It was agreed that the expression "as an ordinary part of its business" should be replaced by the expression "on behalf of a person".

#### *Second sentence*

150. Views were exchanged as to the second sentence of subparagraph (e), which set forth a non-exhaustive list of value-added services that might be provided by an intermediary. One view was that the second sentence should be deleted since the value-added services referred to therein were outside the message-transmission chain and therefore did not involve rights and obligations of concern to the draft Model Law. In that connection, it was suggested that the fundamental functions performed by intermediaries, namely transmitting, storing and receiving information, could be reflected in the first sentence of the definition, while an illustrative list of other functions would more appropriately be contained in the guide to enactment than in the draft Model Law itself. The prevailing view, however, was that the definition of "intermediary" should recognize the fact that value-added services performed an increasingly important commercial function. As to how reference to those value-added services should be formulated, it was agreed that the second sentence should be replaced by an overall reference in the first sentence to "other services" provided with respect to data messages. It was also agreed that the first sentence should expressly list the main services provided by intermediaries, namely, receipt, forwarding and storage of data messages.

#### *Subparagraph (f) (definition of "record")*

151. The view was expressed that the definition of "record" should be combined with that of "data message". It was suggested that wording from subparagraph (f) should be included in the definition of "data message", as an additional reference to the "form" of the information contained in a data message. The prevailing view, however, was that the definition of "record", as well as the suggested combination of subparagraphs (a) and (f), might conflict with the provision regarding the requirements of "writing" under draft article 6. The Working Group was agreed that subparagraph (f) should be deleted, and that the guide to enactment to be prepared at a later stage would make it clear that a definition of "record" in line with the characteristic elements of "writing" under draft article 6 might be used in jurisdictions where such a definition appeared to be necessary.

152. Having completed its review of draft article 2, the Working Group considered possible additional definitions to be included in the draft Model Law.

#### *Definition of "information system"*

153. The suggestion was made that "information system" could be defined along the following lines: "a system for the generation, transmission, receipt or storage of information in electronic, optical or analogous form". While the definition was found to be in principle acceptable, a number of suggestions of a drafting nature were made for its improvement. One suggestion was to refer, for brevity and clarity, to the transmission, receipt or storage of data messages. Another suggestion was to substitute the word "a means of" for the word "a system for" since the information system was merely a set of technical means of transmitting, receiving and storing information. The Working Group approved the substance of the definition and referred the drafting suggestions to the drafting group.

#### *Definition of "authentication"*

154. Differing views were expressed both as to whether a definition of "authentication" was needed, and as to what the substance of such a definition might be. One view was that, in the absence of a definition, there would be some uncertainty as to the exact meaning of the reference to "authentication" in draft articles 9(2) and 10(3). In particular, questions might be raised as to whether the reference was to the identification of the source of the data message or the authentication of its content, or a combination of both elements.

155. As to the exact formulation of a possible definition of "authentication", a number of proposals were made. One proposal was to define authentication along the following lines:

"Authentication means a process by which a communicating party obtains information that gives assurance that a message received from another communicating party:

"(a) originates from that party; and

"(b) is received with [exactly] the same information content as when it was forwarded by that party."

Another proposal was to define authentication along the lines of article 2(i) of the UNCITRAL Model Law on International Credit Transfers, namely: "authentication means a procedure to determine whether a data message was issued by the person indicated as the originator."

156. It was suggested that the need for a definition of "authentication", as well as the use of the notion itself, might be avoided if the text of draft article 9(2) was modified to make it clear that the method referred to therein was meant to provide both identification of the originator and assurance as to the integrity of the information. At the same time, it would be necessary to make it clear in the text of draft article 10(3) that the method referred to was meant to provide mere identification of the originator. After discussion, the Working Group adopted the suggestion and referred the matter to the drafting group.



## Consideration of draft articles presented by the drafting group

### Article 2. Definitions

#### Subparagraph (c) (definition of "originator")

157. The Working Group considered the following text:

"(c) 'Originator' of a data message means a person by whom, or on whose behalf, the data message purports to have been generated, stored or communicated, but it does not include a person acting as an intermediary with respect to that data message;"

158. A suggestion was made that the text might be understood in the sense that a person could become an originator by the mere fact of having stored a received message. It was pointed out that such a meaning was not intended and that therefore the provision might have to clarify expressly that a person did not become an originator solely by storing a data message received from the originator. It was observed that that result could be achieved by shifting the focus of subparagraph (c) so as to emphasize the generation, rather than the storage or the communication of the message, through the use of language along the lines: "generated, either to be stored or to be communicated". It was generally felt that such language might unnecessarily complicate subparagraph (c). The Working Group approved the substance of subparagraph (c) unchanged.

#### Subparagraph (f) (definition of "information system")

159. The Working Group considered the following text:

"(f) 'Information system' means [a system for] [an ensemble of technical means of] generating, transmitting, receiving or storing information in a data message."

160. Differing views were expressed as to whether the term "system" or the term "ensemble of technical means of" was more appropriate. One view was that the term "system", in contrast with the term "ensemble of technical means of", did not make it sufficiently clear whether a mechanical device was meant, or a methodology. The prevailing view, however, was that the term "system" was simple, generally understood and used in various national laws, and that it sufficiently covered the entire range of hardware, software and communications devices that subparagraph (f) was intended to define. The Working Group approved the substance of subparagraph (f), deleting the term "ensemble of technical means of" and adopting the term "system".

### Article 8. Original

#### Subparagraph (b) of paragraph (1)

161. The Working Group considered the following text:

"(b) there exists a reliable assurance as to the integrity of the information between the time when it was first composed in its final form [by the originator or on its behalf], as a data message or otherwise, and the time when it is displayed."

162. The Working Group agreed that, for reasons of consistency in terminology, the word "generated" should replace the word "composed". Differing views were expressed as to whether the language in brackets should be retained. In support of retention, it was stated that the bracketed language was needed to make it sufficiently clear that the important time for the determination of the integrity of the data message was the time when the data message was first created by the originator, as opposed to the time when the information contained in the data message was generated, which was said to be irrelevant. The prevailing view, however, was that subparagraph (b) without the bracketed language made it sufficiently clear that the integrity of the data message should not be compromised from the time of the generation of the data message through its handling by the originator, the addressee or any third party. In addition, it was generally felt that removal of the bracketed language was needed to make it clear that the information did not have to be composed by the originator itself to be treated as original information under draft article 8. The Working Group approved the substance of subparagraph (b) of paragraph (1) without the bracketed language.

#### Subparagraph (a) of paragraph (2)

163. The Working Group considered the following text:

"(2) Where any question is raised as to whether subparagraph (b) of paragraph (1) of this article is satisfied:

"(a) the criteria for assessing integrity shall be whether the information has remained complete and, apart from the addition of any endorsement, unaltered; and"

164. The concern was expressed that such a formulation of subparagraph (a) of paragraph (2) failed to take into account that the originality of the data message should not be affected by those changes that were necessary to make the data message legible. In order to address that concern, the Working Group decided to replace the words "complete and, apart from the addition of any endorsement, unaltered" by the words "complete and unaltered, apart from the addition of any endorsement, and any change which arises in the normal course of communication, storage and display".

### Article 10. Attribution of data messages

#### Paragraphs (1), (2) and (3)

165. The Working Group considered the following text:

"(1) As between the originator and the addressee, a data message is deemed to be that of the originator if it was communicated by the originator or by another person who had the authority to act on behalf of the originator in respect of that data message.

"(2) As between the originator and the addressee, a data message is presumed to be that of the originator if the addressee, by properly applying a procedure previously agreed to by the originator, ascertained that the data message was that of the originator.



"(3) Where paragraphs (1) and (2) do not apply, a data message is [deemed] [presumed] to be that of the originator if:

"(a) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own; or

"(b) the addressee ascertained that the data message was that of the originator by a method which was reasonable in the circumstances.

"However, subparagraphs (a) and (b) do not apply if the addressee knew, or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator."

166. The view was expressed that the provisions contained in those paragraphs were flawed from the standpoint of logic, since they created a rebuttable presumption that could never arise. That situation was said to result from paragraphs (2) and (3) being predicated on the fact that the data message was not authorized by the originator. In order to address that concern, it was suggested that language along the following lines should be inserted at the end of paragraph (1): "where it has not been established that this paragraph applies, the presumption in paragraphs (2) and (3) may apply". Insufficient support was expressed in favour of the suggestion. The Working Group therefore approved the substance of paragraphs (1), (2) and (3) unchanged.

## Article 12. Formation and validity of contracts

### Paragraph (1)

167. The Working Group considered the following text:

"(1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data records. Where any communication by means of which a contract is formed is a data record, the contract shall not be denied validity or enforceability on the sole ground that it was formed by such means."

168. A concern was expressed that the words "any communication by means of which a contract is formed" might exclude from the scope of the provision messages which could not be regarded as an offer or an acceptance but which preceded or accompanied the offer or the acceptance. After discussion, and bearing in mind the concern, the Working Group approved the text along the following lines: "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."

## Article 14. Storage of data records

### Paragraph (1)

#### Opening words

169. The Working Group considered the following text:

"(1) Where it is required by law that certain documents, records or information be retained, that require-

ment shall be satisfied by retaining data records, provided that the following conditions are met. [...]"

170. It was noted that the title used the term "storage" but that the text of the draft article and other provisions of the draft Model Law used both "store" and "retain" and derivatives of those terms. It was considered that it was important for the opening words of paragraph (1) to use the term "retaining" since that term was commonly used to refer to requirements established by law to keep documents or records for a certain period of time. Elsewhere in the draft Model Law, depending on the context, the expression "storage" or its derivative might be appropriate.

### Subparagraph (a)

171. The Working Group considered the following text:

"(a) [parallel the conditions in article 6(1)];"

172. The Working Group agreed to the following formulation of subparagraph (1)(a): "the information contained therein is accessible so as to be usable for subsequent reference".

### Subparagraph (b)

173. The Working Group considered the following text:

"(b) the data record is stored in the transmitted format or in a format which can be demonstrated to represent accurately the transmitted information; and"

174. The Working Group agreed that, for consistency in terminology, subparagraph (b) should be revised to read as follows: "the data message is stored in the format it was generated, transmitted or received or in a format which can be demonstrated to represent accurately the information generated, transmitted or received; and". It was also agreed that paragraph (1) should make it clear that the conditions set out in subparagraphs (a), (b) and (c) had to be met cumulatively.

175. The Working Group reviewed the draft articles of the Model Law as revised by the drafting group. At the conclusion of its deliberation of the draft articles of the Model Law, the Working Group approved the text of the draft Model Law as contained in the annex to this report.<sup>6</sup>

## III. FUTURE WORK

176. The Working Group requested the Secretariat to circulate the text of the draft Model Law to Governments and interested organizations for comments. It was noted that the

<sup>6</sup>The articles of the draft Model Law were renumbered upon approval of the draft Model Law by the Working Group.

Number of article in draft Model Law	Number of draft article before the Working Group
1	8
2	9
3	10
4	11
5	12
6	13
7	14
1	9
2	14
3	5
5 bis	10
6	11
7	12
8	13

text of the draft Model Law, together with a compilation of comments by Governments and interested organizations, would be placed before the Commission at its twenty-eighth session for final review and adoption.

177. There was general support for a suggestion that the draft Model Law should be accompanied by a guide to assist States in enacting and applying the draft Model Law. The guide, much of which could be drawn from the *travaux préparatoires* of the draft Model Law, would also be helpful to EDI users as well as to scholars in the area of EDI. The Working Group noted that, during its deliberations at the current session, it had proceeded on the assumption that the draft Model Law would be accompanied by a guide, to be adopted by the Commission. For example, the Working Group had decided in respect of a number of issues not to settle them in the draft Model Law but to address them in the guide so as to provide guidance to States enacting the draft Model Law. As to the timing and method of preparation of the guide, the Working Group agreed that the Secretariat should prepare a draft and submit it to the Working Group for consideration at its twenty-ninth session.

178. The Working Group noted that its recommendation to the Commission, that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer based environment as soon as the draft Model Law was completed (A/CN.9/390, para. 158), had found general support in the Commission.<sup>7</sup> It was stated that related legal issues involving electronic registries were a necessary part of such a project. The Working Group also reiterated its decision to address, in the context of a future session, the issue of incorporation of terms and conditions into a data message by means of a mere reference to such terms and conditions (see paragraph 90, above). A view was expressed that a broad approach to the issue of transferability might be preferable, with a view to encompassing the electronic transfer of dematerialized securities. It was observed that, in view of the high degree of regulation at the national level, it might be particularly difficult to achieve uniformity in the field of electronic securities.

179. As to the planning of future work, the view was expressed that the Working Group at its twenty-ninth session, after completing its consideration of the draft guide to enactment to be prepared by the Secretariat, could have a general discussion on negotiability and transferability of right in goods. Another view was that the issue of incorporation by reference could also be considered at the twenty-ninth session for possible inclusion in the draft Model Law. A number of delegations expressed their willingness to prepare a brief paper to facilitate discussions on both topics. It was noted, however, that, while the Working Group might have sufficient time for a general discussion, it could not go into detail on either topic.

180. It was noted that, in line with a decision made by the Commission at its twenty-seventh session<sup>8</sup>, the twenty-ninth session of the Working Group would be held in New York, from 27 February to 10 March 1995.

<sup>7</sup>Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), para. 201.

<sup>8</sup>Ibid., para. 259.

## ANNEX

### DRAFT MODEL LAW ON LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF COMMUNICATION

(as approved by the UNCITRAL Working Group on Electronic Data Interchange at its twenty-eighth session, held at Vienna, from 3 to 14 October 1994)

#### CHAPTER I. GENERAL PROVISIONS\*

##### Article 1. *Sphere of application\*\**

This Law forms part of commercial\*\*\* law. It applies to any kind of information in the form of a data message.

##### Article 2. *Definitions*

For the purposes of this Law:

(a) "Data message" means information generated, stored or communicated by electronic, optical or analogous means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

(b) "Electronic data interchange (EDI)" means the electronic transfer from computer to computer of information using an agreed standard to structure the information;

(c) "Originator" of a data message means a person by whom, or on whose behalf, the data message purports to have been generated, stored or communicated, but it does not include a person acting as an intermediary with respect to that data message;

(d) "Addressee" of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;

(e) "Intermediary", with respect to a particular data message, means a person who, on behalf of another person, receives, transmits or stores that data message or provides other services with respect to that data message;

(f) "Information system" means a system for generating, transmitting, receiving or storing information in a data message.

##### Article 3. *Interpretation*

(1) In the interpretation of this Law, regard is to be had to its international source and to the need to promote uniformity in its application and the observance of good faith.

\*This Law does not override any rule of law intended for the protection of consumers.

\*\*The Commission suggests the following text for States that might wish to limit the applicability of this Law to international data messages:

This Law applies to a data message as defined in paragraph (1) of article 2 where the data message relates to international commerce.

\*\*\*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 cooperation; carriage of goods or passengers by air, sea, rail or road.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

## CHAPTER II. APPLICATION OF LEGAL REQUIREMENTS TO DATA MESSAGES

### Article 4. *Legal recognition of data messages*

Information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message.

### Article 5. *Writing*

(1) Where a rule of law requires information to be in writing or to be presented in writing, or provides for certain consequences if it is not, a data message satisfies that rule if the information contained therein is accessible so as to be usable for subsequent reference.

(2) The provisions of this article do not apply to the following: [...].

### Article 6. *Signature*

(1) Where a rule of law requires a signature, or provides for certain consequences in the absence of a signature, that rule shall be satisfied in relation to a data message if:

(a) a method is used to identify the originator of the data message and to indicate the originator's approval of the information contained therein; 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 agreement between the originator and the addressee of the data message.

(2) The provisions of this article do not apply to the following: [...].

### Article 7. *Original*

(1) Where a rule of law requires information to be presented in its original form, or provides for certain consequences if it is not, a data message satisfies that rule if:

(a) that information is displayed to the person to whom it is to be presented; and

(b) there exists a reliable assurance as to the integrity of the information between the time when it was first composed in its final form, as a data message or otherwise, and the time when it is displayed.

(2) Where any question is raised as to whether subparagraph (b) of paragraph (1) of this article is satisfied:

(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 composed and in the light of all the relevant circumstances.

(3) The provisions of this article do not apply to the following: [...].

### Article 8. *Admissibility and evidential value of data messages*

(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to prevent the admission of a data message in evidence:

(a) on the grounds that it is a data message; or,

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information presented in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.

(3) Subject to any other rule of law, where subparagraph (b) of paragraph (1) of article 8 is satisfied in relation to information in the form of a data message, the information shall not be accorded any less weight in any legal proceedings on the grounds that it is not presented in its original form.

### Article 9. *Retention of data messages*

(1) Where it is required by law that certain documents, records or information be retained, that requirement shall be satisfied by retaining data messages, provided that the following conditions are met:

(a) the information contained therein is accessible so as to be usable for subsequent reference; and

(b) the data message is retained in the format in which it was generated, transmitted or received, or in a format which can be demonstrated to represent accurately the information generated, transmitted or received; and

(c) transmittal information associated with the data message, including, but not limited to, originator, addressee(s), and date and time of transmission, is retained.

(2) An obligation of an addressee to retain information in accordance with paragraph (1) shall not extend to any part of such information which is transmitted for communication control purposes but which does not enter the information system of, or designated by, the addressee.

(3) A person may satisfy the requirements referred to in paragraph (1) by using the services of any other person, provided that the above conditions are satisfied.

## CHAPTER III. COMMUNICATION OF DATA MESSAGES

### Article 10. *Variation by agreement*

As between parties involved in generating, storing, communicating, receiving or otherwise processing data messages, and except as otherwise provided, the provisions of this chapter may be varied by agreement.

### Article 11. *Attribution of data messages*

(1) As between the originator and the addressee, a data message is deemed to be that of the originator if it was communicated by the originator or by another person who had the authority to act on behalf of the originator in respect of that data message.

(2) As between the originator and the addressee, a data message is presumed to be that of the originator if the addressee, by properly applying a procedure previously agreed to by the originator, ascertained that the data message was that of the originator.

(3) Where paragraphs (1) and (2) do not apply, a data message is [deemed] [presumed] to be that of the originator if:

(a) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own; or

(b) the addressee ascertained that the data message was that of the originator by a method which was reasonable in the circumstances.

However, subparagraphs (a) and (b) do not apply if the addressee knew, or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.

(4) Where a data message is deemed or presumed to be that of the originator under this article, the content of the data message is presumed to be that received by the addressee. However, where transmission results in an error in the content of a data message or in the erroneous duplication of a data message, the content of the data message is not presumed to be that received by the addressee in so far as the data message was erroneous, if the addressee knew of the error or the error would have been apparent, had the addressee exercised reasonable care or used any agreed procedure to ascertain the presence of any errors in transmission.

(5) Once a data message is deemed or presumed to be that of the originator, any further legal effect will be determined by this Law and other applicable law.

#### Article 12. *Acknowledgement of receipt*

(1) This article applies where, on or before sending a data message, or by means of that data message, the originator has requested an acknowledgement of receipt.

(2) Where the originator has not requested that the acknowledgement be in a particular form, the request for an acknowledgement may be satisfied by any communication or conduct of the addressee sufficient to indicate to the originator that the data message has been received.

(3) Where the originator has stated that the data message is conditional on receipt of that acknowledgement, the data message has no legal effect until the acknowledgement is received.

(4) Where the originator has not stated that the data message is conditional on receipt of the acknowledgement and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time:

(a) the originator may give notice to the addressee stating that no acknowledgement has been received and specifying a time, which must be reasonable, by which the acknowledgement must be received; and

(b) if the acknowledgement is not received within the time specified in subparagraph (a), the originator may, upon notice to

the addressee, treat the data message as though it had never been transmitted, or exercise any other rights it may have.

(5) Where the originator receives an acknowledgement of receipt, it is presumed that the related data message was received by the addressee. Where the received acknowledgement states that the related data message met technical requirements, either agreed upon or set forth in applicable standards, it is presumed that those requirements have been met.

#### Article 13. *Formation and validity of contracts*

(1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. 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.

(2) The provisions of this article do not apply to the following: [...].

#### Article 14. *Time and place of dispatch and receipt of data messages*

(1) Unless otherwise agreed between the originator and the addressee of a data message, the dispatch of a data message occurs when it enters an information system outside the control of the originator.

(2) Unless otherwise agreed between the originator and the addressee of a data message, the time of receipt of a data message is determined as follows:

(a) if the addressee has designated an information system for the purpose of receiving such data messages, receipt occurs at the time when the data message enters the designated information system, but if the data message is sent to an information system of the addressee that is not the designated information system, receipt occurs when the data message is retrieved by the addressee;

(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

(3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is received under paragraph (4).

(4) Unless otherwise agreed between the originator and the addressee of a computerized transmission of a data message, a data message is deemed to be received at the place where the addressee has its place of business, and is deemed to be dispatched at the place where the originator has its place of business. For the purposes of this paragraph:

(a) if the addressee or the originator has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;

(b) if the addressee or the originator does not have a place of business, reference is to be made to its habitual residence.

(5) Paragraph (4) shall not apply to the determination of place of receipt or dispatch for the purpose of any administrative, criminal or data-protection law.

**B. Working paper submitted to the Working Group on Electronic Data Interchange at its twenty-eighth session: newly revised draft model statutory provisions on legal aspects of electronic data interchange (EDI) and related means of trade data communication: articles 1-10: note by the Secretariat**  
**(A/CN.9/WG.IV/WP.62) [Original: English]**

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**INTRODUCTION**

1. Pursuant to a decision taken by the Commission at its twenty-fourth session,<sup>1</sup> in 1991, the Working Group on International Payments devoted its twenty-fourth session to identifying and discussing the legal issues arising from the increased use of electronic data interchange (EDI). The Working Group recommended that the Commission should undertake the preparation of legal rules on the use of EDI in international trade (A/CN.9/360, paras. 129-133).

2. The Commission, at its twenty-fifth session, in 1992, endorsed that recommendation and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange.<sup>2</sup>

3. The Working Group on Electronic Data Interchange devoted its twenty-fifth to twenty-seventh session to the preparation of uniform rules on the legal aspects of EDI (reports of those sessions are found in A/CN.9/373, A/CN.9/387 and A/CN.9/390). The work has been carried out on the basis of background working papers prepared by the Secretariat on

possible issues to be included in the uniform rules (A/CN.9/WG.IV/WP.53 and A/CN.9/WG.IV/WP.55). The draft articles of the uniform rules, which the Working Group decided should be prepared in the form of statutory provisions, were presented by the Secretariat in A/CN.9/WG.IV/WP.57 and A/CN.9/WG.IV/WP.60).

4. At its twenty-seventh session, in 1994, the Commission had before it the reports of the Working Group on the work of its twenty-sixth and twenty-seventh sessions (A/CN.9/387 and A/CN.9/390). The Commission expressed its appreciation for the work accomplished by the Working Group and noted that the Working Group had decided to use the term "model statutory provisions" in order to reflect the special nature of the text as a variety of statutory rules that an enacting State would not necessarily incorporate as a whole or together in any one particular place in its statutes (A/CN.9/390, paras. 16-17).

5. As to the time schedule for completion of the current work of the Working Group, the view was expressed that it might be difficult to complete the current work within one year and submit the model statutory provisions to the Commission at its next session since a number of issues, such as scope of application and party autonomy, still remained to be resolved, and that, at any rate, the Commission might not have sufficient time available on the agenda of its next

<sup>1</sup>Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17 (A/46/17), paras. 306-317.

<sup>2</sup>Ibid., Forty-seventh Session, Supplement No. 17 (A/47/17), paras. 140-148.

session to consider the rules. The prevailing view, however, was that a draft set of basic, "core" provisions could be completed by the Working Group at its twenty-eighth or twenty-ninth session, in particular since it had been decided that the relationships between EDI users and public authorities, as well as consumer transactions, should not be the focus of the model statutory provisions (A/CN.9/390, para. 21). It was pointed out that further provisions could be added at a later stage, in particular since that was an area of rapid technological development.

6. As to possible future topics, the Commission noted that, at its twenty-seventh session, the Working Group had adopted a recommendation to the Commission that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment as soon as it had completed the preparation of the model statutory provisions (A/CN.9/390, para. 155). That recommendation received general support. Another suggestion was that a broader approach should be adopted so as to include in any future work the negotiability of rights in securities. That suggestion was objected to on the ground that it might be particularly difficult to achieve uniformity on that concept in view of the high degree of regulation at the national level. Yet another suggestion, which received some support, was that the Commission should consider the legal issues arising in the context of the relationships between EDI users and service providers, such as electronic communications networks. However, recalling the discussion of that suggestion at the twenty-seventh session of the Working Group (A/CN.9/390, para. 159), the Commission was of the view that, at least at the current stage, liability of service providers was better dealt with in communications agreements and that, at any rate, it would be very difficult to devise rules that would apply to all types of electronic communications services. Yet another suggestion was to prepare a study on legal issues of encryption. With regard to that suggestion, the view was expressed that the matter fell more appropriately within the mandate of specialized national or international bodies.<sup>3</sup>

7. At its twenty-seventh session, the Working Group considered a revised draft of uniform rules on the legal aspects of electronic data interchange and related means of trade data communication prepared by the Secretariat (A/CN.9/WG.IV/WP.60). The Secretariat was requested to prepare a further revision of draft articles 1 to 10 on the basis of the deliberations and decisions of the Working Group (A/CN.9/390, para. 14).

8. The present note contains newly revised articles 1 to 10 of the Model Statutory Provisions. Additions and modifications to the text are indicated by underlining. It may be noted that, in line with the recent instructions relating to the stricter control and limitation of United Nations documentation, no explanatory remarks have been added to the draft provisions. General reference is therefore made to the relevant portions of the Working Group report (A/CN.9/390); additional explanations will be provided orally during the session of the Working Group.

<sup>3</sup>Ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 198-201.

## I. DRAFT MODEL STATUTORY PROVISIONS ON THE LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF DATA COMMUNICATION

### Chapter I. General provisions\*

#### Article 1. Sphere of application\*\*

These *statutory provisions* apply to [commercial] information in the form of a data [record].

#### Article 2. Definitions

For the purposes of these *statutory provisions*:

(a) "Data [record]" means information [generated], stored or communicated by electronic, optical or analogous means including, but not limited to, electronic data interchange (EDI), *electronic mail*, telegramme, telex or telecopy;

(b) "Electronic data interchange (EDI)" means the [computerized transmission] [electronic interchange] of structured data between independent [computer] [information] systems;

(c) "Originator" of a data [record] means a person other than one acting as an intermediary with respect to that data [record], on whose behalf the data [record] purports to have been generated, stored or communicated;

(d) "Addressee" of a data [record] means a person other than one acting as an intermediary with respect to that data [record], who is intended by the originator to receive the data [record];

(e) "Intermediary", with respect to a particular data [record], means a person who, as an ordinary part of its business, engages in receiving data [records] and forwarding such data [records] to their addressees or to other intermediaries. [An intermediary may, in addition, provide such services as, [inter alia], formatting, translating, recording, preserving and storing data [records]].

(f) "Record"

*Variant A* means the form in which information is preserved for subsequent reference.

*Variant B* means a representation of data that is susceptible of accurate reproduction at a later time.

*Variant C* means a durable representation of information, either in, or capable of being converted into, a perceivable form.]

#### Article 3. Interpretation of the model statutory provisions

*Variant A* (1) In the interpretation of these *statutory provisions*, regard is to be had, [where appropriate], to their

\*These *statutory provisions* do not override any rule of law intended for the protection of consumers.

\*\*The Commission suggests the following text for States that might wish to limit the applicability of these *statutory provisions* to international data [records]:

These *statutory provisions* apply to a data [record] as defined in paragraph (1) of article 2 where the data [record] relates to international trading interests.

international character and to the need to promote uniformity in their application and the observance of good faith.

(2) Questions concerning matters governed by these *statutory provisions* which are not expressly settled in them are to be settled in conformity with the general principles on which these *statutory provisions* are based.

*Variant B* In the interpretation of these *statutory provisions*, regard is to be had to their purpose of giving effect to principles formulated internationally, which are intended to facilitate the use of technological developments in methods of communicating and holding information, and the need to promote uniformity in the application of those principles.

#### Article 4.

[deleted]

#### [Article 5. Variation by agreement

As between parties involved in generating, storing, communicating, receiving or otherwise processing data [records], and except as otherwise provided in these *statutory provisions*, their corresponding rights and obligations may be determined by agreement.]

### Chapter II. Form requirements

#### Article 5 bis.

Information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is recorded as a data [record].

#### Article 6. [Functional equivalent] [Requirement] of "writing"

(1) Where a rule of law requires information to be presented in writing, or provides for certain consequences if it is not, that requirement shall be satisfied in relation to a data [record] containing the requisite information if

(a) the information can be [reproduced] [displayed] in [visible and intelligible] [legible, interpretable] [durable] form; and

(b) the information is preserved as a record.

(2) The provisions of this article do not apply to the following situations: [...].

#### Article 7. [Functional equivalent] [Requirement] of "signature"

(1) Where a rule of law requires information to be signed, or provides for certain consequences if it is not, that requirement shall be satisfied in relation to a data [record] containing the requisite information if

[(a) a method [of authentication] identifying the originator of the data [record] and indicating the originator's

approval of the information contained therein has been agreed between the originator and the addressee of the data [record] and that method has been used; or]

(b) a method [of authentication] is used to identify the originator of the data [record] and to indicate the originator's approval of the information contained therein; and

(c) that method was as reliable as was appropriate for the purpose for which the data [record] was [generated or communicated] [made], in the light of all circumstances [, including any agreement between the originator and the addressee of the data [record]].

(2) The provisions of this article do not apply to the following situations: [...].

#### Article 8. [Functional equivalent] [Requirement] of "original"

(1) Where a rule of law requires information to be presented in the form of an original record, or provides for certain consequences if it is not, that requirement shall be satisfied in relation to a data [record] containing the requisite information if:

(a) that information is displayed to the person to whom it is to be presented; and

(b) there exists a reliable assurance as to the integrity of the information between the time the originator first composed the information in its final form, as a data [record] or as a record of any other kind, and the time that the information is displayed.

(2) Where any question is raised as to whether subparagraph (b) of paragraph (1) of this article is satisfied:

(a) the criteria for assessing integrity are whether the information has remained complete and, apart from the addition of any endorsement, unaltered; and

(b) the standard of reliability required is to be assessed in the light of the purpose for which the relevant record was made and all the circumstances.

(3) The provisions of this article do not apply to the following situations: [...].

#### Article 9. Admissibility and evidential value of a data [record]

(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to prevent the admission of a data [record] in evidence

(a) on the grounds that it is a data [record]; or,

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not an original document.

(2) Information presented in the form of a data [record] shall be given due evidential weight. In assessing the evidential weight of a data [record], regard shall be had to the reliability of the manner in which the data [record] was generated, stored or communicated, to the reliability of the



manner in which the information was authenticated *and to any other relevant factor.*

(3) *Subject to any other rule of law, where subparagraph (b) of paragraph (1) of article 8 is satisfied in relation to information in the form of a data [record], the information shall not be accorded any less weight in any legal proceedings on the grounds that it is not presented in the form of an original record.*

### Chapter III. Communication of data [records]

#### Article 10. [Effectiveness] [Obligations binding on the originator] of a data [record]

(1) *As between the originator and the addressee, an originator is [deemed] [presumed] to have approved the [content] [communication] of a data [record] if it was [issued] [transmitted] by the originator or by another person who had the authority to act on behalf of the originator in respect of that data [record].*

(2) *As between the originator and the addressee, a data [record] is [deemed] [presumed] to be that of the originator if the addressee properly applied a procedure previously agreed with the originator for verifying that the data [record] was the data [record] of the latter.]*

(3) *An originator who is not [deemed] [presumed] to have approved the data [record] by virtue of paragraph (1) or (2) of this article is [deemed] [presumed] to have done so by virtue of this paragraph if:*

(a) *the data [record] as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to the authentication procedure of the originator; or*

(b) *the addressee verified the authentication by a method which was reasonable in the circumstances.]*

[(4) *The originator and the addressee of a data [record] are permitted to agree that an originator may be [deemed] [presumed] to have approved the data [record] although the authentication is not [commercially] reasonable in the circumstances.]*

[(5) *Where an originator is [deemed] [presumed] to have approved the content of a data [record] under this article, it is [deemed] [presumed] to have approved the content of the data [record] as received by the addressee. However, where a data [record] contains an error, or duplicates in error a previous [record], the originator is not [deemed] [presumed] to have approved the content of the data [record] by virtue of this article in so far as the data [record] was erroneous, if the addressee knew of the error or the error would have been apparent, had the addressee exercised reasonable care or used any agreed procedure of verification.]*

[(5) *bis Paragraph (5) of this article applies to an error or discrepancy in an amendment or a revocation message as it applies to an error or discrepancy in a data [record].]*

[(6) *The fact that a data [record] is [deemed] [presumed] to be effective as that of the originator does not impart legal significance to that data [record].]*

### C. Report of the Working Group on Electronic Data Interchange (EDI) on the work of its twenty-ninth session (New York, 27 February-10 March 1995) (A/CN.9/407) [Original: English]

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## INTRODUCTION

1. At its twenty-fourth session (1991), the Commission agreed that the legal issues of electronic data interchange (EDI) would become increasingly important as the use of EDI developed and that the Commission should undertake work in that field. The Commission agreed that the matter needed detailed consideration by a Working Group.<sup>1</sup>

2. Pursuant to that decision, the Working Group on International Payments devoted its twenty-fourth session to identifying and discussing the legal issues arising from the increased use of EDI. In its report on that session, the Working Group suggested that the review of legal issues arising out of the increased use of EDI had demonstrated that among those issues some would most appropriately be dealt with in the form of statutory provisions (A/CN.9/360, para. 129). As regards the possible preparation of a standard communication agreement for world-wide use in international trade, the Working Group decided that, at least currently, it was not necessary for the Commission to develop a standard communication agreement. However, the Working Group noted that, in line with the flexible approach recommended

to the Commission concerning the form of the final instrument, situations might arise where the preparation of model contractual clauses would be regarded as an appropriate way of addressing specific issues (A/CN.9/360, para. 132). The Working Group reaffirmed the need for close cooperation among all international organizations active in the field. It was agreed that the Commission, in view of its universal membership and general mandate as the core legal body of the United Nations system in the field of international trade law, should play a particularly active role in that respect (A/CN.9/360, para. 133).

3. At its twenty-fifth session (1992), the Commission considered the report of the Working Group on International Payments on the work of its twenty-fourth session (A/CN.9/360). In line with the suggestions of the Working Group, the Commission agreed that there existed a need to investigate further the legal issues of EDI and to develop practical rules in that field. It was agreed, along the lines suggested by the Working Group, that, while some issues would most appropriately be dealt with in the form of statutory provisions, other issues might more appropriately be dealt with through model contractual clauses. After discussion, the Commission endorsed the recommendations contained in the report of the Working Group (A/CN.9/360, paras. 129-133), reaffirmed the need for active cooperation among all international

<sup>1</sup>Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17 (A/46/17), paras. 314-317.

organizations active in the field and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange.<sup>2</sup>

4. The Working Group devoted its twenty-fifth to twenty-eighth sessions to the preparation of legal rules that were aimed at eliminating legal obstacles to, and uncertainties in, the use of modern communication techniques, where effective removal of such obstacles and uncertainties could only be achieved by statutory provisions. At its twenty-eighth session, the Working Group approved that text of the draft Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication (hereinafter referred to as "the Model Law"). The Working Group requested the Secretariat to circulate the text of the draft Model Law to Governments and interested organizations for comments. It was noted that the text of the draft Model Law, together with a compilation of comments by Governments and interested organizations, would be placed before the Commission at its twenty-eighth session for final review and adoption.

5. There was general support for a suggestion that the draft Model Law should be accompanied by a guide to assist States in enacting and applying the draft Model Law. The guide, much of which could be drawn from the *travaux préparatoires* of the draft Model Law, would also be helpful to EDI users as well as to scholars in the area of EDI. The Working Group noted that, during its deliberations at its twenty-eighth session, it had proceeded on the assumption that the draft Model Law would be accompanied by a guide, to be adopted by the Commission. For example, the Working Group had decided in respect of a number of issues not to settle them in the draft Model Law but to address them in the guide so as to provide guidance to States enacting the draft Model Law. As to the timing and method of preparation of the guide, the Working Group agreed that the Secretariat should prepare a draft and submit it to the Working Group for consideration at its twenty-ninth session.

6. The Working Group noted that its recommendation to the Commission that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment as soon as the draft Model Law was completed (A/CN.9/390, para. 158) had found general support in the Commission.<sup>3</sup> It was stated that related legal issues involving electronic registries were a necessary part of such a project. The Working Group also reiterated its decision to address, at a future session, the issue of incorporation of terms and conditions into a data message by means of a mere reference to such terms and conditions.

7. As to the planning of future work, the view was expressed that the Working Group at its twenty-ninth session, after completing its consideration of the draft Guide to enactment to be prepared by the Secretariat, could have a general discussion on negotiability and transferability of rights in goods. Another view was that the issue of incorporation by reference could also be considered at the twenty-ninth session for possible inclusion in the draft Model Law.

A number of delegations expressed their willingness to prepare a brief paper to facilitate discussions on both topics. It was noted, however, that, while the Working Group might have sufficient time for a general discussion, it could not go into detail on either topic.

8. The Working Group on Electronic Data Interchange, which was composed of all the States members of the Commission, held its twenty-ninth session in New York from 27 February to 10 March 1995. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Bulgaria, Canada, Chile, China, Costa Rica, Denmark, Ecuador, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Mexico, Morocco, Poland, Russian Federation, Saudi Arabia, Slovakia, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

9. The session was attended by observers from the following States: Algeria, Australia, Bangladesh, Bolivia, Bosnia and Herzegovina, Cambodia, Colombia, Czech Republic, Finland, Indonesia, Lebanon, Malaysia, Netherlands, Republic of Korea, Sweden, Ukraine and Yemen.

10. The session was attended by observers from the following international organizations: International Association of Ports and Harbours (IAPH), International Chamber of Commerce (ICC) and International Federation of Freight Forwarders Associations.

11. The Working Group elected the following officers:

*Chairman:* Mr. José-María Abascal Zamora (Mexico);

*Rapporteur:* Mr. T. L. Gill (India).

12. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.63), a note by the Secretariat containing a draft Guide to enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication (A/CN.9/WG.IV/WP.64), a proposal by the observer for the International Chamber of Commerce (A/CN.9/WG.IV/WP.65), a proposal by the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.IV/WP.66) and a proposal by the United States of America (A/CN.9/WG.IV/WP.67).

13. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication: preparation of a guide to enactment.
4. Planning of future work: general discussion on the issue of incorporation by reference; general discussion on negotiability and transferability of rights in goods in an electronic data interchange environment.
5. Other business.
6. Adoption of the report.

<sup>2</sup>Ibid., Forty-seventh Session, Supplement No. 17 (A/47/17), paras. 140-148.

<sup>3</sup>Ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), para. 201.

## I. DELIBERATIONS AND DECISIONS

14. The Working Group discussed the draft Guide to enactment (hereinafter referred to as "the draft Guide") of the Model Law as set forth in the note by the Secretariat (A/CN.9/WG.IV/WP.64) and requested the Secretariat to prepare a revised version of the draft Guide reflecting the decisions made by the Working Group and taking into account the various views, suggestions and concerns that had been expressed at the current session. The deliberations and conclusions of the Working Group with respect to the draft Guide are set forth in section II below.

15. The Working Group also considered in the context of a general debate on possible future work the topics of incorporation by reference and negotiability or transferability of rights in goods as set forth in the proposals by the observer for the International Chamber of Commerce, the United Kingdom of Great Britain and Northern Ireland and the United States of America (A/CN.9/WG.IV/WP.65, A/CN.9/WG.IV/WP.66 and A/CN.9/WG.IV/WP.67). The Working Group requested the Secretariat to take into account the various views, suggestions and concerns expressed with regard to the issue of incorporation by reference when preparing a revised version of the draft Guide. As to the issues of negotiability or transferability of rights in goods in an electronic environment, the Working Group requested the Secretariat to prepare a study that would discuss those issues in the context of transport documents, with particular reference to maritime bills of lading, for consideration at a future session of the Working Group. The deliberations and conclusions of the Working Group with respect to those topics are set forth in section II below.

## II. CONSIDERATION OF THE DRAFT GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF COMMUNICATION

### *General remarks*

16. The Working Group expressed overall satisfaction about the current form and substance of the draft Guide and engaged in a general exchange of views on its structure and intended audience. With respect to audience, it was generally considered that the draft Guide should be geared primarily to providing guidance to legislators and other authorities that might contemplate implementing the Model Law as part of their national legislation. However, it was also thought that the draft Guide should be so drafted that other audiences could benefit from it. In particular, the draft Guide should provide a tool for interpretation of the Model Law by courts, public authorities and users of EDI applying the Model Law. It was decided that appropriate explanations should be introduced into the draft Guide regarding its intended audience.

17. With respect to structure, it was thought that the first part of the draft Guide should contain more detailed information as to the purpose of the Model Law. To that effect, it was suggested that a new section of the draft Guide should: (a) contain a general description of EDI and related communication techniques; (b) describe the main characteristics of the Model Law, for example, its focus on commercial relationships between originators and addressees of data

messages and the fact that it was not intended to constitute a regulatory document; (c) explain why the legal rules developed in a paper-based environment needed to be adapted to accommodate the new situations created by electronic communications and provide examples illustrating the reasons why the kind of provisions contained in the Model Law were needed to facilitate the increased use of EDI; and (d) indicate briefly why the individual rules contained in the Model Law had been chosen as particularly appropriate for EDI and related means of communication. For example, it was stated that a general presentation of EDI should indicate why provisions inspired from the "receipt rule", according to which contracts are formed at the moment when acceptance by the offeree is received by the offeror, might be regarded as particularly suitable for transactions operated in an electronic environment. More generally, it was suggested that the new section should include a presentation of the main benefits to be expected from the Model Law, for example, (a) validating transactions operated by electronic means; (b) eliminating uncertainties as to the rules to be applied to the movement of dematerialized information; (c) providing a framework for parties to structure their transactions; and (d) establishing equal treatment for users of electronic communication techniques and for users of more traditional means of communication. It was stated that most of the additional information to be concentrated in the first part of the draft Guide was already present in scattered form in the various paragraphs that dealt with the purpose of the Model Law.

18. Various views were expressed as to the manner in which the new section dealing with the general purpose of the Model Law should be combined with the current section entitled "History and purpose of the Model Law". One view was that the new section should replace the section currently opening the draft Guide. It was stated that the current section, while entitled "History and purpose of the Model Law", dealt almost exclusively with history, which was of secondary interest to legislators. Therefore, it should be placed at the end of the draft Guide or in an annex. Another view was that the section dealing with history should be considerably shortened. The prevailing view, however, was that the history of the Model Law should be presented with sufficient detail, since in many countries it would be of particular importance to legislators considering enacting the Model Law. It was decided that the history of the Model Law should be dealt with in the first part of the draft Guide. It was suggested that, when preparing a revised version of the draft Guide, the historical presentation of the Model Law should be streamlined. In that connection, consideration might be given to combining the current chronological approach with a thematic approach to explain, for example, the conditions under which the Commission had decided to prepare model legislation instead of a model interchange agreement and the reasons why legislation in the field of EDI had been found to be necessary, together with interchange agreements. It was also suggested that, either in the general presentation of the purposes of the Model Law or in the presentation of its history, the draft Guide should reflect the decision by the Working Group that the focus of the Model Law should be on the relationships between originators and addressees of data messages, and not on the relationships between either the originator or the addressee and any intermediary whose services they might use.

19. The Working Group proceeded with a discussion of the contents of the draft Guide on a paragraph-by-paragraph basis. It was agreed that, when preparing a revised version of the draft Guide to reflect the decisions made by the Working Group at its current session, the Secretariat should have the discretion to consider additional redrafting and restructuring of the draft Guide, as might be appropriate.

#### *Consideration of the paragraphs of the draft Guide*

### **History and purpose of the model law**

#### **A. History (paragraphs 1-21)**

20. The Working Group found the substance of paragraph 1 to be generally acceptable.

21. With respect to paragraph 2, the view was expressed that the notion of "trading partners" might have no readily ascertainable meaning outside the context of EDI. It was considered that wording along the lines of "parties doing business on an international level through the use of computerized or other modern techniques" would be preferable. The view was also expressed that the reference to "the field of communication" was inappropriate since the Model Law was not attempting to deal with communication law but rather with commercial relationships in which communication issues might become relevant.

22. The Working Group found the substance of paragraphs 3-12 to be generally acceptable. As a matter of drafting, a view was expressed that the meaning of the word "writing" used as a noun in the second sentence of paragraph 9 might be difficult to interpret and that a definition of "a writing" might need to be included in the draft Guide. It was noted that the word was also used as a noun in paragraphs 3, 38, 59, 61-63, 74, 75, 82 and 100. The prevailing view was that such a definition was unnecessary. It was observed that the word had been used consistently during the preparation of the Model Law, apparently without giving rise to difficulties. A suggestion was made that, in the preparation of a revised version of the draft Guide, attention might be given to avoiding the use of "writing" as a noun, omitting the definite article or placing the word "writing" between inverted commas.

23. With respect to paragraph 13, a concern was expressed that the second sentence might be misinterpreted as indicating that the Model Law was intended to constitute "a general framework identifying the legal issues and providing a set of legal principles and basic legal rules governing communication through EDI". It was agreed that the objectives of the Model Law were somewhat different and more limited, since the main purpose of the Model Law was to adapt existing statutory requirements so that they would no longer constitute obstacles to the use of EDI and related means of communication. It was also agreed that the objectives of the Model Law should be clearly spelled out in paragraph 13.

24. The Working Group found the substance of paragraphs 14-21 to be generally acceptable.

#### **B. Purpose (paragraphs 22-26)**

25. It was agreed that paragraph 22 should be revised to indicate more clearly that the notion of EDI used in that paragraph was not to be construed as a reference to narrowly defined EDI under article 2(b) of the Model Law but to a variety of trade-related uses of modern communication techniques that might be referred to broadly under the rubric of "electronic commerce". In that connection, it was suggested that the draft Guide should better reflect the fact that the Model Law was not intended only for application in the context of existing communication techniques but rather as a set of flexible rules that should accommodate foreseeable technical developments. In the context of the discussion of paragraph 22, the view was expressed that the draft Guide should emphasize that the purpose of the Model Law was not only to establish rules for the movement of information communicated by means of data messages but equally to deal with the storage of information in data messages that were not intended for communication.

26. With respect to paragraph 23, it was generally thought that indicating that a purpose of the Model Law was "to enable potential EDI users to establish a secure EDI relationship by way of a communication agreement within a closed network" was misleading. It was stated that the current wording might be misinterpreted as dealing with the "enabling" of EDI relationships from a technical perspective. It was pointed out that the aim of the Model Law was not to deal with the establishment of secure EDI relationships by the parties but to create a legal environment that would be as secure as possible, so as to facilitate the use of EDI between communicating parties. As to the indication that the Model Law "set forth a basic framework for the development of EDI outside such a closed network in an open environment", it was stated that the draft Guide should not create the impression that the Model Law established a general framework for "open EDI". It was agreed that the draft Guide should emphasize that the Model Law was intended to remove statutory requirements that constituted obstacles to the increased use of EDI and related means of communication, irrespective of whether the users of such means of communication were linked by an interchange agreement. It was suggested that the third sentence of paragraph 23 should be redrafted to indicate that the Model Law was intended to support the increased use of EDI within a closed network or an open-system environment. As regards the reference to "some of the issues concerning the situation of third parties" in the third sentence of paragraph 23, the view was expressed that, since the Model Law did not deal with intermediaries, the draft Guide should acknowledge that the Model Law had failed to achieve its purpose in that respect.

27. In the context of the discussion of paragraphs 24-25, views were exchanged regarding the title of the Model Law. One view was that the notion of "model statutory provisions", which allowed for more flexibility in the implementation of the text, was more appropriate than the notion of "model law". The Working Group, while noting that its mandate at its current session was not to discuss the form or content of the Model Law, reaffirmed its previous decision as to the title of the Model Law. As to how the specific nature of the Model Law should be reflected in the draft Guide, it was agreed that clear indication should be given

that the Model Law was intended to constitute a discrete and balanced set of rules, all of which should be enacted by implementing States in order to meet the objectives of the Model Law. However, it was also agreed that appropriate mention should be made in the draft Guide that, depending on the situation in each implementing State, the Model Law could be enacted in various ways, either as a single statute or in various pieces of legislation. For example, it was stated that, while the provisions contained in articles 5-7 would typically replace existing statutory requirements, the provisions of the Model Law regarding evidence or the provisions of chapter III, which could be regarded as default rules to be used in the absence of an interchange agreement, might not necessarily form part of statutory law in certain countries.

28. The Working Group found the substance of paragraph 26 to be generally acceptable. As a matter of drafting, it was suggested that the word "legislator" should replace the word "parliament".

## **Part one. Introduction to the Model Law**

### **A. Objectives (paragraphs 27-29)**

29. The Working Group found the substance of paragraphs 27-29 to be generally acceptable. It was felt that the draft Guide should make it clear that, while a few countries had adopted specific provisions to deal with certain aspects of EDI, there existed no legislation dealing with EDI and related means of communication as a whole. It was stated that existing legislation governing communication and storage of information was inadequate or outdated precisely because it did not contemplate the use of EDI and related means of communication, thus creating uncertainty with respect to the legal regime of transactions operated by electronic means and restricting the use of such means. It was agreed that express mention should be made in the draft Guide of the fact that existing legislation was restrictive. In the context of the discussion of paragraph 29, it was suggested that the concept of media neutrality should be presented in the first part of the draft Guide, since a fundamental purpose of the Model Law was to ensure that users of electronic means and users of more traditional means of communication and storage of information would receive equal treatment.

### **B. Scope (paragraphs 30-33)**

30. The Working Group found the substance of paragraphs 30-33 to be generally acceptable. It was generally thought that the draft Guide should contain detailed explanations as to why the sphere of application of the Model Law was intended to be broad. For example, a data message might be initiated as an oral communication and end up in the form of a teletype, or it might start as a teletype and end up as an EDI message. In that connection, it was stated that the draft Guide should indicate as a characteristic of EDI and related means of communication that they covered programmable messages, the computer programming of which was the essential difference between such messages and traditional paper-based documents. As a matter of drafting, it was stated that the references to telex and teletype in paragraphs 27, 30 and 31 might need to be combined to avoid repetition.

### **C. A "framework" law to be supplemented by technical regulations (paragraphs 34-35)**

31. The Working Group found the substance of paragraphs 34-35 to be generally acceptable. As a matter of drafting, it was suggested that, in the third sentence of paragraph 34, the words "an enacting State may wish to issue" should replace the words "an enacting State may be envisaged to issue". It was also suggested that the words "technique for recording and communicating information" should replace the words "communication techniques" in paragraph 35. A further suggestion was that references to "procedure" should be clarified so as not to be misinterpreted as dealing with questions of civil or criminal procedure. In the context of the discussion of paragraphs 34-35, the view was expressed that the first part of the draft Guide should contain an indication that the Model Law was not intended to restate any existing body of substantive law.

### **D. The "functional-equivalent" approach (paragraphs 36-39)**

32. The Working Group found the substance of paragraphs 36-39 to be generally acceptable. It was suggested that the draft Guide should indicate more clearly that the functional-equivalent approach had been taken in articles 5-7 of the Model Law with respect to the concepts of "writing", "signature" and "original" but not with respect to other legal concepts dealt with in the Model Law. For example, article 14 did not attempt to create a functional equivalent of existing storage requirements. Another suggestion was that article 7 of the UNCITRAL Model Law on International Commercial Arbitration should be given as an example in paragraph 37, together with article 13 of the United Nations Convention on Contracts for the International Sale of Goods. As a matter of drafting, it was agreed that the last sentence of paragraph 36 should read as follows: "This was due to one of many distinctions between EDI messages and paper-based documents, namely, that the latter were readable by the human eye, while the former were not so readable unless reduced to paper or displayed on a screen". In paragraph 39, it was agreed that the words "corresponding paper documents" should replace the words "the corresponding paper documents".

### **E. Default rules and mandatory law (paragraphs 40-41)**

33. The Working Group found the substance of paragraphs 40-41 to be generally acceptable. As to the use of the notion of "system rules", a view was expressed that the draft Guide should make it clear that the notion might cover two different categories of rules, namely, general terms provided by communication networks and specific rules that might be included in those general terms to deal with bilateral relationships between originators and addressees of data messages. It was suggested that the draft Guide should make it clear that it dealt only with the narrower category.

34. With respect to paragraph 40, it was stated that the words "They may be used by parties as a basis for concluding more detailed agreements" should be deleted to avoid suggesting that the Model Law might invite parties already



using EDI in the context of interchange agreements to conclude more detailed agreements.

35. As to paragraph 41, a concern was expressed that the word "enable" might be misinterpreted as dealing with the "enabling" of EDI relationships from a technical perspective (see paragraph 26, above). It was stated that appropriate wording might need to be found to reflect the fact that the Model Law was intended to facilitate or accommodate the use of modern communication and storage techniques. It was also stated that the last sentence of paragraph 41 might need to be redrafted to avoid being misinterpreted as encouraging States to impose additional requirements beyond the "minimal requirements" established under chapter II of the Model Law. Such additional requirements should be discouraged unless they responded to compelling reasons that might exist in certain enacting States.

#### **F. Assistance from UNCITRAL secretariat (paragraphs 42-43)**

36. The Working Group found the substance of paragraphs 42-43 to be generally acceptable. In the context of the discussion of those paragraphs, the view was expressed that assistance from the UNCITRAL secretariat with respect to the legal issues of EDI would be particularly needed by developing countries. Another view was that it might be desirable to make information concerning the Model Law available through electronic mail.

### **Part two. Article-by-article remarks**

#### **Chapter I. General provisions**

##### **Article 1. Sphere of application (paragraphs 44-49)**

37. The Working Group found the substance of paragraphs 44-49 to be generally acceptable. Various suggestions were made with respect to possible additions to the current text. One suggestion was that paragraph 44 should provide examples of factual situations where communication would be carried out using various means of transmission, such as a communication beginning as a telecopy and ending up as an EDI message (see paragraph 30, above). Another suggestion was that paragraph 45 should contain more indications as to what constituted "commercial law". It was stated that the draft Guide should reproduce the wording of the footnote to article 1 and indicate that, when interpreting the notion of "commercial law" under the Model Law, it should be borne in mind that the Model Law was referring to "commercial law" as understood in international trade usage, and not to "commercial law" as defined under the domestic law of any enacting State.

38. As a matter of drafting, the view was expressed that paragraph 46 might need to be modified to parallel the wording of paragraph 45 with respect to the limitation of the sphere of application of the Model Law to "commercial law". It was suggested that the words "and nothing in the Model Law should prevent an implementing State to extend the scope ..." should be replaced by the words "and notwithstanding that the Model Law was drafted to form part of commercial law, implementing States may wish to extend

the scope of it to cover uses outside the commercial sphere, such as administrative uses involving public authorities".

39. As regards paragraphs 48-49, the view was expressed that the draft Guide should emphasize that, in some jurisdictions, particularly in federal States, considerable difficulties might arise in distinguishing international trade from domestic trade. It was stated that the draft Guide should clearly indicate that the Model Law was not intended to encourage implementing States to limit the applicability of the Model Law to international cases.

40. As a matter of drafting, the view was expressed that the third sentence of paragraph 49 would be better drafted along the lines "As the Model Law contains a number of articles (articles 5-7) that allow a degree of flexibility to implementing States to limit the scope of application of specific aspects of the Model Law, a narrowing of the scope of application of the text to international trade should not be necessary". A final sentence indicating the difficulty of dividing communications in international trade into purely domestic and international parts might also be useful.

#### **Article 2. Definitions (paragraphs 50-55)**

##### **"Data message" (paragraphs 50-51)**

41. The Working Group found the substance of paragraphs 50-51 to be generally acceptable. Various suggestions were made with respect to possible additions to the current text. A concern was expressed that the current text of paragraph 50, while covering communicated data messages and data messages not intended for communication, might be interpreted as not covering data messages intended for communication and not communicated. With a view to covering all data messages, irrespective of whether they were communicated or intended for communication, it was suggested that the first sentence of paragraph 50 should be drafted as follows: "The notion of 'data message' is not limited to communication but also intended to encompass computer-generated records that are not necessarily intended for communication".

42. As to possible amendments to data messages, it was suggested that wording along the following lines should be included in paragraph 51: "A data message is presumed to have a fixed information content but it may be revoked or amended by another data message".

43. As to the notion of "analogous means", it was suggested that the draft Guide should contain more explanations, and that it should emphasize that the definition of data message was not intended to exclude any future technical means of communication and storage of data (see paragraph 25, above).

##### **"Originator" (paragraph 52)**

44. The Working Group found the substance of paragraph 52 to be generally acceptable. It was generally felt that, in addition to providing guidance as to the interpretation of the notion of "originator", the draft Guide should discuss the notion of "addressee". It was suggested that the draft Guide



should emphasize that the "addressee" under the Model Law was the person with whom the originator intended to communicate by transmitting the data message, as opposed to any person who might receive, forward or copy the data message in the course of transmission. It was also suggested that the draft Guide should point out that the definition of "addressee" contrasted with the definition of "originator", which was not focused on intent.

45. It was agreed that the draft Guide should contain an indication that, under the definitions of "originator" and "addressee" under the Model Law, the originator and the addressee of a given data message could be the same person, for example in the case where the data message was intended for storage by its author.

46. The view was expressed that appropriate wording should be included in the draft Guide to make it clear that the addressee who stored a message transmitted by an originator was not itself intended to be covered by the definition of "originator". It was noted, however, that an effect of the current definition of "originator" was that, where a data message was communicated to an addressee and stored by that addressee, the person who communicated the data message and the addressee would both be an "originator" of it. It was stated that the issue might need to be discussed by the Commission when reviewing the text of the Model Law.

47. The view was expressed that the draft Guide should indicate, by way of example, that the definition of "originator" was intended to cover the person who generated the data message even if that message was transmitted by another person. It was stated that the words " 'originating' from the legal entity on behalf of which the computer is operated" at the end of paragraph 52 were too vague and might raise questions as to the rule to be applied to determine on whose behalf a computer was operated. In response, it was stated that the law of agency was outside the scope of the Model Law. It was agreed that the draft Guide should contain an indication that questions relevant to agency were to be settled under rules outside the Model Law.

#### *"Intermediary" (paragraphs 53-54)*

48. The view was expressed that the draft Guide should put more emphasis on the following elements: (a) the definition of "intermediary" was intended to cover both professional and non-professional intermediaries; (b) "intermediary" in the Model Law was defined not as a generic category but with respect to each data message, thus recognizing that the same person could be the originator or addressee of one data message and an intermediary with respect to another data message; and (c) that the Model Law, which was focused on the relationships between originators and addressees, did not, in general, deal with the rights and obligations of intermediaries. It was recalled that a suggestion had been made to include in the general presentation of the Model Law an indication that the Model Law was not intended to address the issues of rights and obligations of intermediaries (see paragraphs 18 and 26, above).

49. Various views were expressed as to whether the draft Guide should contain a reference to the "paramount importance" of intermediaries in the field of electronic communi-

cations. One view was that the word "paramount" should be deleted, in order not to overemphasize the importance of intermediaries under the Model Law. Another view was that the draft Guide should indicate more clearly that intermediaries had a crucial importance and that no EDI communication was conceivable without them. In the context of that discussion, it was noted that the notion of "intermediary" was used in the Model Law only for definition purposes. The Working Group was informed that several Governments, in their comments to the Commission on the Model Law, had expressed the wish that drafting amendments in the relevant definitions might lead to the elimination of all references to "intermediaries" from the Model Law.

50. The view was expressed that paragraph 54 should list additional "value-added services" performed by network operators, for example, authenticating and certifying data messages and providing security services for electronic transactions.

51. In the context of the discussion of the definition of "intermediary", views were exchanged on the definition of "EDI" under article 2(b) of the Model Law and, more particularly, on the words "electronic transfer" in that definition. One view was that, since the definition of EDI necessarily implied that data messages were communicated electronically from computer to computer, the use of a telecommunications system acting as an intermediary was inherent in EDI. Another view was that, while EDI would primarily cover situations where data messages were communicated through a telecommunications system, the current definition of EDI would also cover exceptional or incidental types of situation where data structured in the form of an EDI message would be communicated by means that did not involve telecommunications systems, for example, the case where magnetic disks containing EDI messages would be delivered to the addressee by courier. In addition, it was stated that, even if EDI as defined under article 2(b) were interpreted as implying the use of telecommunications, it would not necessarily imply the use of intermediaries, since electronic communication could be achieved by linking directly the computer systems of the originator and the addressee. A related view was that the definition of EDI in article 2(b) was focused on the information to be communicated from computer to computer and not on the medium which was used to achieve such communication. After discussion, the Working Group did not reach a decision as to whether or not the case of manual transmission of information should fall under the definition of EDI under article 2(b). It was noted that, in any event, such a situation would be covered by the definition of "data message" under article 2(a), thus falling under the scope of the Model Law. It was generally felt that the matter might need to be further discussed by the Commission and, possibly, by technical bodies involved in the development of EDI messages such as the Working Party on Facilitation of International Trade Procedures of the Economic Commission for Europe. It was also felt that the draft Guide should contain appropriate explanations regarding the definition of "EDI" under the Model Law.

#### *"Information system" (paragraph 55)*

52. The Working Group found the substance of paragraph 55 to be generally acceptable. As a matter of drafting,

it was suggested that, in the second sentence, the words "an electronic mailbox" should be replaced by the words "could include an electronic mailbox". Another suggestion was that the final sentence should be amended to indicate that the Model Law did not address the question of whether the information system was located on the premises of the addressee or on other premises, since location of information systems was not an operative criterion under the Model Law.

### *Article 3. Interpretation (paragraphs 56-58)*

53. The Working Group found the substance of paragraphs 56-58 to be generally acceptable. It was suggested that paragraph 57 should indicate in more detail why the Model Law contained a reference to its "international source". It was stated that the Model Law, while enacted as part of domestic legislation, and therefore domestic in character, should be interpreted with reference to its international origin in order to ensure uniformity in the interpretation of the Model Law in various countries.

54. Another suggestion was that the draft Guide should indicate that, in interpreting the Model Law, proper attention should be given to international and local trade usages and practice.

## *Chapter II. Application of legal requirements to data messages*

### *Article 4. Legal recognition of data messages (paragraph 59)*

55. The Working Group found the substance of paragraph 59 to be generally acceptable. The view was expressed that the draft Guide should explain in more detail: (a) the meaning of the words "solely on the grounds" in the Model Law; (b) that the provision under which information should "not be denied legal validity" should not be misinterpreted as establishing the legal validity of a message; and (c) that the principle that data messages should not be discriminated against meant that the Model Law was intended to eliminate disparity of treatment between EDI messages and paper-based documents. As a matter of drafting, it was suggested that the first sentence of paragraph 59 should read: "Article 4 embodies the fundamental principle that a data message should not be treated differently from paper, simply because of its form. It should be as valid, enforceable and effective as paper". It was also suggested that the second sentence should read: "It is not intended to affect any of the statutory requirements for 'writing' or an original, which are addressed in articles 5 and 7". Another drafting suggestion was that the draft Guide should reproduce the text of article 4.

### *Article 5. Writing (paragraphs 60-65)*

56. The view was expressed that the draft Guide should explain in more detail: (a) the content of the deliberations of the Working Group that led to the adoption of the words "to be in writing or to be presented in writing" in article 5;

(b) that article 5 was not intended to apply only where the law expressly required information to be presented "in writing" but also where a "document" or any other paper-based instrument was required; and (c) the content of the deliberations of the Working Group that led to the adoption of the words "accessible so as to be usable for subsequent reference". In particular, it was stated that the use of the word "accessible" was meant to imply that information in the form of computer data should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained. It was also stated that the word "usable" was not intended to cover only human use but also computer processing. As to the notion of "subsequent reference", it should be made clear that it had been preferred to such notions as "durability" or "non-alterability", which would have established too harsh standards, and to such notions as "readability" or "intelligibility", which might constitute too subjective criteria.

57. With respect to the use of the words "a data message satisfies that rule" in article 5, paragraph 1, the view was expressed that the draft Guide should make it clear that only a data message generated at the relevant time could be considered as satisfying the rule in question. It was stated that, in a paper-based environment, where a transmission was only valid if it was in writing, the date that it was put into writing was important. Similarly, in an electronic environment, where a transaction was concluded orally, and was only subsequently recorded in a data message, the requirement for writing should be satisfied only as from the date when the relevant data message was generated. Article 5, paragraph 1, should not have the effect that in such a case a subsequent data message could satisfy the requirement retrospectively. It was felt that the matter might need to be discussed by the Commission in the context of its review of article 5.

58. The view was expressed that the notion of "minimum standard" in paragraph 60 might need to be further explained in the draft Guide so as not to suggest that the Model Law encouraged enacting States to establish additional standards beyond the requirements of article 5. As a matter of drafting, it was suggested that the first sentence should read as follows: "Article 5 is intended to define the minimum standard to be met by a data message if it is to satisfy a requirement that information be in writing".

59. The Working Group found the substance of paragraph 61 to be generally acceptable.

60. With respect to paragraphs 62-63, a suggestion was made that the draft Guide should contain a reference to the integrity of the data message. It was stated that, to be covered by article 5, data messages should be kept unaltered in the form in which they were received. It was generally considered, however, that since the integrity of the message was not an operative criterion under the definition of "writing" in the Model Law, no reference to the integrity of the message should be introduced into the draft Guide.

61. As a matter of drafting, it was suggested that paragraph 63 should read as follows: "The purpose of article 5 is not to establish a requirement that, in all instances, trade data messages should fulfil all conceivable functions of a writing.

Rather than focusing upon specific functions of a 'writing', for example, its evidentiary function in the context of tax law or its warning function in the context of civil law, article 5 focuses upon the basic notion of the information being reproduced and read. That notion is expressed in article 5 in terms that were found to provide an objective criterion, namely that the information in a data message must be accessible so as to be usable for subsequent reference".

62. The Working Group found the substance of paragraph 64 to be generally acceptable.

63. With respect to paragraph 65, a concern was expressed that the recommendation to legislators to avoid blanket exclusions from the scope of the Model Law might be misinterpreted as interfering with legislative techniques that might differ from country to country. It was stated that certain legislators might wish to proceed by way of general or "abstract" exclusions of certain areas of law (a technique that might fall under the category of "blanket exclusions"), for example in the case where writing requirements served a warning function. Other legislators might adopt a more casuistic approach. While it was agreed that certain drafting changes might be needed, it was generally felt that the substance of the paragraph reflected the intent of the Working Group that article 5, paragraph 2, and similar provisions of the Model Law should not be used to overly narrow the scope of the Model Law. It was recalled that the main exceptions that had been envisaged in the preparation of the Model Law were in the field of bills of exchange and other negotiable instruments. It was suggested that the third sentence of paragraph 65 should read as follows: "The objectives of the Model Law would not be achieved if paragraph 2 were used to establish blanket exceptions, and the opportunity provided by paragraph 2 to do this should be avoided."

#### *Article 6. Signature (paragraphs 66-73)*

64. The Working Group found the substance of paragraphs 66-70 to be generally acceptable. It was suggested that the opening words of paragraph 70 should read as follows: "Paragraph 1(b) establishes a flexible approach to the level of security to be achieved by the method of identification used in paragraph 1(a). The method used in paragraph 1(a) ...".

65. It was generally agreed that the Guide should clearly indicate that the list of factors provided in paragraph 71 was non-exhaustive and illustrative in nature. It was suggested that the words "factors to be taken into account" should be replaced by the words "factors that may be taken into account". As to the specific factors, it was suggested that "(1) the statute and relative economic size of the parties;" should be deleted, since technology available provided equal footing among users of modern communication techniques. It was stated in response that, while the economic size of the parties might not in itself be a relevant factor, their relative level of technical equipment still needed to be taken into account. It was suggested that the text should be redrafted as follows: "(1) the sophistication of the equipment used by each of the parties;". Another suggestion was that a reference to the nature of the message should be added to the list,

to indicate that different procedures might be appropriate for different types of message.

66. The Working Group found the substance of paragraph 72 to be generally acceptable.

67. With respect to paragraph 73 a drafting suggestion was that the words "would typically" in paragraph 73 should be replaced by the word "may". Another suggestion was that the reference to agreements concluded between parties should be simplified to indicate that trading-partner agreements were also known as interchange agreements or communication agreements.

68. In the context of the discussion of article 6, a question was raised as to how the definitions of "originator" and "intermediary" in article 2 would interplay with article 6. The example was given of a message being sent on behalf of the originator by an agent, who would then be regarded as an intermediary under the Model Law. Should the data message contain the electronic signature of the intermediary, the conditions for the data message to be regarded as the functional equivalent of "writing" under article 6 would not be fulfilled. It was therefore suggested that the draft Guide or the Model Law itself should make it clear that the electronic signature of an agent could be regarded as a possible way of identifying the originator under article 6. It was stated in response that either the intermediary would simply forward the initial message, in which case the message would typically bear the identification of the originator, or the intermediary would send a new message reproducing the information contained in the initial message in a new message, in which case the intermediary would rightly be regarded as the originator of the second message. The view was expressed that, in order to achieve certainty in that respect, the definitions of "originator" and "intermediary" might need to be redrafted by the Commission.

69. Various suggestions were made as to how the draft Guide should clarify the relationships between the Model Law and the law of agency. One suggestion was expressly to mention that the Model Law was not intended to supplant the principles of agency that might be used to establish that a person other than the originator might be bound by the sending of a data message. Another suggestion was to explain that the words "on whose behalf" in the definition of "originator" were intended to deal not with the law of agency but rather with the situation in which a computer-generated message contained the identifying symbols of the originator. A further suggestion was to provide a series of examples illustrating the various possibilities with respect to the operation of article 6 in situations involving intermediaries and computer-generated messages.

70. As a possible further issue to be discussed in the context of article 6, it was suggested that the draft Guide should make it clear that the mere signing of a data message by means of a functional equivalent of a handwritten signature was not intended, in and of itself, to confer legal validity to the data message. Whether a data message that fulfilled the requirement of a signature had legal validity was to be settled under applicable law outside the Model Law. A further suggestion was that the draft Guide should indicate that possible agreement between originators and

addressees of data messages as to the use of a method of authentication was not conclusive evidence of whether that method was reliable or not.

#### *Article 7. Original (paragraphs 74-77)*

71. The Working Group found the substance of paragraphs 74-77 to be generally acceptable. Various views and suggestions were expressed with respect to possible additions to the current text.

72. One view was that the words "a rule of law" in the opening words of article 7 might need to be further explained in the draft Guide as encompassing not only statutory law but also judicially created law and other procedural law. Another view was that, in certain common law countries, the words "a rule of law" would normally be interpreted as referring to common law rules, as opposed to statutory requirements. The draft Guide should make it clear that the words "a rule of law" were intended to encompass those various sources of law.

73. It was suggested that the draft Guide should explain in more detail the meaning of "endorsement" in article 7, paragraph 2(a). It was stated that the term "endorsement" had in many countries a technical meaning in the field of negotiable instruments, which should not be confused with the meaning of the term in the context of EDI and related means of communication.

74. As to the words "complete and unaltered" used in article 7, paragraph 2(a), it was also considered that additional guidance should be provided. The draft Guide should describe the various changes that would normally affect a data message during its transmission and indicate, for example, that, where a message went through a certification process, all elements corresponding to that process should not necessarily be retained. It was also suggested that a parallel should be drawn in the draft Guide between electronic messages and paper-based original documents. In the case of paper, it was not uncommon for information regarding certification or endorsements to be appended to the paper document, without affecting its nature as an original document.

75. With respect to the words "the time when it was first composed in its final form" in article 7, paragraph 1(b), it was suggested that the draft Guide should explain that the provision was intended to encompass the situation where information was first composed as a paper document and subsequently transferred on to a computer. In such a situation, article 7, paragraph 1(b), was to be interpreted as requiring assurances that the information had remained complete and unaltered from the time when it was composed as a paper document onwards, and not only as from the time when it was translated into electronic form. Another suggestion was that the Guide should also illustrate the situation where several drafts were created and stored before the final message was composed. In such a situation, article 7, paragraph 1(b), should not be misinterpreted as requiring assurance as to the integrity of the drafts.

76. With respect to article 7, paragraph 3, it was generally considered that the Guide should include provisions along the lines of paragraph 65, warning legislators that the objec-

tives of the Model Law would not be achieved if article 7, paragraph 3, were used to establish blanket exceptions.

77. As to the specific paragraphs of the draft Guide, it was suggested that the following text should be added to paragraph 75:

"Examples of documents that might require an 'original' are trade documents such as weight certificates, agricultural certificates, quality/quantity certificates, inspection reports, insurance certificates, etc. While such documents are not negotiable or used to transfer rights or title, it is essential that they be transmitted unchanged, that is in their 'original' form, so that other parties in international commerce may have confidence in their contents. Using paper, these types of document are usually only accepted if they are 'original' to lessen the chance that they have been altered, which would be difficult to detect in copies. Various technical means are available to certify the contents of a data message to confirm its 'originality'. Without this functional equivalent of originality, the sale of goods using EDI would be hampered by requiring the issuers of such documents to retransmit their data message each and every time the goods are sold, or forcing the parties to use paper documents to supplement the EDI transaction."

78. The following was suggested as a separate paragraph to be added after paragraph 77:

"Paragraph 2(a) sets forth the criteria for assessing integrity, taking care to except necessary additions to the first (or 'original') data message such as endorsements, certifications, notarizations, etc. from other alterations. As long as the contents of a data message remain complete and unaltered, necessary additions to that data message would not affect its 'originality'. Thus when an electronic certificate is added to the end of an 'original' data message to attest to that data message's 'originality', or when data is automatically added by computer systems at the start and the finish of a data message in order to transmit it, such additions would be considered as if they were a supplemental piece of paper with an 'original' piece of paper, or the envelope and stamp used to send that 'original' piece of paper."

79. As a matter of drafting, various suggestions were made. In paragraph 74, it was suggested that the sentence beginning "In addition, article 7 is necessary since ..." should read as follows: "Although in some jurisdictions the concepts of 'writing', 'original' and 'signature' may overlap, the Model Law approaches them as three separate and distinct concepts". In paragraph 75, it was suggested that the words "not intended primarily" should be replaced by the words "not intended only". In paragraph 76, it was suggested that the second sentence should either be deleted or be put in the active voice.

#### *Article 8. Admissibility and evidential value of data messages (paragraphs 78-80)*

80. The Working Group found the substance of paragraphs 78-79 to be generally acceptable. It was stated that the "best

evidence rule" embodied in article 8, paragraph 1(b), was not known in all common law jurisdictions and that paragraph 78 should be amended to reflect that situation.

81. Doubt was expressed as to the need for paragraph 80. It was stated that article 8, paragraph 3, was sufficiently clear in stating that, in case an original was required by custom or practice, a document would not be given less evidential weight merely because it was in the form of a data message. As to the second sentence of paragraph 80, it was stated that while parties might require an original in contracts, the evidential weight of such an original was settled in article 7 and not in article 8, paragraph 3. After discussion, the Working Group decided to delete paragraph 80.

#### *Article 9. Retention of data messages* (paragraphs 81-84)

82. The Working Group found the substance of paragraphs 81-82 to be generally acceptable. As a matter of drafting, it was suggested that in paragraph 81, the words "supplementary rules for" should be replaced by "rules supplementing" and that the word "merely" should be deleted from paragraph 82.

83. With respect to paragraph 83, a number of suggestions were made. One suggestion was to explain that information, in order to be legible, might need to be deciphered, compressed or decompressed. Another suggestion was to make it clear that article 9, paragraph 1(c), should not be understood as imposing an obligation to retain transmittal information additional to the information contained in the data message when it was generated, stored or transmitted. Yet another suggestion was that it should be explained that the acknowledgement of receipt of a data message was a separate message that did not need to be retained. As to article 9, paragraph 2, which provided that transmittal information not necessary for the identification of a data message (e.g. communication protocols) did not need to be retained, the suggestion was made that further clarification was needed.

84. As to paragraph 84, the suggestion was made that it should be amended to read as follows: "In practice, storage of information, and especially storage of transmittal information, may often be carried out by someone other than the originator or the addressee, such as an intermediary. Nevertheless, it is intended that the person to whom the obligation to retain certain transmittal information attaches cannot escape meeting that obligation simply because, for example, the communications system operated by that other person does not retain the required information. This is intended to discourage bad practice or wilful misconduct. Paragraph 3 provides that in meeting its obligations under paragraph 1, an addressee or originator may use the services of any third party, not just an intermediary".

### *Chapter III. Communication of data messages*

#### *Article 10. Variation by agreement (paragraphs 85-86)*

85. The Working Group found the substance of paragraphs 85-86 to be generally acceptable. It was suggested that the

draft Guide should explain more clearly that the provisions of chapter II could be varied either by bilateral or multilateral agreements between parties, or by systems rules agreed to by the parties.

#### *Article 11. Attribution of data messages* (paragraphs 87-92)

86. The discussion focused on the substance of article 11. Doubts were expressed as to the usefulness of article 11, paragraph 1. It was stated in response that article 11, paragraph 1, contained a useful reminder of agency law principles that existed outside the Model Law. In that respect, paragraphs 87-88 of the draft Guide should elaborate on article 5 of the UNCITRAL Model Law on International Credit Transfers, from which article 11 was inspired. It was also stated that it should be made clear in the draft Guide that article 11, paragraph 1, was not intended to displace the domestic law of agency. As to article 11, paragraph 2, it was suggested that the last sentence of paragraph 89 should be amended to clarify, possibly by way of examples, that the addressee should benefit from the presumption that the message received was that of the originator if the addressee could show that it followed an agreed procedure of authentication. The reason the presumption applied was neither that the procedure was reasonable nor that the chances were that it was the originator's fault that someone unauthorized had learned how to authenticate the data message. Another suggestion was that article 11, paragraph 3, needed further clarification. As a matter of drafting, it was suggested that the last sentence should be deleted from paragraph 90.

87. The view was expressed that article 11, paragraph 4, was defective in that it provided for a rebuttable presumption that the content of a message was that received by the originator, a presumption which was predicated on the determination that an error in the content or an erroneous duplicate actually existed. It was therefore suggested to postpone elaborating on article 11, paragraph 4, until the Commission had an opportunity to consider and finalize it. The prevailing view, however, was that any explanation in the Guide as to article 11, paragraph 4, could be useful to the Commission in its future deliberations. In that connection, it was suggested that the draft Guide should explain that article 11, paragraph 4, was intended to deal with two separate situations, namely error in the content of a data message and erroneous duplication of a data message. For example, the draft Guide should make it clear: (a) that both situations could result from either an error by the person composing a message or from an error in transmission; (b) that, in case of an erroneous duplication of a data message, which message was the correct one would be a matter of context; (c) that it was irrelevant to know whether error or duplication resulted from a fault, since the situation was dealt with by way of a presumption; and (d) that exceptions to that presumption depended on whether the addressee knew or should have known of the error or erroneous duplication of the message.

88. In addition, it was pointed out that the Guide should explain the intent and the purpose of article 11 by referring to one of the primary questions arising in the use of electronic communications, namely the question as to who bears the risk of erroneous messages. In order to achieve that

result, the suggestion was made that the Guide should include language along the following lines: "This article assigns responsibility for erroneous or unauthorized data messages. However the consequences of such data messages are to be determined under the applicable law. Standing alone this article is somewhat incomplete, but when read in conjunction with the applicable law, its use would be clearer. For example, when a data message is presumed to be that of the originator, the applicable law would determine the effect of that presumption. While the assignment of presumptions is something that most legal systems can do quite readily, the new procedures of electronic commerce would create confusion in attempting to equate them to existing usages. This article will fill that gap."

89. Several concerns were expressed with regard to the suggested wording. One concern was that the wording suggested was not accurate in that article 11 assigned responsibility not only for erroneous messages but for all messages. Another concern was that the suggested wording was adding a function that article 11 was never intended to perform. It was said that the purpose of article 11 was not to assign responsibility. It dealt rather with attribution of data messages by establishing a presumption that under certain circumstances a data message would be considered as a message of the originator, and went on to qualify that presumption in case the addressee knew or ought to have known that the data message was not that of the originator. It was also said that the first sentence of paragraph 91 of the draft Guide was not correct because article 11, paragraph 4, dealt only with a presumption as to the content of the message. It was generally felt that the matter might need to be considered by the Commission in the context of its review of the Model Law.

*Article 12. Acknowledgement of receipt*  
(paragraphs 93-96)

90. It was suggested, at the outset, that additional information should be provided in the draft Guide as to the reasons why a provision on acknowledgement of receipt was needed in the Model Law. It was also suggested that the additional paragraph should contain: (a) a description of the use of acknowledgements of receipt in the context of EDI; (b) an enumeration of the ways in which acknowledgements of receipt might be required, for example, in communication agreements or in individual data messages; and (c) a comparison between the use of acknowledgements in the context of EDI and the parallel use of acknowledgement of receipt in the context of paper-based communications, particularly the system known as "return receipt requested" in postal systems. It was generally agreed that the draft Guide should briefly mention the variety of procedures available under the general rubric of "acknowledgement", ranging from a mere acknowledgement of receipt of an unspecified message to an expression of agreement with the content of a specific data message. In that connection, it was suggested that the draft Guide should make it clear that the provision contained in article 12, paragraph 5, corresponded to a certain type of acknowledgement, for example, an EDIFACT message establishing that the data message received was syntactically correct. It was also suggested that the draft Guide should point out that variety among acknowledgement procedures implied variety of the related costs.

91. With respect to paragraph 93, it was generally felt that the explanations contained in the last sentence needed to be further developed. It should be made clear that article 12 did not deal with the legal consequences that might flow from sending an acknowledgement of receipt, apart from establishing receipt of the data message. It was suggested that the following example should be given in the draft Guide: where an originator sent an offer in a data message and requested acknowledgement of receipt, the acknowledgement of receipt simply evidenced that the offer had been received. Whether or not sending that acknowledgement amounted to accepting the offer was not dealt with by the Model Law but by contract law outside the Model Law.

92. The view was expressed that the draft Guide should point out that the procedure described under article 12, paragraph 4, was purely at the discretion of the originator. It was suggested that the following example should be included in the draft Guide: where the originator sent a data message which under agreement between the parties had to be received by a certain time, and the originator requested an acknowledgement of receipt, the addressee could not deny the legal effectiveness of the message simply by withholding the requested acknowledgement.

*Article 13. Formation and validity of contracts*  
(paragraphs 97-100)

93. The Working Group found the substance of paragraphs 97-100 to be generally acceptable. It was suggested that paragraph 97 of the draft Guide should emphasize the need for a provision on formation of contract in the Model Law. The need for such a provision resulted from the doubt that might exist in many countries as to the validity of contracts concluded through the use of computer because the data messages expressing offer and acceptance might be generated by computers without immediate human intervention, thus raising doubts as to the expression of intent by the parties. Another reason for such uncertainty was inherent in the mode of communication and resulted from the absence of a paper document. As a matter of drafting, it was suggested that the word "restates" in paragraph 98 should be replaced by the word "reinforces".

*Article 14. Time and place of dispatch and receipt of data messages* (paragraphs 101-107)

94. It was generally felt that the draft Guide should further explain the reasons why article 14 had been introduced into the Model Law. Article 14 resulted from the recognition that, for the operation of many existing rules of law, it was important to ascertain the time and place of receipt of information. The use of electronic communication techniques made those difficult to ascertain. It was not uncommon for users of EDI and related means of communication to communicate from one State to another without knowing the location of information systems through which communication was operated. In addition, the location of certain communication systems might change without either of the parties being aware of the change. The Model Law was thus intended to reflect the fact that the location of information systems was irrelevant and set forth a more objective



criterion, namely, the place of business of the parties. In that connection, a suggestion was made that the draft Guide should expressly indicate that article 14 had not been intended to establish a conflict-of-laws rule.

95. A proposal was made to make it clear in the draft Guide that, in the context of the Model Law, the concept of dispatch referred to the commencement of the electronic transmission of the data message. It was generally considered that this explanation would be appropriate because "dispatch" was a term that had already an established meaning in most jurisdictions. It was agreed that the draft Guide should make it clear that the rule on dispatch was intended to supplement national rules on dispatch and not to displace them.

96. A view was expressed that it might be useful to explain in the draft Guide whether dispatch under article 14, paragraph 1, should be interpreted as occurring: "only"; "at the latest"; or "among other possibilities" at the time when the data message entered an information system outside the control of the originator. It was stated that, in view of the possible delays in transmission of the message, the originator should have the option to prove that the message had been dispatched even if it had not reached the information system of the addressee. In addition, it might be impossible for the originator to prove the time at which a data message had entered an information system outside its control. The prevailing view was that there should be no need for the Model Law to envisage such an option, since article 14, paragraph 1, was focused on the data message leaving the sphere of control of the originator. In addition, audit trails would normally make it possible to establish the time at which a given message had entered any computer system. The Working Group agreed that article 14 was intended to cover only situations where data was transmitted electronically. Should the transmission involve other means of transmission, for example, delivery of diskettes by courier, another rule might be needed. It was suggested that the matter might need to be further clarified by the Commission when reviewing article 14. It was pointed out that the application of article 14 was subject to contrary agreement by the parties. It was suggested that the draft Guide might appropriately encourage parties to conclude such agreements, particularly when using hybrid transmission methods.

97. As regards the notion of "designated information system", it was generally agreed that the draft Guide should contain more detailed explanations. For example, the mere indication of an electronic mail or telecopy address on a letterhead or other document should not be regarded as express designation of one or more information systems. By "designated information system", the Model Law was intended to cover a system that had been specifically designated by a party, for instance in the case where an offer expressly specified the address to which acceptance should be sent.

98. With respect to article 14, paragraph 5, it was generally agreed that the draft Guide should make it clear that the use of the Model Law for determining the place of receipt or dispatch under administrative, criminal or data-protection law was not intended to be precluded. The draft Guide

should indicate that article 14, paragraph 5, by its own force, did not apply to such areas of law.

99. A number of suggestions of a drafting nature were made. In the second sentence of paragraph 101, the words "If dispatch occurs where" should be replaced by the words "If dispatch occurs when". The last sentence of paragraph 102 should read as follows: "In such a situation, receipt is deemed to occur when the data message is retrieved by the addressee". In paragraph 103, the word "usable" should be replaced by the words "intelligible or usable". In paragraph 105, the words "but rather" should be replaced by the word "and". In paragraph 107, the reference to the "presumed place of receipt" should be replaced by a reference to "deemed place of receipt". In the third sentence of that paragraph, the word "presumption" should be replaced by the words "irrebuttable presumption". In the fourth sentence, the words "distinguishing between the place of receipt of a data message and the place reached by that data message" should be replaced by the words "to introduce a deemed place of receipt as distinct from the place actually reached by that data message".

### III. FUTURE WORK

#### A. *Incorporation by reference*

100. The Working Group had before it two proposals for a draft provision on incorporation by reference, one submitted by the observer for the International Chamber of Commerce (A/CN.9/WG.IV/WP.65) and another submitted by the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.IV/WP.66).

101. The Working Group engaged in a general debate as to whether the issue of incorporation by reference should be addressed in the Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication or in the context of future work. The view was expressed that there was a need to include a provision in the Model Law in order to remove the uncertainty existing in many legal systems as to whether such terms as clauses of trading-partner agreements or possible E-TERMS to be developed along the lines of INCOTERMS could be incorporated in a data message by means of a mere reference in a data message. In support of that view, it was stated that incorporation by reference was of particular importance to EDI in view of the need to abbreviate messages for reasons of economy or to use codes for reasons of machine-processability. As to the possible relationship between the kind of provision suggested for inclusion in the Model Law and existing contract law, it was stated that a provision in the Model Law should not interfere with the applicable contract law. To that effect, it was suggested that the additional provision should be limited to addressing the question whether terms were incorporated but not deal with the question whether the terms incorporated were legally binding. The suggested provision, which was said to be in line with the functional-equivalent approach taken by the Working Group in preparing the Model Law, would be aimed at expanding the application of the existing rules on incorporation by reference in a paper environment to encompass incorporation by reference in an electronic environment.



102. The prevailing view, however, was that the issue was not mature for inclusion in the Model Law and deserved further study. It was stated that both proposals presented to the Working Group needed to be further clarified on a number of issues, such as what terms would be incorporated and in what circumstances. In addition, it was stated that both proposals might appear as interfering with general rules of contract law. Moreover, it was stated that incorporation by reference in an electronic environment did not need to be addressed in the Model Law since it raised essentially the same issues as incorporation by reference in a paper-based environment, which were dealt with by general contract law. Finally, it was said that a provision distinguishing between incorporation by reference in paper-based and EDI communications would be inconsistent with the approach followed thus far by the Working Group, which was aimed at ensuring "media-neutrality".

103. The Working Group then turned to discuss the forms that future work on incorporation by reference could take. One view was that incorporation by reference should be considered as a separate future topic. That view did not attract sufficient support. It was generally thought that incorporation by reference did not raise such a range of issues that it could justify a separate consideration of the topic in the context of future work. Another view was that the issue should be addressed in the context of future work on negotiability of rights in goods. While that view received considerable support, a concern was expressed that it might be inappropriate to limit the scope of possible provisions on incorporation by reference to the area of documents of title. After discussion, the Working Group decided that the discussion of incorporation by reference should be reflected in the draft Guide to enactment of the Model Law. It was agreed that the issue of incorporation by reference might need to be further considered in the context of future work (see paragraph 117, below).

104. It was stated that, in addition to reflecting the discussion reported above, the Guide to enactment of the Model Law could elaborate on a number of points. One such point was that there was a perception among practitioners that the issue of incorporation by reference was more complex in EDI than in a paper-based environment, for example because the number of communications involved was larger and terms incorporated by reference might be more difficult to ascertain if they were in the form of data messages. There also existed a perceived need among practitioners for specific provisions dealing with incorporation by reference in the context of electronic communications. Another point was that, in view of the number of data messages involved in a particular contractual relationship conducted through EDI, the problem known as the "battle of forms" was particularly likely to arise in the context of electronic communications. Yet another point was that incorporation by reference in an electronic environment could involve not only contractual terms but also codes used in abbreviating data messages.

105. As to the context in which incorporation by reference could be discussed in the Guide to enactment of the Model Law, a number of views were expressed. One view was that it could be discussed in the context of article 4, the purpose of which was to ensure equality of treatment between EDI

and paper-based communications under all rules of law applicable outside the Model Law, including existing rules on incorporation by reference. Another view was that the issue could be addressed in the Guide in the context of the discussion of article 13.

### **B. *Negotiability of rights in goods***

106. The Working Group had before it two brief notes discussing negotiability and transferability of rights in goods in an EDI context, one submitted by the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.IV/WP.66) and another submitted by the United States of America (A/CN.9/WG.IV/WP.67).

107. It was noted that the functions of bills of lading that might be affected by the use of EDI communications included those of serving: (a) as a receipt for the cargo by the carrier; (b) as evidence of the contract of carriage with regard to its general terms and the particular details of vessel, loading and discharge ports, and nature, quantity and condition of the cargo; and (c) as a document giving the holder a number of rights, including the right to claim and receive delivery of the goods at the port of discharge and the right to dispose of the goods in transit.

108. The first two functions could be easily performed by EDI since the receipt for the cargo and information about the contract of carriage could be given by means of data messages such as EDIFACT messages. However, the third function (as document of title) raised difficulties in an EDI environment since, in the absence of a single piece of paper, it was difficult to establish the identity of the exclusive holder to whom the carrier could deliver the goods without running the risk of being faced with a claim by another party for misdelivery. In that regard, the Working Group noted that a central problem in the use of EDI bills of lading was to guarantee the singularity, or uniqueness, of the message to be relied upon by the carrier for delivering the goods. While any data message could probably be rendered unique through the use of cryptography, the possibility that the message might be fraudulently or mistakenly multiplied could not be excluded. The Working Group noted that solutions to that problem might be found in security, time-stamping or similar techniques or through a central registry in which the holder could register its rights.

109. The Working Group also noted that work on negotiability and transferability of documents of title in goods by EDI means could include establishing a preliminary list of areas of commercial practice to be covered, validating of agreements for negotiability and transferability of rights in goods through EDI, establishing criteria for parties to be holders in due course for the transfer of rights in goods or subsequently to negotiate such rights through EDI, determining the effect of negotiation of documents of title in EDI, establishing default rules for allocation of risk and electronic registries. With regard to electronic registries, it was noted that they could be governmental, central, and private. The purpose, the access, the administrator, the costs, the insurance, the allocation of risks and the security could vary depending on the nature of the registry.

110. The Working Group engaged in a general debate, with a view to identifying the scope of possible future work and issues that could be addressed. With regard to the scope of future work, one suggestion was that the work should cover multimodal transport documents of title since they essentially fulfilled the same functions and raised similar issues. Another suggestion was that, while work could include transport documents of title in general, particular emphasis should be paid to maritime bills of lading since the maritime transport area was the area in which EDI was predominantly practised and in which unification of law was urgently needed in order to remove existing impediments and to allow the practice to develop.

111. In support, it was pointed out that EDI messaging was currently restricted to the exchange of information messages in the North Atlantic maritime routes and could not develop without the support of a legal regime that would validate, and provide certainty about, transport documents in electronic form. For example, it was stated that there was a need to facilitate delivery of the cargo at the port of discharge without production of a paper bill of lading, which was often necessary for a number of reasons. One reason was that the cargo might reach the port of discharge before the documents necessary for delivery. Another reason was that often the buyer had to receive delivery and sell the cargo in order to be able to pay the price of the cargo and the freight. In addition, it was stated that there was a need to remove the legal uncertainty as to who bore the risk of the cargo not corresponding to its description when discharged. It was pointed out that usually the shipper provided the description of the goods and the bill of lading included a disclaimer that the description was that of the shipper; such disclaimer clauses were not always valid. Moreover, it was stated that there was a need to establish a functional equivalent replicating the uniqueness of the paper bill of lading, which was essential for its function as a title document.

112. Other suggestions were to address all documents of title covering tangible goods (e.g. warehouse receipts), or all documents of title covering tangible and intangible goods, or all negotiable (or even non-negotiable) instruments. In opposition to those suggestions, it was pointed out that covering such a broad range of documents would complicate work since the functions of the respective documents were different, which would make the elaboration of specific rules necessary.

113. After discussion, it was agreed that future work could focus on EDI transport documents, with particular emphasis on maritime electronic bills of lading and the possibility of their use in the context of the existing national and international legislation dealing with maritime transport. After having established a set of rules for the maritime bills of lading, the Working Group could examine the question whether issues arising in multimodal transport could be addressed by the same set of rules or whether specific rules would need to be elaborated.

114. The Working Group then turned to a discussion of possible issues that could be addressed in the context of future work on maritime bills of lading. A number of issues were mentioned. One issue was to ensure the uniqueness of an electronic bill of lading that would allow its "holder" to dispose of the cargo in transit by electronic means while

protecting the carrier from the risk of misdelivery. A number of possible ways to address that issue were suggested, including private keys to be used in communications from party to party, electronic certificates, smartcards and registries. With regard to registries, it was pointed out that a legal regime would need to be devised addressing issues, such as subject of registration, parties that could register, parties that would have access to the registry and towards whom the registration could produce effects, confidentiality, accuracy and completeness of the information registered, liability for errors and effects on third parties.

115. Another issue was the definition of the holder in an EDI environment. It was pointed out that in a paper context the holder was defined on the basis of physical possession of the paper bill of lading and was protected against good faith acquisition of rights in the goods by third parties in that possession of the bill of lading functioned as notice to third parties. In an EDI environment, where possession is not possible, the holder might be protected by other means (e.g. registration, use of public and private key sets) or might not be protected at all. Another issue involved the rights and obligations of the holder and the issuer of EDI transport documents (e.g. right of the holder to give instructions in transit and obligation of the issuer to receive and execute those instructions). It was pointed out that, in a paper-based environment, the rights of a holder were based on three principles: (a) the bill of lading was conclusive evidence of title in the goods only after endorsement (conclusive evidence rule); (b) the endorsee was the only party entitled to claim delivery of the cargo at the discharge point; and (c) only the endorsee was entitled to instruct the carrier to vary the contract and make another endorsement. In this respect, it was stated that negotiability needed to be studied in the context of trade law, security law and transportation law. It was explained that property would not be of use if acquired under trade law but effectively lost under transportation law because no right of stoppage or control could be exercised.

116. In addition, it was pointed out that the holder could have a right to possess the goods, a property right in the goods, or a right to receive delivery of the goods arising from a sales contract. It was explained that from the point of view of the carrier the most important question was who had possessory title in the goods, in other terms, to whom should the carrier deliver the goods. Yet another issue was the allocation of liability among the shipper, carrier, consignee and, possibly, a registry.

117. Other issues suggested for study were: the effects of transfer of EDI transport documents on third parties (e.g. when transfer is effective towards the carrier, third parties in the chain of endorseees, third parties not shown in the EDI bill of lading); the rights of the rightful holder in case of a wrongful transfer of the goods and the rights of the transferee in case its title proved to be defective (subject to other parties' rights); timeliness of transfer in an EDI environment; relative priority among multiple claimants of the same cargo; timeliness of messages (e.g. some messages related to precontractual terms might create rights and obligations); incorporation by reference; issues of security (principles of identification, authentication, integrity, non-repudiation) designed to promote negotiability in an open EDI environment. It was stated that the issues of security should be considered with respect to a broad

range of issues regarding negotiability. In connection with its discussion of security issues, in particular the use of cryptography, the Working Group agreed that possible future work by UNCITRAL should not affect mandatory rules of national legislation adopted for public policy reasons in certain States to restrict the use of cryptography or the export of cryptography-related techniques.

118. After discussion, the Working Group requested the Secretariat to prepare a background study on negotiability and transferability of EDI transport documents, with particular emphasis on EDI maritime transport documents, taking into account the views expressed and the suggestions made with regard to the scope of future work and the issues that

could be addressed. A number of other topics were suggested for inclusion in the study, including a report on the potential problems for the use of EDI in maritime transport under existing international instruments and a report on the work undertaken by other organizations in related areas of work. In that connection, the view was expressed that work undertaken within the Comité maritime international (CMI), or the BOLERO project ("Bill of Lading for Europe"), were aimed at facilitating the use of EDI transport documents but did not, in general, deal with the legal effects of EDI transport documents. It was stated that particular attention should be given in the study to the ways in which future work by UNCITRAL could bring legal support to the new methods being developed in the field of electronic transfer of rights.

#### **D. Working papers submitted to the Working Group on Electronic Data Interchange (EDI) at its twenty-ninth session**

##### **1. Draft Guide to enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication; note by the Secretariat**

*(A/CN.9/WG.IV/WP.64) [Original: English]*

1. In preparing the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (hereinafter referred to as "the Model Law"), the Working Group on Electronic Data Interchange noted that it would be useful to provide in a commentary additional information concerning the Model Law. In particular, at the twenty-eighth session of the Working Group, during which the text of the draft Model Law was finalized for submission to the Commission, there was general support for a suggestion that the draft Model Law should be accompanied by a guide to assist States in enacting and applying the draft Model Law. The guide, much of which could be drawn from the *travaux préparatoires* of the draft Model Law, would also be helpful to EDI users as well as to scholars in the area of EDI. The Working Group noted that, during its deliberations at that session, it had proceeded on the assumption that the draft Model Law would be accompanied by a guide. For example, the Working Group had decided in respect of a number of issues not to settle them in the draft Model Law but to address them in the

guide so as to provide guidance to States enacting the draft Model Law. As to the timing and method of preparation of the guide, the Working Group agreed that the Secretariat should prepare a draft and submit it to the Working Group for consideration at its twenty-ninth session (A/CN.9/406, para. 177).

2. No decision was made by the Working Group as to the specific structure of the guide to be prepared by the Secretariat. It is submitted that such a guide could fulfil three possible functions, namely, giving guidance to legislatures considering enactment of the Model Law, to public authorities and EDI users applying the Model Law, and to courts interpreting the Model Law. It may be noted that the content of such a guide might differ depending upon its predominant function. It has been understood by the Secretariat that, at least at the initial stage, priority should be given to the function of giving guidance to legislatures. The annex to the present note contains the draft Guide prepared by the Secretariat.

#### **Annex**

##### **DRAFT GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF COMMUNICATION\***

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\*It may be noted that the draft Guide is geared to the text of the draft Model Law as established by the Working Group upon the conclusion of its twenty-eighth session and set forth in the annex of the report of that session (A/CN.9/406). Once the Commission has completed its review and adoption of the Model Law, it is the intention of the Secretariat to finalize the Guide to take account of the deliberations and decisions in the Commission. For the convenience of the reader, it may be preferable to publish the text of the Model Law together with the Guide. This has not been done in the present document due to the availability to the Working Group of the text of the draft Model Law in the annex to document A/CN.9/406.

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## HISTORY AND PURPOSE OF THE MODEL LAW

### A. History

1. The United Nations Commission on International Trade Law (UNCITRAL) is an organ of the United Nations General Assembly established to promote the harmonization and unification of international trade law, so as to remove unnecessary obstacles to the international trade caused by inadequacies and divergences in the law affecting trade. Over the past quarter of a century, UNCITRAL, whose membership consists of States from all regions and of all levels of economic development, has implemented its mandate by formulating international conventions (the United Nations Convention on Contracts for the International Sale of Goods, the Convention on the Limitation Period in the International Sale of Goods, the United Nations Convention on the Carriage of Goods by Sea, 1978 ("Hamburg Rules"), the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, and the United Nations Convention on International Bills of Exchange and International Promissory Notes), model laws (the UNCITRAL Model Laws on International Commercial Arbitration, on International Credit Transfers and on Procurement of Goods, Construction and Services), the UNCITRAL Arbitration Rules, the Conciliation Rules of UNCITRAL, and legal guides (on construction contracts, on countertrade transactions and on electronic funds transfers).

2. The UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (hereinafter referred to as "the Model Law"), adopted by UNCITRAL in 1995, was prepared in response to a major change in the means by which communications are made between trading partners. The Model Law is intended to serve as a model to coun-

tries for the evaluation and modernization of certain aspects of their laws and practices in the field of communication involving the use of computerized or other modern techniques, and for the establishment of relevant legislation where none presently exists. The text of the Model Law is set forth in annex II to the report of UNCITRAL on the work of its twenty-eighth session.<sup>1</sup>

3. The Commission, at its seventeenth session (1984), considered a report of the Secretary-General entitled "Legal aspects of automatic data processing" (A/CN.9/254), which identified several legal issues relating to the legal value of computer records, the requirement of a writing, authentication, general conditions, liability and bills of lading. The Commission took note of a report of the Working Party on Facilitation of International Trade Procedures (WP.4), which is jointly sponsored by the Economic Commission for Europe and the United Nations Conference on Trade and Development, and is responsible for the development of UN/EDIFACT standard messages. That report suggested that, since the legal problems arising in this field were essentially those of international trade law, the Commission as the core legal body in the field of international trade law appeared to be the appropriate central forum to undertake and coordinate the necessary action.<sup>2</sup> The Commission decided to place the subject of the legal implications of automatic data processing to the flow of international trade on its programme of work as a priority item.<sup>3</sup>

<sup>1</sup>Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17).

<sup>2</sup>"Legal aspects of automatic trade data interchange" (TRADE/WP.4/R.185/Rev.1). The report submitted to the Working Party is reproduced in A/CN.9/238, annex.

<sup>3</sup>Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17 (A/39/17), para. 136.

4. At its eighteenth session (1985), the Commission had before it a report by the Secretariat entitled "Legal value of computer records" (A/CN.9/265). That report came to the conclusion that, on a global level, there were fewer problems in the use of data stored in computers as evidence in litigation than might have been expected. It noted that a more serious legal obstacle to the use of computers and computer-to-computer telecommunications in international trade arose out of requirements that documents had to be signed or be in paper form. After discussion of the report, the Commission adopted the following recommendation, which expresses some of the principles on which the Model Law is based:

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

*"Noting that the use of automatic data processing (ADP) is about to become firmly established throughout the world in many phases of domestic and international trade as well as in administrative services,*

*"Noting also that legal rules based upon pre-ADP paper-based means of documenting international trade may create an obstacle to such use of ADP in that they lead to legal insecurity or impede the efficient use of ADP where its use is otherwise justified,*

*"Noting further with appreciation the efforts of the Council of Europe, the Customs Co-operation Council and the United Nations Economic Commission for Europe to overcome obstacles to the use of ADP in international trade arising out of these legal rules,*

*"Considering at the same time that there is no need for a unification of the rules of evidence regarding the use of computer records in international trade, in view of the experience showing that substantial differences in the rules of evidence as they apply to the paper-based system of documentation have caused so far no noticeable harm to the development of international trade,*

*"Considering also that the developments in the use of ADP are creating a desirability in a number of legal systems for an adaptation of existing legal rules to these developments, having due regard, however, to the need to encourage the employment of such ADP means that would provide the same or greater reliability as paper-based documentation,*

*"1. Recommends to Governments:*

*"(a) to review the legal rules affecting the use of computer records as evidence in litigation in order to eliminate unnecessary obstacles to their admission, to be assured that the rules are consistent with developments in technology, and to provide appropriate means for a court to evaluate the credibility of the data contained in those records;*

*"(b) to review legal requirements that certain trade transactions or trade related documents be in writing, whether the written form is a condition to the enforceability or to the validity of the transaction or document, with a view to permitting, where appropriate, the transaction or document to be recorded and transmitted in computer-readable form;*

*"(c) to review legal requirements of a handwritten signature or other paper-based method of authentication on trade related documents with a view to permitting, where appropriate, the use of electronic means of authentication;*

*"(d) to review legal requirements that documents for submission to governments be in writing and manually signed with a view to permitting, where appropriate, such documents to be submitted in computer-readable form to those administrative services which have acquired the necessary equipment and established the necessary procedures;*

*"2. Recommends to international organizations elaborating legal texts related to trade to take account of the present Recommendation in adopting such texts and, where appropriate, to consider modifying existing legal texts in line with the present Recommendation."*<sup>4</sup>

5. That recommendation (hereinafter referred to as the "1985 UNCITRAL Recommendation") was endorsed by the General Assembly in resolution 40/71, paragraph 5(b), of 11 December 1985 as follows:

*"The General Assembly,*

*"... Calls upon Governments and international organizations to take action, where appropriate, in conformity with the recommendation of the Commission so as to ensure legal security in the context of the widest possible use of automated data processing in international trade; ..."*<sup>5</sup>

6. The decision by UNCITRAL to formulate model legislation on legal issues of electronic data interchange and related means of communication may be regarded as a consequence of the process that led to the adoption by the Commission of the 1985 UNCITRAL recommendation.

7. As was pointed out in several documents and meetings involving the international EDI community, e.g. in meetings of WP.4, there was a general feeling that, in spite of the efforts made through the 1985 UNCITRAL recommendation, little progress had been made to achieve the removal of the mandatory requirements in national legislation regarding the use of paper and handwritten signatures. It has been suggested by the Norwegian Committee on Trade Procedures (NORPRO) in a letter to the Secretariat that "one reason for this could be that the 1985 UNCITRAL recommendation advises on the need for legal update, but does not give any indication of how it could be done". In this vein, the Commission considered what follow-up action to the 1985 UNCITRAL recommendation could usefully be taken so as to enhance the needed modernization of legislation.

8. At its twenty-first session (1988), the Commission considered a proposal to examine the need to provide for the legal principles that would apply to the formation of international commercial contracts by electronic means. It was noted that there existed no refined legal structure for the important and rapidly growing field of formation of contracts by electronic means and that future work in that area could help to fill a legal vacuum and to reduce uncertainties and difficulties encountered in practice. The Commission requested the Secretariat to prepare a preliminary study on the topic.<sup>6</sup>

9. At its twenty-third session (1990), the Commission had before it a report entitled "Preliminary study of legal issues related to the formation of contracts by electronic means" (A/CN.9/333). The report summarized work that had been undertaken in the European Communities and in the United States of America on the requirement of a writing as well as other issues that had been identified as arising in the formation of contracts by electronic means. The efforts to overcome some of those problems by the use of model communication agreements were also discussed. The Commission requested the Secretariat to continue its examination of the legal issues related to the formation of contracts by electronic means

<sup>4</sup>Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), para. 360.

<sup>5</sup>Resolution 40/71 was reproduced in *United Nations Commission on International Trade Law, Yearbook*, Volume XVI: 1985 (United Nations publication, Sales No. E.87.V.4), part one, section D.

<sup>6</sup>Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), paras. 46 and 47, and *ibid.*, Forty-fourth Session, Supplement No. 17 (A/44/17), para. 289.

and to prepare for the Commission at its twenty-fourth session a report that would analyse existing and proposed model communication agreements with a view to recommending whether a model agreement should be available for worldwide use and, if so, whether the Commission should undertake its preparation. The Commission expressed the wish that the report would give it the basis on which to decide what work might be undertaken by the Commission in the field.<sup>7</sup>

10. At its twenty-fourth session (1991), the Commission had before it a report entitled "Electronic data interchange" (A/CN.9/350). The report described the current activities in the various organizations involved in the legal issues of electronic data interchange (EDI) and analysed the contents of a number of standard interchange agreements already developed or then being developed. It also pointed out that such documents varied considerably according to the various needs of the different categories of users they were intended to serve and that the variety of contractual arrangements had sometimes been described as hindering the development of a satisfactory legal framework for the business use of EDI. It suggested that there was a need for a general framework that would identify the issues and provide a set of legal principles and basic legal rules governing communication through EDI. It concluded that such a basic framework could, to a certain extent, be created by contractual arrangements between parties to an EDI relationship and that the existing contractual frameworks that were proposed to the community of EDI users were often incomplete, mutually incompatible, and inappropriate for international use since they relied to a large extent upon the structures of local law.

11. The report noted that, although many efforts were currently being undertaken by different technical bodies, standardization institutions and international organizations with a view to clarifying the issues of EDI, none of the organizations that were primarily concerned with worldwide unification and harmonization of legal rules had, as yet, started working on the subject of a communication agreement. With a view to achieving the harmonization of basic EDI rules for the promotion of EDI in international trade, the report suggested that the Commission might wish to consider the desirability of preparing a standard communication agreement for use in international trade. It pointed out that work by the Commission in this field would be of particular importance since it would involve participation of all legal systems, including those of developing countries that were already or would soon be confronted with the issues of EDI.

12. The report also suggested that possible future work for the Commission on the legal issues of EDI might concern the subject of the replacement of negotiable documents of title, and more particularly transport documents, by EDI messages. That was the area where the need for statutory provisions seemed to be developing most urgently with the increased use of EDI. The report suggested that the Secretariat might be requested to submit a report to a further session of the Commission on the desirability and feasibility of preparing such a text.

13. The Commission was agreed that the legal issues of EDI would become increasingly important as the use of EDI developed and that the Commission should undertake work in that field. There was wide support for the suggestion that the Commission should undertake the preparation of a general framework identifying the legal issues and providing a set of legal principles and basic legal rules governing communication through EDI. The Commission was agreed that, given the number of issues involved, the matter needed detailed consideration by a Working Group.

14. As regards the preparation of a standard communication agreement for worldwide use in international trade, support was given to the idea that such a project might be appropriate for the

Commission. However, divergent views were expressed as to whether the preparation of such a standard communication agreement should be undertaken as a priority item. Under one view, work on a standard agreement should be undertaken immediately for the reasons expressed in the report, namely that no such document existed or seemed to be prepared by any of the organizations that were primarily concerned with worldwide unification and harmonization of legal rules and that the Commission would be a particularly good forum since it involved participation of all legal systems, including those of developing countries that were already or would soon be confronted with the issues of EDI. The prevailing view, however, was that it was premature to engage immediately in the preparation of a standard communication agreement and that it might be preferable, until the next session of the Commission, to monitor developments in other organizations, particularly the Commission of the European Communities and the Economic Commission for Europe. It was pointed out that high-speed electronic commerce required a new examination of basic contract issues such as offer and acceptance, and that consideration should be given to legal implications of the role of central data managers in international commercial law.

15. After deliberation, the Commission decided that a session of the Working Group on International Payments would be devoted to identifying the legal issues involved and to considering possible statutory provisions, and that the Working Group would report to the Commission on the desirability and feasibility of undertaking further work such as the preparation of a standard communication agreement. The Commission also took note of the suggestion by the Secretariat to prepare a uniform law on the replacement of negotiable documents of title, and more particularly transport documents, by EDI messages.<sup>8</sup>

16. At its twenty-fifth session (1992), the Commission had before it the report of the Working Group on International Payments on the work of its twenty-fourth session (A/CN.9/360). As requested by the Commission, the report contained recommendations for future work by the Commission with respect to the legal issues of EDI. The report suggested that any future work by the Commission in the field should be aimed at facilitating the increased use of EDI. The report also noted that the deliberations of the Working Group had made it clear that there existed a need for legal norms to be developed in the field of EDI. The report further suggested that the review of legal issues arising out of the increased use of EDI had also demonstrated that among those issues some would most appropriately be dealt with in the form of statutory provisions. Examples of such issues included: formation of contracts; risk and liability of commercial partners and third-party service providers involved in EDI relationships; extended definitions of "writing" and "original" to be used in an EDI environment; and issues of negotiability and documents of title (A/CN.9/360, para. 129).

17. The report also suggested that other issues arising from the use of EDI were not ready for consideration in the context of statutory provisions and would require further study or further technical or commercial developments. While it was generally felt by the Working Group that it was desirable to seek the high degree of legal certainty and harmonization provided by the detailed provisions of a uniform law, it was also felt that care should be taken to preserve a flexible approach to some issues where legislative action might be premature or inappropriate. As an example of such an issue, it was stated that it might be fruitless to attempt providing legislative unification of rules on evidence applicable to EDI messaging. It was stated in the report that, on some such issues, the Commission might deem it appropriate to undertake the preparation of legal rules, legal principles or recommendations (A/CN.9/360, para. 130).

<sup>7</sup>Ibid., *Forty-fifth Session, Supplement No. 17* (A/45/17), paras. 38-40.

<sup>8</sup>Ibid., *Forty-sixth Session, Supplement No. 17* (A/46/17), paras. 311-317.



18. The Working Group recommended that the Commission should undertake the preparation of legal norms and rules on the use of EDI in international trade. The Working Group was agreed that such norms and rules should be sufficiently detailed to provide practical guidance to EDI users as well as to national legislators and regulatory authorities. The Group also recommended that the Commission, while it should aim at providing the greatest possible degree of certainty and harmonization, should not, at that stage, make a decision as to the final form in which those norms and rules would be expressed (A/CN.9/360, para. 131).

19. As regards the possible preparation of a standard communication agreement for world-wide use in international trade, the Working Group was agreed that, at least for the time being, it was not necessary for the Commission to develop a standard communication agreement. However, the Working Group noted that, in line with the flexible approach recommended to the Commission concerning the form of the final instrument, situations might arise where the preparation of model contractual clauses would be regarded as an appropriate way of addressing specific issues (A/CN.9/360, para. 132).

20. At its twenty-fifth session, in line with the suggestions of the Working Group, the Commission was agreed that there existed a need to investigate further the legal issues of EDI and to develop practical rules in that field. It was agreed, along the lines suggested by the Working Group, that no decision should be taken at that early stage as to the final form or the final content of the legal rules to be prepared by the Commission. In particular, it was agreed that, while some issues would most appropriately be dealt with in the form of statutory provisions, other issues might more appropriately be dealt with through model contractual clauses.

21. After discussion, the Commission endorsed the recommendation contained in the report of the Working Group (A/CN.9/360, paras. 129-133) and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange.<sup>9</sup>

### B. Purpose

22. The Working Group devoted its twenty-fifth to twenty-eighth sessions to the preparation of legal rules. At the outset, it was noted that, while practical solutions to the legal difficulties raised by the use of EDI were often sought within contracts (A/CN.9/WG.IV/WP.53, paras. 35-36), the contractual approach to EDI was developed not only because of its intrinsic advantages such as its flexibility, but also for lack of specific provisions of statutory or case law. The contractual approach is limited in that it cannot overcome any of the legal obstacles to the use of EDI that might result from mandatory provisions of applicable statutory or case law. In that respect, one difficulty inherent in the use of communication agreements results from uncertainty as to the weight that would be carried by some contractual stipulations in case of litigation. Another limitation to the contractual approach results from the fact that parties to a contract cannot effectively regulate the rights and obligations of third parties. At least for those parties not participating in the contractual arrangement, statutory law based on a model law or an international convention seems to be needed (see A/CN.9/350, para. 107).

23. The Working Group considered preparing uniform rules with the aim of eliminating the legal obstacles to, and uncertainties in, the use of modern communication techniques, where effective removal of such obstacles and uncertainties could only be achieved by statutory provisions. One purpose of the uniform rules

is to enable potential EDI users to establish a secure EDI relationship by way of a communication agreement within a closed network. The second purpose of the uniform rules is to set forth a basic framework for the development of EDI outside such a closed network in an open environment, including a regulation of some of the issues concerning the situation of third parties. It should be noted, however, that the aim of the uniform rules is to enable, and not to impose, the use of EDI and related means of communication.

24. As to the form of the uniform rules, the Working Group was agreed that it should proceed with its work on the assumption that the uniform rules should be prepared in the form of statutory provisions. While it was agreed that the form of the text should be that of a "model law", it was felt, at first, that, owing to the special nature of the legal text being prepared, a more flexible term than "model law" needed to be found. It was observed that the title should reflect that the text contained a variety of provisions relating to existing rules scattered throughout various parts of different national laws in a typical enacting State. It was thus a possibility that enacting States would not necessarily incorporate the text as a whole and that the provisions of such a "model law" would not necessarily appear together in any one particular place in the national law. The text could be described, in the parlance of one legal system, as a "miscellaneous statute amendment act". The Working Group agreed that this special nature of the text would be better reflected by the use of the term "model statutory provisions". The view was also expressed that the nature and purpose of the "model statutory provisions" could be explained in an introduction or guidelines accompanying the text.

25. At its twenty-eighth session, however, the Working Group reviewed its earlier decision to formulate a legal text in the form of "model statutory provisions" (A/CN.9/390, para. 16). It was widely felt that the use of the term "model statutory provisions" might raise uncertainties as to the legal nature of the instrument. While some support was expressed for the retention of the term "model statutory provisions", the widely prevailing view was that the term "model law" should be preferred. It was widely felt that, as a result of the course taken by the Working Group as its work progressed towards the completion of the text, the model statutory provisions could be regarded as a balanced and discrete set of rules, which could also be implemented as a whole in a single instrument.

26. In preparing and adopting the Model Law, the Commission was mindful that the Model Law would be a more effective tool for States modernizing their legislation if background and explanatory information would be provided to executive branches of Governments and parliaments to assist them in using the Model Law. The Commission was also aware of the likelihood that the Model Law would be used in a number of States with limited familiarity with the type of communication techniques considered in the Model Law. The information presented in this Guide is intended to explain why the provisions in the Model Law have been included as essential minimum features of a statutory device designed to achieve the objectives of the Model Law. Such information might assist States in considering which, if any, of the provisions of the Model Law might have to be varied to take into account particular national circumstances.

## I. INTRODUCTION TO THE MODEL LAW

### A. Objectives

27. The decision by UNCITRAL to formulate model legislation on EDI and related means of communication was taken in response to the fact that in a number of countries the existing legislation governing communication and storage of information is

<sup>9</sup>Ibid., Forty-seventh Session, Supplement No. 17 (A/47/17), paras. 141-148.

inadequate or outdated. This may result in uncertainty as to the legal nature and validity of information presented in a form other than a traditional paper-based document. While sound laws and practices are necessary in all countries where the use of EDI and electronic mail is becoming widespread, this need is also felt in many countries with respect to such communication techniques as teletype and telex.

28. Furthermore, the Model Law may help to remedy disadvantages that stem from the fact that inadequate legislation at the national level creates obstacles to international trade, a significant amount of which is linked to the use of modern communication techniques. Disparities among, and uncertainty about, national legal regimes governing the use of such communication techniques may contribute to limiting the extent to which businesses may access international markets.

29. The objectives of the Model Law, which include enabling, or facilitating, the use of EDI and related means of communication and providing equal treatment to users of paper-based documentation and to users of computer-based information, are essential for fostering economy and efficiency in international trade. By incorporating the procedures prescribed in the Model Law in its national legislation for those situations where parties opt to use electronic means of communication, an enacting State may create a media-neutral environment.

### B. Scope

30. The title of the Model Law refers to "EDI and related means of communication". While a definition of "EDI" is provided in article 2, the Model Law does not specify what "related means of communication" are envisaged. In preparing the Model Law, the Commission decided that, in addressing the subject matter before it, it would have in mind a broad notion of EDI, covering a variety of trade-related uses of EDI that might be referred to broadly under the rubric of "electronic commerce" (see A/CN.9/360, paras. 28-29), although other descriptive terms were also proposed. Among the means of communication encompassed in the notion of "electronic commerce" are the following modes of transmission based on the use of electronic techniques: communication by means of EDI defined narrowly as the computer-to-computer transmission of data in a standardized format; transmission of electronic messages involving the use of either publicly available standards or proprietary standards; transmission by electronic means of free-formatted text. It was also noted that, in certain circumstances, the notion of "electronic commerce" might cover the use of techniques such as telex and teletype.

31. There may exist situations where digitalized information initially dispatched in the form of a standardized EDI message might, at some point in the communication chain between the sender and the recipient, be forwarded in the form of a computer-generated telex or in the form of a teletype of a computer print-out. Such situations are intended to be covered by the Model Law, based on a consideration of the users' need for a consistent set of rules to govern a variety of communication techniques that might be used interchangeably. More generally, it may be noted that, as a matter of principle, no communication technique is excluded from the scope of the Model Law since future technical developments might need to be accommodated. It should be noted that, while the Model Law was drafted with constant reference to the more modern communication techniques, e.g. EDI and electronic mail, the principles on which the Model Law is based, as well as its provisions are intended to apply also in the context of less advanced communication techniques, such as teletype.

32. The objectives of the Model Law are best served by the widest possible application of the Model Law. Thus, although

there is provision made in the Model Law for exclusion of certain situations from the scope of articles 5, 6, 7, 13 and 14, an enacting State might decide not to enact in its legislation substantial restrictions on the scope of application of the Model Law.

33. The Model Law is intended to provide a set of basic or "core" rules but it is not intended to answer all questions that may arise with respect to legal issues in the context of the use of electronic communications. In particular, the legal issues that may arise in the context of negotiable instruments and other documents of title, e.g. negotiable bills of lading, remain outside the purview of the Model Law. UNCITRAL expects to start working on the formulation of additional provisions needed to address those issues. It may be expected that the provisions on negotiability in an electronic environment to be formulated by UNCITRAL would be designed to foster the same objectives as those of the Model Law.

### C. A "framework" law to be supplemented by technical regulations

34. The Model Law is intended to provide essential procedures and principles for facilitating the use of modern communication techniques in various types of circumstances. However, it is a "framework" law that does not itself set forth all the rules and regulations that may be necessary to implement those communication techniques in an enacting State. Accordingly, an enacting State may be envisaged to issue regulations to fill in the procedural details for procedures authorized by the Model Law and to take account of the specific, possibly changing, circumstances at play in the enacting State without compromising the objectives of the Model Law.

35. It should be noted that the communication techniques considered in the Model Law, beyond raising matters of procedure to be addressed in the implementing technical regulations, may raise certain legal questions the answers to which will not necessarily be found in the Model Law, but rather in other bodies of law. Such other bodies of law may include, for example, the applicable administrative, contract, criminal and judicial-procedure law.

### D. The "functional-equivalent" approach

36. The Model Law is based on the recognition that legal requirements prescribing the use of traditional paper-based documentation constitute the main obstacle to the development of modern means of communication. In the preparation of the Model Law, consideration was given to a possibility of dealing with impediments to the use of EDI posed by such requirements in national laws by way of an extension of the scope of such notions as "writing", "signature" and "original", with a view to encompassing computer-based techniques. Such an approach is used in a number of existing legal instruments, e.g. article 13 of the United Nations Convention on Contracts for the International Sale of Goods. It was observed that the Model Law should permit States to adapt their domestic legislation to developments in communications technology applicable to trade law without necessitating the wholesale removal of the paper-based requirements themselves or disturbing the legal concepts and approaches underlying those requirements. At the same time, it was said that the electronic fulfilment of writing requirements might in some cases necessitate the development of new rules. This was due to one of many distinctions between paper-based documents and EDI, namely, that the latter were readable by the human eye, while the former were not so readable unless reduced to paper or displayed on a screen.

37. The Model Law thus relies on a new approach, sometimes referred to as the "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 EDI techniques. For example, among the functions served by a paper document are the following: to provide that a document would be legible by all; to provide that a document would remain unaltered over time; to allow for the reproduction of a document so that each party would hold a copy of the same data; to allow for the authentication of data by means of a signature; and to provide that a document would be in a form acceptable to public authorities and courts. It should be noted that in respect of all of the above-mentioned functions of paper, electronic records can provide the same level of security as paper and, in most cases, a much higher degree of reliability and speed, especially with respect to the identification of the source and content of the data, provided that a number of technical and legal requirements are met. However, the adoption of the functional-equivalent approach should not result in imposing on EDI users more stringent standards of security (and the related costs) than in a paper-based environment.

38. A data message, in and of itself, cannot be regarded as an equivalent of a paper document in that it is of a different nature and does not necessarily perform all conceivable functions of a paper document. That is why the Model Law adopted a flexible standard, taking into account the various layers of existing requirements in a paper-based environment: when adopting the "functional-equivalent" approach, attention was given to the existing hierarchy of form requirements, which provides distinct levels of reliability, traceability and unalterability with respect to paper-based documents. For example, the requirement that data be presented in written form (which constitutes a "threshold requirement") is not to be confused with more stringent requirements such as "signed writing", "signed original" or "authenticated legal act".

39. The Model Law 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 the corresponding paper document performing the same function.

#### E. Default rules and mandatory law

40. The decision to undertake the preparation of the Model Law was based on the recognition that, in practice, solutions to most of the legal difficulties raised by the use of modern means of communication are sought within contracts. The Model Law embodies the principle of party autonomy in article 10 with respect to the provisions contained in chapter III. Chapter III contains a set of rules of the kind that would typically be found in agreements between parties, e.g. interchange agreements or "system rules". They may be used by parties as a basis for concluding more detailed agreements. They may also be used to supplement the terms of agreements in cases of gaps or omissions in contractual stipulations. In addition, they may be regarded as setting a minimum standard for situations where data messages are exchanged without a previous agreement being entered into by the communicating parties, e.g. in the context of "open-EDI".

41. The provisions contained in chapter II are of a different nature. One of the main purposes of the Model Law is to enable the use of modern communication techniques and to provide certainty with the use of such techniques where obstacles or uncertainty resulting from statutory provisions could not be avoided by contractual stipulations. The provisions contained in chapter II may, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. Such well-established rules are normally of a mandatory nature

since they generally reflect decisions of public policy. The provisions contained in chapter II should be regarded as stating the minimum acceptable form requirement and are, for that reason, of a mandatory nature, unless expressly stated otherwise in those provisions.

#### F. Assistance from UNCITRAL secretariat

42. In line with its training and assistance activities, the UNCITRAL secretariat may provide technical consultations for Governments preparing legislation based on the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, as it may for Governments considering legislation based on other UNCITRAL model laws, or considering adhesion to one of the international trade law conventions prepared by UNCITRAL.

43. Further information concerning the Model Law, as well as the Guide, and other model laws and conventions developed by UNCITRAL, may be obtained from the secretariat at the address below. The secretariat welcomes comments concerning the Model Law and the Guide, as well as information concerning enactment of legislation based on the Model Law.

International Trade Law Branch, Office of Legal Affairs, United Nations

Vienna International Centre P.O. Box 500 A-1400, Vienna, Austria

Telex: 135612 uno a

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## II. ARTICLE-BY-ARTICLE REMARKS

### Chapter I. General provisions

#### Article 1. Sphere of application

44. The purpose of article 1, which is to be read in conjunction with the definition of "data message" under article 2(a), is to delineate the scope of application of the Model Law. The approach used in the Model Law is to provide in principle for the coverage of all factual situations where information is generated, stored or communicated, irrespective of the medium on which such information may be affixed. It was felt during the preparation of the Model Law that exclusion of any form or medium by way of a limitation in the scope of the Model Law might result in practical difficulties and would run counter to the purpose of providing truly "media-neutral" rules.

45. However, it was also felt that the Model Law should contain an indication that its focus was on the types of situations encountered in the commercial area and that it had been prepared against the background of trade relationships. For that reason, article 1 indicates that the Model Law forms part of "commercial law" and provides, in a footnote, indications as to what is meant thereby. Such indications, which may be particularly useful for those countries where there does not exist a discrete body of commercial law, are modelled, for reasons of consistency, on the footnote to article 1 of the Model Law on International Commercial Arbitration. In certain countries, the use of footnotes in a statutory text would not be regarded as acceptable legislative practice. National authorities implementing the Model Law might thus consider the possible inclusion of the text of footnotes in the body of the Law itself.

46. The Model Law applies to all kinds of data messages that might be generated, stored or communicated, and nothing in the Model Law should prevent an implementing State to extend the

scope of the Model Law to cover uses of EDI and related means outside the commercial sphere. For example, while the focus of the Model Law is not on the relationships between EDI users and public authorities, the Model Law is not intended to be inapplicable to such relationships.

47. Some countries have special consumer protection laws that may govern certain aspects of the use of information systems. With respect to such consumer legislation, as was the case with previous UNCITRAL instruments (e.g. the Model Law on International Credit Transfers), it was felt that an indication should be given that the Model Law had been drafted without special attention being given to issues that might arise in the context of consumer protection. At the same time, it was felt that there was no reason why situations involving consumers should be excluded from the scope of the Model Law by way of a general provision, particularly since the provisions of the Model Law might be found appropriate for consumer protection, depending on legislation in each implementing State. The footnote to chapter I thus recognizes that any such consumer protection law may take precedence over the provisions in the Model Law. Legislators implementing the Model Law may wish to consider whether the Model Law should apply to consumers. The question of which individuals or corporate bodies would be regarded as "consumers" is left to applicable law outside the Model Law.

48. Another possible limitation of the scope of the Model Law is contained in the second footnote. In principle, the Model Law applies to both international and domestic uses of data messages. The footnote to article 1 is intended for use by implementing States that might wish to limit the applicability of the Model Law to international cases. It indicates a possible test of internationality for use by those States as a possible criterion for distinguishing international cases from domestic ones.

49. It is recommended that application of the Model Law be made as wide as possible. Particular caution should be used in excluding the application of the Model Law by way of a limitation of its scope to international uses of data messages, since such a limitation may be seen as negatively affecting the objectives of the Model Law. Furthermore, the variety of procedures available under the Model Law (particularly articles 5-7) to limit the use of data messages if necessary (e.g. for purposes of public policy) may make it less necessary to limit the scope of the Model Law. Moreover, legal certainty to be provided by the Model Law is necessary for both domestic and international trade, and a duality of regimes governing the use of electronic means of recording and communication of data might create a serious obstacle to the use of such means.

#### References:

- A/CN.9/406, paras. 80-85
- A/CN.9/WG.IV/WP.62, article 1
- A/CN.9/390, paras. 21-43
- A/CN.9/WG.IV/WP.60, article 1
- A/CN.9/387, paras. 15-28
- A/CN.9/WG.IV/WP.57, article 1
- A/CN.9/373, paras. 21-25 and 29-33
- A/CN.9/WG.IV/WP.55, paras. 15-20

#### Article 2. Definitions

##### "Data message"

50. The notion of "data message" is not limited to communication but also intended to encompass computer-generated records that are not intended for communication. Thus, the notion of "message" includes the notion of "record". However, a definition of "record" in line with the characteristic elements of "writing" in article 6 may be added in jurisdictions where it would appear to be necessary.

51. The definition of "data message" is also intended to cover the case of revocation or amendment of a data message, provided that the revocation or amendment is itself contained in a data message.

##### "Originator"

52. In most legal systems, the notion of "person" is used to designate the subjects of rights and obligations and should be interpreted as covering both natural persons and corporate bodies or other legal entities. Data messages that are generated automatically by computers without direct human intervention are intended to be covered by subparagraph (c). However, the Model Law should not be misinterpreted as allowing for a computer to be made the subject of rights and obligations. Data messages that are generated automatically by computers without direct human intervention should be regarded as "originating" from the legal entity on behalf of which the computer is operated.

##### "Intermediary"

53. The focus of the Model Law is on the relationship between the originator and the addressee, and not on the relationship between either the originator or the addressee and any intermediary. However, the Model Law does not ignore the paramount importance of intermediaries in the field of electronic communications. In addition, the notion of "intermediary" is needed in the Model Law to establish the necessary distinction between originators or addressees and third parties.

54. The definition of "intermediary" is intended to cover any person, other than the originator and the addressee, who performs any of the functions of an intermediary. The main functions of an intermediary are listed in subparagraph (e), namely receiving, transmitting or storing data messages on behalf of another person. Additional "value-added services" may be performed by network operators and other intermediaries, such as formatting, translating, recording and preserving data messages.

##### "Information system"

55. The definition of "information system" is intended to cover the entire range of technical means used for transmitting, receiving and storing information. For example, depending on the factual situation, the notion of "information system" could be indicating a communications network, and in other instances an electronic mailbox or even a telecopier. The Model Law contains no indication as to whether the information system is located on the premises of the addressee or on other premises.

#### References:

- A/CN.9/406, paras. 132-156
- A/CN.9/WG.IV/WP.62, article 2
- A/CN.9/390, paras. 44-65
- A/CN.9/WG.IV/WP.60, article 2
- A/CN.9/387, paras. 29-52
- A/CN.9/WG.IV/WP.57, article 1
- A/CN.9/373, paras. 11-20, 26-28 and 35-36
- A/CN.9/WG.IV/WP.55, paras. 23-26
- A/CN.9/360, paras. 29-31
- A/CN.9/WG.IV/WP.53, paras. 25-33

#### Article 3. Interpretation

56. Article 3 is inspired by article 7 of the United Nations Convention on Contracts for the International Sale of Goods. It is intended to provide guidance for interpretation of the Model Law by courts and other national or local authorities. Particularly in

federal States, it may be useful to provide such guidance, which is aimed at limiting the extent to which a uniform text, once incorporated in local legislation, would be interpreted only by reference to the concepts of local law.

57. The purpose of paragraph (1) is to draw the attention of courts and other national authorities to the fact that the provisions of the Model Law (or the provisions of the instrument implementing the Model Law), while not having a built-in international character, are of international origin and should be interpreted as such.

58. As to the general principles on which the Model Law is based, the following non-exhaustive list may be considered: (a) to facilitate electronic commerce among and within nations; (b) to validate transactions entered into by means of new information technologies; (c) to promote and encourage the implementation of new information technologies; (d) to promote the uniformity of law; and (e) to support commercial practice.

#### References:

- A/CN.9/406, paras. 86-87
- A/CN.9/WG.IV/WP.62, article 3
- A/CN.9/390, paras. 66-73
- A/CN.9/WG.IV/WP.60, article 3
- A/CN.9/387, paras. 53-58
- A/CN.9/WG.IV/WP.57, article 3
- A/CN.9/373, paras. 38-42
- A/CN.9/WG.IV/WP.55, paras. 30-31

## Chapter II. Application of legal requirements to data messages

### Article 4. Legal recognition of data messages

59. Article 4 embodies the fundamental principle that data messages should not be discriminated against. It is intended to apply notwithstanding any statutory requirements for a writing or an original. That fundamental principle is intended to find general application and its scope should not be limited to evidence or other matters covered in articles 5-8.

#### References:

- A/CN.9/406, paras. 91-94
- A/CN.9/WG.IV/WP.62, article 5 *bis*
- A/CN.9/390, paras. 79-87
- A/CN.9/WG.IV/WP.60, article 5 *bis*
- A/CN.9/387, paras. 93-94

### Article 5. Writing

60. Article 5 is intended to define the minimum standard to be met by a data message in order to be considered as meeting a requirement that information be in writing. It may be noted that article 5 is part of a set of three articles (articles 5, 6 and 7), which share the same structure and should be read together.

61. Implementing legislators are invited to recognize the efforts that were made, in the preparation of the Model Law, with a view to identifying the functions traditionally performed by various kinds of "writings" in a paper-based environment. For example, the following non-exhaustive list of functions was considered as some among the reasons why national laws might require the use of "writings": (a) to ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves; (b) to help the parties be aware of the consequences of their entering into a contract; (c) to provide that a document

would be legible by all; (d) to provide that a document would remain unaltered over time and provide a permanent record of a transaction; (e) to allow for the reproduction of a document so that each party would hold a copy of the same data; (f) to allow for the authentication of data by means of a signature; (g) to provide that a document would be in a form acceptable to public authorities and courts; (h) to finalize the intent of the author of the writing and provide a record of that intent; (i) to allow for the easy storage of data in a tangible form; (j) to facilitate control and subsequent audit for accounting, tax or regulatory purposes; and (k) to bring legal rights and obligations into existence in those cases where a writing was required for validity purposes.

62. However, in the preparation of the Model Law, it was found that it would be inappropriate to adopt an overly comprehensive notion of the functions performed by writing. Existing requirements that data be presented in written form, though generally not focusing on the functions to be performed by a writing, often combine the requirement of a writing with concepts distinct from writing, such as signature and original. Thus, when adopting a functional approach, attention should be given to the fact that the requirement of a writing should be considered as the lowest layer in a hierarchy of form requirements, which provide distinct levels of reliability, traceability and unalterability with respect to paper-based documents. The requirement that data be presented in written form (which can be described as a "threshold requirement") should thus not be confused with more stringent requirements such as "signed writing", "signed original" or "authenticated legal act". For example, under certain national laws, a written document that is neither dated nor signed, and the author of which either is not identified in the written document or is identified by a mere letterhead, would be regarded as a writing although it might be of little evidential weight in the absence of other evidence (e.g. testimony) regarding the authorship of the document. In addition, the notion of unalterability should not be considered as built into the concept of writing as an absolute requirement since a writing in pencil might still be considered a writing under certain existing legal definitions. Taking into account the way in which such issues as integrity of the data and protection against fraud are dealt with in a paper-based environment, a fraudulent document would nonetheless be regarded as a "writing". In general, notions such as "evidence" and "intent of the parties to bind themselves" are to be tied to the more general issues of reliability and authentication of the data and should not be included in the definition of a "writing".

63. The purpose of article 5 is not to establish a requirement that, in all instances, trade data messages should fulfil all conceivable functions of a writing but rather to take into account that, when establishing a requirement that certain information has to be presented in written form, legislators generally intend to focus on specific functions of a "writing", for example, its evidentiary function in the context of tax law or its warning function in the context of civil law. Thus, in setting out criteria for a functional equivalent of paper, article 5 focuses on the basic notion of the information being capable of being reproduced and read. That notion is expressed in article 5 in terms that were found to provide an objective criterion, namely that the information in a data message must be accessible so as to be usable for subsequent reference.

64. The principle embodied in paragraph (2) of articles 5-7 is that an enacting State may exclude from the application of those articles certain situations to be specified in the legislation enacting the Model Law. An enacting State may wish to exclude specifically certain types of situations, depending in particular on the purpose of the formal requirement in question. One such type of situation may be the case of writing requirements intended to provide notice or warning of specific factual or legal risks, for example, requirements for warnings to be placed on certain types of products. Other specific exclusion might be considered, for

example in the context of formalities required pursuant to international treaty obligations of the enacting State (e.g. the requirement that a cheque be in writing pursuant to the Convention providing a Uniform Law for Cheques, Geneva, 1931) and other kinds of situations and areas of law that are beyond the power of the enacting State to change by means of a statute.

65. Paragraph (2) was included with a view to enhancing the acceptability of the Model Law. It recognizes that the matter of specifying exclusions should be left to enacting States, an approach that would take better account of differences in national circumstances. However, it is strongly advised against using the possibilities opened by paragraph (2) to establish blanket exclusions, thereby undermining the objectives of the Model Law. Numerous exclusions from the scope of articles 5-7 would raise needless obstacles to the development of modern communication techniques, since what the Model Law contains are very fundamental principles and approaches that are expected to find general application.

#### References:

- A/CN.9/406, paras. 95-101
- A/CN.9/WG.IV/WP.62, article 6
- A/CN.9/390, paras. 88-96
- A/CN.9/WG.IV/WP.60, article 6
- A/CN.9/387, paras. 66-80
- A/CN.9/WG.IV/WP.57, article 6
- A/CN.9/WG.IV/WP.58, annex
- A/CN.9/373, paras. 45-62
- A/CN.9/WG.IV/WP.55, paras. 36-49
- A/CN.9/360, paras. 32-43
- A/CN.9/WG.IV/WP.53, paras. 37-45
- A/CN.9/350, paras. 68-78
- A/CN.9/333, paras. 20-28
- A/CN.9/265, paras. 59-72

#### Article 6. Signature

66. Article 6 is based on the recognition of the functions of a signature in a paper-based environment. In the preparation of the Model Law, the following functions of a signature were considered: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; to associate that person with the content of a document. It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that was signed. For example, a signature might attest to the intent of a party to be bound by the content of a signed contract; the intent of a person to endorse authorship of a text; the intent of a person to associate itself with the content of a document written by someone else; the fact that, and the time when, a person had been at a given place.

67. It may be noted that, alongside the traditional handwritten signature, there exist various types of procedures, sometimes also referred to as "signatures", which provide various levels of certainty. For example, in some countries, there exists a general requirement that contracts for the sale of goods above a certain amount should be "signed" in order to be enforceable. However, the concept of a signature adopted in that context is such that a stamp, a typewritten signature or a printed letterhead might be regarded as sufficient to fulfil the signature requirement. At the other end of the spectrum, there exist requirements that combine the traditional handwritten signature with additional security procedures such as the confirmation of the signature by witnesses.

68. It might be desirable to develop functional equivalents for the various types and levels of signature requirements in existence. Such an approach would increase the level of certainty as to the degree of legal recognition that could be expected from the use of

the various means of authentication used in EDI practice as substitutes for "signatures". However, the notion of signature is intimately linked to the use of paper and there might exist no technical solutions for accommodating all existing types and uses of "signature" in a dematerialized environment. Furthermore, any attempt to develop rules on standards and procedures to be used as substitutes for specific instances of "signatures" might create the risk of tying the legal framework provided by the Model Law to a given state of technical development.

69. With a view to ensuring that a message that was required to be authenticated should not be denied legal value for the sole reason that it was not authenticated in a manner peculiar to paper documents, article 6 adopts a comprehensive approach. It establishes the general conditions under which data messages would be regarded as authenticated with sufficient credibility and would be enforceable in the face of signature requirements which currently present barriers to electronic commerce. Article 6 focuses on the two basic functions of a signature, namely to identify the author of a document and to confirm that the author approved the content of that document. Paragraph (1)(a) establishes the principle that, in an electronic environment, the basic legal functions of a signature are performed by way of a method that identifies the originator of a data message and confirms that the originator approved the content of that data message.

70. As to the level of security provided by that method, paragraph (1)(b) establishes the principle of a flexible approach. It provides that the method used under paragraph (1)(a) should be as reliable as is appropriate for the purpose for which the data message is generated or communicated, in the light of all the circumstances, including any agreement between the originator and the addressee of the data message.

71. In determining whether the method used under paragraph (1)(a) is appropriate, legal, technical and commercial factors to be taken into account include the following: (a) the status and relative economic size of the parties; (b) the nature of their trade activity; (c) the frequency at which commercial transactions take place between the parties; (d) the kind and size of the transaction; (e) the function of signature requirements in a given statutory and regulatory environment; (f) the capability of communication systems; (g) compliance with authentication procedures set forth by intermediaries; (h) the range of authentication procedures made available by any intermediary; (i) compliance with trade customs and practice; (j) the existence of insurance coverage mechanisms against unauthorized messages; and (k) any other relevant factor.

72. Paragraph (1)(b) does not introduce a distinction between the situation in which EDI users are linked by a communication agreement and the situation in which parties had no prior contractual relationship regarding the use of EDI. Thus, article 6 may be regarded as establishing a minimum standard of authentication for EDI messages that might be exchanged in the absence of a prior contractual relationship and, at the same time, to provide guidance as to what might constitute an appropriate substitute for a signature if the parties used EDI communications in the context of a communication agreement. The Model Law is thus intended to provide useful guidance both in a context where national laws would leave the question of authentication of data messages entirely to the discretion of the parties and in a context where requirements for signature, which were usually set by mandatory provisions of national law, should not be made subject to alteration by agreement of the parties.

73. It may be noted that the notion of an "agreement between the originator and the addressee of a data message" is to be interpreted as covering not only bilateral or multilateral agreements concluded between parties exchanging directly data messages (e.g. "trading partners agreements") but also communication agreements (e.g.



"third-party service agreements") involving intermediaries such as networks. Agreements concluded between EDI users and networks would typically incorporate "system rules", i.e. administrative and technical rules and procedures to be applied when communicating data messages.

#### References:

- A/CN.9/406, paras. 102-105
- A/CN.9/WG.IV/WP.62, article 7
- A/CN.9/390, paras. 97-109
- A/CN.9/WG.IV/WP.60, article 7
- A/CN.9/387, paras. 81-90
- A/CN.9/WG.IV/WP.57, article 7
- A/CN.9/WG.IV/WP.58, annex
- A/CN.9/373, paras. 63-76
- A/CN.9/WG.IV/WP.55, paras. 50-63
- A/CN.9/360, paras. 71-75
- A/CN.9/WG.IV/WP.53, paras. 61-66
- A/CN.9/350, paras. 86-89
- A/CN.9/333, paras. 50-59
- A/CN.9/265, paras. 49-58 and 79-80

#### Article 7. Original

74. If "original" were defined as a medium on which information was fixed for the first time, it would be impossible to speak of "original" data messages, since the addressee of a data message would always receive a copy thereof. However, article 7 should be put in a different context. The notion of "original" in article 7 is useful since in practice many disputes relate to the question of originality of documents and in electronic commerce the requirement for presentation of originals constituted one of the main obstacles that the Model Law attempts to remove. In addition, article 7 is necessary since, although in some jurisdictions a signed "original" may be meant whenever a "writing" is required, the Model Law deals with "writing", "signature" and "original" in articles 5, 6 and 7 respectively as separate concepts. Article 7 is also useful in clarifying the notions of "writing" and "original", in particular in view of their importance for purposes of evidence.

75. Although article 7 may appear to be pertinent to documents of title and negotiable instruments, in which the notion of uniqueness of an original is particularly relevant, attention is drawn to the fact that the Model Law is not primarily intended to apply to documents of title and negotiable instruments, or to such areas of law where special requirements exist with respect to registration or notarization of writings, e.g. family matters or the sale of real estate.

76. Article 7 should be regarded as stating the minimum acceptable form requirement to be met by a data message for it to be regarded as the functional equivalent of an original. It was stated that parties should not be free to derogate from the provisions of article 7, for the same reasons that they would not be free to derogate from existing mandatory provisions which would be replaced by article 7.

77. Article 7 emphasizes the importance of the integrity of the information for its originality and sets out criteria to be taken into account when assessing integrity by reference to systematic recording of the information, assurance that the information was recorded without lacunae and protection of the data against alteration. It links the concept of originality to a method of authentication and puts the focus on the method of authentication to be followed in order to meet the requirement. It is based on the following elements: a simple criterion as to "integrity" of the data; a description of the elements to be taken into account in assessing the integrity; and an element of flexibility, i.e. a reference to circumstances.

#### References:

- A/CN.9/406, paras. 106-110
- A/CN.9/WG.IV/WP.62, article 8
- A/CN.9/390, paras. 110-133
- A/CN.9/WG.IV/WP.60, article 8
- A/CN.9/387, paras. 91-97
- A/CN.9/WG.IV/WP.57, article 8
- A/CN.9/WG.IV/WP.58, annex
- A/CN.9/373, paras. 77-96
- A/CN.9/WG.IV/WP.55, paras. 64-70
- A/CN.9/360, paras. 60-70
- A/CN.9/WG.IV/WP.53, paras. 56-60
- A/CN.9/350, paras. 84-85
- A/CN.9/265, paras. 43-48

#### Article 8. Admissibility and evidential value of data messages

78. The purpose of article 8 is to establish both the admissibility of data messages as evidence in legal proceedings and their evidential value. With respect to admissibility, paragraph (1), establishing that data messages should not be denied admissibility as evidence in legal proceedings on the sole ground that they are in electronic form, puts emphasis on the general principle stated in article 4 and is needed to make it expressly applicable to admissibility of evidence, an area in which particularly complex issues might arise in certain jurisdictions. The term "best evidence" is a term understood in and necessary for common law jurisdictions. However, the notion of "best evidence" could raise a great deal of uncertainty in legal systems in which such a rule is unknown. States in which the term would be regarded as meaningless and potentially misleading may wish to enact the Model Law without the reference to the "best evidence" rule contained in paragraph (1).

79. As regards the assessment of the evidential weight of a data message, paragraph (2) provides useful guidance as to how the evidential value of data messages should be assessed (e.g. depending on whether they were generated, stored or communicated in a reliable manner).

80. Paragraph (3) establishes the functional equivalent of "original" for evidentiary purposes in the case where neither the agreement of the parties nor a provision of law require the furnishing of an original. In addition to dealing with custom and practice, that paragraph provides a default rule to supplement the terms of agreements in cases of gaps or omissions in contractual stipulations, e.g. interchange agreements or "system rules".

#### References:

- A/CN.9/406, paras. 111-113
- A/CN.9/WG.IV/WP.62, article 9
- A/CN.9/390, paras. 134-143
- A/CN.9/WG.IV/WP.60, article 9
- A/CN.9/387, paras. 98-109
- A/CN.9/WG.IV/WP.57, article 9
- A/CN.9/WG.IV/WP.58, annex
- A/CN.9/373, paras. 97-108
- A/CN.9/WG.IV/WP.55, paras. 71-81
- A/CN.9/360, paras. 44-59
- A/CN.9/WG.IV/WP.53, paras. 46-55
- A/CN.9/350, paras. 79-83 and 90-91
- A/CN.9/333, paras. 29-41
- A/CN.9/265, paras. 27-48

#### Article 9. Retention of data messages

81. Article 9 establishes a set of supplementary rules for existing requirements regarding the storage of information (e.g. for

accounting or tax purposes) that may constitute obstacles to the development of modern trade.

82. Paragraph (1) is intended to set out the conditions under which the obligation to store data messages that might exist under the applicable law would be met. Subparagraph (a) merely reproduces the conditions established under article 5 for a data message to satisfy a rule which prescribes the presentation of a writing. Subparagraph (b) emphasizes that the message does not need to be retained unaltered as long as the information stored accurately reflects the data message as it was sent. It would not be appropriate to require that information should be stored unaltered, since usually messages have to be decoded, compressed or converted in order to be stored.

83. Subparagraph (c) is intended to cover all the information that may need to be stored, which includes, apart from the message itself, certain transmittal information that may be necessary for the identification of the message. Subparagraph (c), by imposing the retention of the transmittal information associated with the data message, is creating a standard that is higher than most standards existing under national laws as to the storage of paper-based communications. However, while some transmittal information is important and has to be stored, other transmittal information can be exempted without the integrity of the data message being compromised. That is the reason why subparagraph (c) establishes a distinction between those elements of transmittal information that are important for the identification of the message and the very few elements of transmittal information (e.g. communication protocols) which are of no value with regard to the data message and which, typically, would automatically be stripped out of an incoming EDI message by the receiving computer before the data message actually entered the information system of the addressee.

84. In practice, storage of information, and especially storage of transmittal information would often be carried out not by the originator or the addressee but by intermediaries. However, even in a situation where the required information would be unavailable due to communications system operations not controlled by the person to whom the retention requirement applies, that person would not be excused. This is intended to discourage bad practice or wilful misconduct, to the extent that a person required to store data messages cannot be relieved from that obligation on the ground that the information system of the chosen intermediary was operating in such a way that it did not retain transmittal information. However, paragraph (3) provides that the person obliged to store data messages is allowed to use the services of any third party, and not only intermediaries as defined in article 2.

#### References:

- A/CN.9/406, paras. 59-72
- A/CN.9/WG.IV/WP.60, article 14
- A/CN.9/387, paras. 164-168
- A/CN.9/WG.IV/WP.57, article 14
- A/CN.9/373, paras. 123-125
- A/CN.9/WG.IV/WP.55, para. 94

### Chapter III. Communication of data messages

#### Article 10. Variation by agreement

85. The decision to undertake the preparation of the Model Law was based on the recognition that, in practice, solutions to the legal difficulties raised by the use of modern means of communication are mostly sought within contracts. The Model Law is thus intended to support the principle of party autonomy. However, that principle is embodied only with respect to the provisions of the Model Law contained in chapter III. The reason for such a limitation

is that the provisions contained in chapter II may, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. Such well-established rules are normally of a mandatory nature since they generally reflect decisions of public policy. An unqualified statement regarding the freedom of parties to derogate from the Model Law might thus be misinterpreted as allowing parties, through a derogation to the Model Law, to derogate from mandatory rules adopted for reasons of public policy. The provisions contained in chapter II should be regarded as stating the minimum acceptable form requirement and are, for that reason, to be regarded as mandatory, unless expressly stated otherwise.

86. Article 10 is intended to apply not only in the context of relationships between originators and addressees of data messages but also in the context of relationships involving intermediaries. The text expressly limits party autonomy to rights and obligations arising as between parties so as not to suggest any implication as to the rights and obligations of third parties.

#### References:

- A/CN.9/406, paras. 88-89
- A/CN.9/WG.IV/WP.62, article 5
- A/CN.9/390, paras. 74-78
- A/CN.9/WG.IV/WP.60, article 5
- A/CN.9/387, paras. 62-65
- A/CN.9/WG.IV/WP.57, article 5
- A/CN.9/373, para. 37
- A/CN.9/WG.IV/WP.55, paras. 27-29

#### Article 11. Attribution of data messages

87. Article 11 has its origin in article 5 of the UNCITRAL Model Law on International Credit Transfers, which defines the obligations of the sender of a payment order. Article 11 is intended to apply where there is a question as to whether a data message was really sent by the person who is indicated as being the originator. In the case of a paper-based communication the problem would arise as the result of an alleged forged signature of the purported originator. In an electronic environment, an unauthorized person may have sent the message but the authentication by code, encryption or the like would be accurate.

88. The Model Law answers the question in three steps. The first step is described in article 11(1): "a data message is deemed to be that of the originator if it was communicated by the originator or by another person who had the authority to act on behalf of the originator with respect to that data message." The question as to whether the other person did in fact and in law have the authority to act on behalf of the originator is left to the appropriate legal rules outside the Model Law.

89. The second step described in article 11(2) is more important: if the addressee applied agreed authentication procedures and such application resulted in the proper verification of the originator as the source of the message, the message is presumed to be that of the originator. Paragraph (2) covers not only the situation where an authentication procedure had been agreed upon by the originator and the addressee but also situations where an originator, unilaterally or as a result of an agreement with an intermediary, identified a procedure and agreed to be bound by a data message that met the requirements corresponding to that procedure. Paragraph (2) reflects two judgments. The first is that the addressee has no means to distinguish the authorized use of the procedure from the unauthorized use of the procedure. The second is that if the procedure agreed to by the originator is reasonable and the addressee can show that it followed the procedure, the chances are that it was the originator's fault that someone unauthorized learned how to authenticate the data message.

90. That introduces the third step in the analysis as described in article 11(3). The originator or the addressee, as the case may be, would be responsible for any unauthorized data message that could be shown to have been sent as a result of the fault, or negligence, of that party. For the rule as to who bears the burden of proof, see article 11(3).

91. Paragraph (4) is intended to preclude the originator from disavowing the message once it was sent, unless the addressee knew, or should have known, that the data message was not that of the originator. In addition, paragraph (4) is intended to deal with errors in the content of the message arising from errors in transmission.

92. Paragraph (5) establishes that the attribution of the authorship of the message to the originator should not interfere with the legal consequences of the message, to be determined by applicable law.

#### References:

- A/CN.9/406, paras. 114-131
- A/CN.9/WG.IV/WP.62, article 10
- A/CN.9/390, paras. 144-153
- A/CN.9/WG.IV/WP.60, article 10
- A/CN.9/387, paras. 110-132
- A/CN.9/WG.IV/WP.57, article 10
- A/CN.9/373, paras. 109-115
- A/CN.9/WG.IV/WP.55, paras. 82-86

#### Article 12. Acknowledgement of receipt

93. The use of functional acknowledgements is a business decision to be made by EDI users; the Model Law does not intend to impose the use of any such procedure. However, taking into account the commercial value of a system of acknowledgement of receipt and the widespread use of such systems in the context of EDI, it was felt that the Model Law should address a number of legal issues arising from the use of acknowledgement procedures. The provisions of article 12 are based on the assumption that acknowledgement procedures are to be used at the discretion of the originator. It should be noted that article 13 is not intended to interfere with law on the formation of contracts.

94. The purpose of paragraph (2) is to validate acknowledgement by any communication or conduct of the addressee (e.g. the shipment of the goods as an acknowledgement of receipt of a purchase order) where the originator has not requested that the acknowledgement be in a particular form. Paragraph (3), which deals with the situation where the originator has stated that the data message is conditional on receipt of an acknowledgement, applies whether or not the originator has specified that the acknowledgement should be received by a certain time.

95. The purpose of paragraph (4) is to deal with the more common situation where an acknowledgement is requested, without any statement being made by the originator that the data message is of no effect until an acknowledgement has been received. Such a provision is needed to establish the point in time when the originator of a data message who has requested an acknowledgement of receipt is relieved from any legal implication of sending that data message if the requested acknowledgement has not been received. An example of a factual situation where a provision along the lines of paragraph (3) would be particularly useful would be that the originator of an offer to contract who has not received the requested acknowledgement from the addressee of the offer may need to know the point in time after which it is free to transfer the offer to another party. It may be noted that the provision does not create any obligation binding on the originator, but merely establishes means by which the originator, if it so wishes, can clarify

its status in cases where it has not received the requested acknowledgement. It may also be noted that the provision does not create any obligation binding on the addressee of the data message, who would, in most circumstances, be free to rely or not to rely on any given data message, provided that it would bear the risk of the data message being unreliable for lack of an acknowledgement of receipt. The addressee, however, is protected since the originator who does not receive a requested acknowledgement may not automatically treat the data message as though it had never been transmitted, without giving further notice to the addressee.

96. The rebuttable presumption established in paragraph (5) is needed to create certainty and would be particularly useful in the context of electronic communication between parties that were not linked by a trading-partners agreement. The reference to technical requirements, which is to be construed primarily as a reference to "data syntax" in the context of EDI communications, may be less relevant in the context of the use of other means of communication, such as telegram or telex.

#### References:

- A/CN.9/406, paras. 15-33
- A/CN.9/WG.IV/WP.60, article 11
- A/CN.9/387, paras. 133-144
- A/CN.9/WG.IV/WP.57, article 11
- A/CN.9/373, paras. 116-122
- A/CN.9/WG.IV/WP.55, paras. 87-93
- A/CN.9/360, para. 125
- A/CN.9/WG.IV/WP.53, paras. 80-81
- A/CN.9/350, para. 92
- A/CN.9/333, paras. 48-49

#### Article 13. Formation and validity of contracts

97. Article 13 is not intended to interfere with law on the formation of contracts but rather to promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means. It deals not only with the issue of contract formation but also with the form in which an offer and an acceptance may be expressed. In certain countries, a provision along the lines of paragraph (1) might be regarded as merely stating the obvious, namely that an offer and an acceptance, as any other expression of will, can be communicated by any means, including data messages. However, the provision is needed in view of the remaining uncertainties in a number of countries as to whether contracts can validly be concluded by electronic means.

98. It may also be noted that paragraph (1) restates, in the context of contract formation, a principle already embodied in other articles of the Model Law, such as articles 4, 8 and 11, all of which establish the legal effectiveness of data messages. However, paragraph (1) is needed since the fact that electronic messages may have legal value as evidence and produce a number of effects, including those provided in articles 8 and 11, does not necessarily mean that they can be used for the purpose of concluding valid contracts.

99. Paragraph (1) covers not merely the cases in which both the offer and the acceptance are communicated by electronic means but also cases in which only the offer or only the acceptance is communicated electronically. As to the time and place of formation of contracts in cases where an offer or the acceptance of an offer is expressed by means of a data message, no specific rule has been included in the Model Law in order not to interfere with national law applicable to contract formation. It was felt that such a provision might exceed the aim of the Model Law, which should be limited to providing that electronic communications would achieve the same degree of legal certainty as paper-based communications. The combination of existing rules on the formation of

contracts with the provisions contained in article 14 is designed to dispel uncertainty as to the time and place of formation of contracts in cases where the offer or the acceptance are exchanged electronically.

100. During the preparation of paragraph (1), it was felt that the provision might have the harmful effect of overruling otherwise applicable provisions of national law, which might prescribe specific formalities for the formation of certain contracts. Such forms included notarization and other requirements for writings, and might respond to considerations of public policy, such as the need to protect certain parties or to warn them against specific risks. For that reason, it was decided that paragraph (2) provides that an enacting State can exclude the application of paragraph (1) in certain instances to be specified in the legislation enacting the Model Law.

#### References:

- A/CN.9/406, paras. 34-41
- A/CN.9/WG.IV/WP.60, article 12
- A/CN.9/387, paras. 145-151
- A/CN.9/WG.IV/WP.57, article 12
- A/CN.9/373, paras. 126-133
- A/CN.9/WG.IV/WP.55, paras. 95-102
- A/CN.9/360, paras. 76-86
- A/CN.9/WG.IV/WP.53, paras. 67-73
- A/CN.9/350, paras. 93-96
- A/CN.9/333, paras. 60-68

#### Article 14. Time and place of dispatch and receipt of data messages

101. Paragraph (1) defines the time of dispatch of a data message as the time when the data message enters an information system outside the control of the originator, which may be the information system of an intermediary or an information system of the addressee. If dispatch occurs where the data message reaches an information system of the addressee, dispatch under paragraph (1) and receipt under paragraph (2) are simultaneous, except where the data message is sent to an information system of the addressee that is not the information system designated by the addressee under paragraph (2)(a).

102. Paragraph (2), the purpose of which is to define the time of receipt of a data message, addresses the situation where the addressee unilaterally designates a specific information system for the receipt of a message (in which case the designated system may or may not be an information system of the addressee), and the data message reaches an information system of the addressee that is not the designated system. In such a situation, the designated information system prevails.

103. Attention is drawn to the notion of "entry" into an information system, which is used for both the definition of dispatch and that of receipt of a data message. A data message enters an information system at the time when it becomes available for processing within that information system. Whether a data message which enters an information system is usable by the addressee is outside the purview of the Model Law. The Model Law does not intend to overrule provisions of national law under which receipt of a message may occur at the time when the message enters the sphere of the addressee, irrespective of whether the message is usable by the addressee. Nor is the Model Law intended to run counter to trade usages, under which certain encoded messages are deemed to be received even before they are usable by, or intelligible for, the addressee. It was felt that the Model Law should not create a more stringent requirement than currently exists in a paper-based environment, where a message

can be considered to be received even if it is not intelligible for the addressee or not intended to be intelligible to the addressee (e.g. where encrypted data is transmitted to a depository for the sole purpose of retention in the context of intellectual property rights protection).

104. A data message should not be considered to be dispatched if it merely reached the information system of the addressee but failed to enter it. It may be noted that the Model Law does not address the question of possible malfunctioning of information systems. In particular, where the information system of the addressee does not function at all or functions improperly or, while functioning properly, cannot be entered into by the data message (e.g. in the case of a telecopier that is constantly occupied), dispatch under the Model Law does not occur. It was felt during the preparation of the Model Law that the addressee should not be placed under the burdensome obligation to maintain its information system functioning at all times by way of a general provision. However, States enacting the Model Law may wish to consider adding provisions, in line with the principle of observance of good faith in international trade embodied in article 3, to address situations in which the addressee might have wilfully or negligently caused the malfunctioning of its information system.

105. The purpose of paragraph (4) is to deal with the place of receipt of a data message. The principal reason for including a rule on the place of receipt of a data message is to address a circumstance characteristic of electronic commerce that might not be treated adequately under existing law, namely, that very often the information system of the addressee where the data message is received, or from which the data message is retrieved, is located in a jurisdiction other than that in which the addressee itself is located. Thus, the rationale behind the provision is to ensure that the location of an information system is not the determinant element, but rather 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. It may be noted that the Model Law does not contain specific provisions as to how the designation of an information system should be made, or whether a change could be made after such a designation by the addressee.

106. It may be noted that paragraph (4), which contains a reference to the "underlying transaction", is intended to refer to both actual and contemplated underlying transactions. References to "place of business", "principal place of business" and "place of habitual residence" were adopted to bring the text in line with article 10 of the United Nations Convention on Contracts for the International Sale of Goods.

107. The effect of paragraph (4) is to introduce a distinction between the presumed place of receipt and the place actually reached by a data message at the time of its receipt under paragraph (2). That distinction is not to be interpreted as apportioning risks between the originator and the addressee in case of damage or loss of a data message between the time of its receipt under paragraph (2) and the time when it reached its place of receipt under paragraph (4). Paragraph (4) merely establishes a presumption regarding a legal fact, to be used where another body of law (e.g. on formation of contracts or conflict of laws) require determination of the place of receipt of a data message. However, it was felt during the preparation of the Model Law that distinguishing between the place of receipt of a data message and the place reached by that data message at the time of its receipt would be inappropriate outside the context of computerized transmissions (e.g. in the context of telegram or telex). The provision was thus limited in scope to cover only computerized transmissions of data messages. A further limitation is contained in paragraph (5), which excludes matters of administrative, criminal and data-protection law from the scope of paragraph (4).

## References:

A/CN.9/406, paras. 42-58  
 A/CN.9/WG.IV/WP.60, article 13  
 A/CN.9/387, paras. 152-163  
 A/CN.9/WG.IV/WP.57, article 13

A/CN.9/373, paras. 134-146  
 A/CN.9/WG.IV/WP.55, paras. 103-108  
 A/CN.9/360, paras. 87-89  
 A/CN.9/WG.IV/WP.53, paras. 74-76  
 A/CN.9/350, paras. 97-100  
 A/CN.9/333, paras. 69-75

## 2. *Proposal by the Observer for the International Chamber of Commerce: note by the Secretariat* (A/CN.9/WG.IV/WP.65) [Original: English]

1. At the twenty-eighth session of the Working Group, a proposal was made to include in the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication a provision to the effect of ensuring that certain terms and conditions that might be incorporated in a data record by means of a mere reference would be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of the data record. It was stated that the issue of incorporation by reference of certain terms into EDI messages was crucial to EDI users and that there existed an important need for certainty in the use of that method. It was said that, arguably, EDI was inherently a system of incorporation by reference since EDI messages were meaningless, and of little contractual value, without the incorporation by reference of the relevant communication standards. It was decided that the Working Group would address, in the context of a future session, the issue of incorporation of terms and conditions into a data message by means of a mere reference to such terms and conditions (A/CN.9/406, paras. 90 and 178). As to the planning of future work, the view was expressed that the Working Group at its twenty-ninth session, after completing its consideration of the draft guide to enactment to be prepared by the Secretariat, could have a general discussion on negotiability and transferability of rights in goods. Another view was that the issue of incorporation by reference could also be considered at the twenty-ninth session for possible inclusion in the draft Model Law. A number of delegations expressed their willingness to prepare a brief paper to facilitate discussions on both topics. It was noted, however, that, while the Working Group might have sufficient time for a general discussion, it could not go into detail on either topic (A/CN.9/406, para. 179).

2. Following the twenty-eighth session of the Working Group, the Secretariat received from the observer for the International Chamber of Commerce (ICC) the text of a proposed article on the issue of incorporation by reference, with explanatory notes. The draft article proposed by the ICC together with the explanatory notes is reproduced in the annex to the present note as it was received by the Secretariat.

## ANNEX

### A. Proposed article

The International Chamber of Commerce, Paris proposes the following draft for consideration by the Working Group at its next session regarding the issue of incorporation by reference, as a possible addition to the draft model law. Reference: Report of the

Working Group (Vienna, 3-14 October 1994), (A/CN.9/406), paras. 90 and 179.

### Article 15. *Incorporation by reference*

When terms, conditions, clauses, agreements, standards, rules or guidelines (collectively "Terms") are [reasonably identified] [specified] in a data message, those terms [may be] [shall be presumed to be], unless otherwise agreed, incorporated by reference in that data message. Such terms shall be as legally effective and binding as if they had been fully stated in the data message, to the extent permitted by law, and except where timely rejected by a party. Certain factors should be considered in determining whether such Terms incorporated by reference shall be considered legally binding, including whether such Terms:

- (a) have been previously specified by applicable contract or by the course of dealing among the parties;
- (b) are in the possession of the addressee of the data message;
- (c) have been previously provided to the addressee from the sender;
- (d) are reasonably accessible to the addressee of the data message [in the normal course of business communications];
- (e) are communicated promptly to the addressee by the sender upon the request of the addressee; or
- (f) are registered or maintained and distributed by a person or entity that is widely recognized in the relevant industry for such purposes and such person or entity is identified in the data message].

This article does not affect incorporation of Terms by trade usage or by business practices established between the parties.

## B. Discussion

### 1. *Incorporation by reference defined*

Incorporation by reference is defined as the method of making one data message or record become a part of another, separate data message or record by referring to the former within the latter, and declaring that the former shall be taken and considered as a part of the latter, the same as if it were fully set out therein. When a data message or record incorporates outside material by reference, the subject matter to which it refers becomes a part of the incorporating data message or record just as if it were set out in full.

### 2. *Incorporation by reference essential to electronic commerce*

EDI and other electronic commerce techniques/methods invariably make intensive use of incorporation by reference. This is necessary for the efficiency of data processing. Indeed, EDI and diverse forms of electronic commerce are inherently and funda-

mentally systems of incorporation by reference. As a practical matter, EDI messages are potentially less legally certain, without the rigorous incorporation by reference of the relevant legal, technical, and administrative terms, conditions, clauses, agreements, standards, rules, or guidelines. Consequently, an explicit rule is indispensable to assure that such incorporation by reference provides electronic commerce legal certainty and the facilitation of computer-based trade. A common example is the growing use of standardized message sets, which are intelligible, and derive legal import in some cases only by reference to the UN/EDIFACT standards.

### 3. *Traditional trade usage and legal tests inadequate*

The traditional use of incorporation by reference for diverse trade terms, such as the ICC's INCOTERMS, UCP 500 and similar terms which are recognized to reflect trade usage, is sometimes considered to enjoy greater legal certainty (when incorporated by reference) than are certain electronic commerce terms (including model EDI/interchange agreements, guidelines and security policies) when such terms are incorporated by reference. Because of the more recent origin of EDI, judicial or other treatment of incorporation by reference may fall to ensure a comparable level of legal certainty.

There is a significant threat that the application of traditional legal tests for determining the enforceability of terms that seek to be incorporated by reference are less effective when applied to corresponding electronic commerce terms because of the inherent differences between traditional and electronic commerce mechanisms. For example, certain traditional legal tests of incorporation by reference include whether the incorporated terms are "clear and conspicuous", whether they contain "suitable words of reference evidencing explicit intention to incorporate", or whether the intended incorporation is "clear and convincing". Such tests may create unintended barriers to the facilitation of electronic trade. Indeed, the proposed new article is consistent with, and imple-

ments the UNCITRAL EDI Rules' recognition of party autonomy. The problem is that methods of notice and access are different in a computer medium, and therefore could in some tribunals be rejected in the absence of supportive language of the type here proposed for UNCITRAL.

### C. *Relevant UNCITRAL Texts*

While it could be argued that some Terms could be covered by the following UNCITRAL texts, it would not be sufficient to cover incorporation by reference in an electronic commerce context.

#### *Article 9(2) of the Vienna Sales Convention*

The parties are considered, unless otherwise agreed, to have impliedly made application to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

[*Editorial note:* This provision was intended to accommodate the incorporation by reference of INCOTERMS and UCP. This particular wording, however, is not entirely appropriate for EDI electronic commerce purpose.]

#### *Article 7 of the Model Law on International Commercial Arbitration*

(1) ... 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 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.

### 3. *Proposal by the United Kingdom of Great Britain and Northern Ireland: note by the Secretariat (A/CN.9/WG.IV/WP.66) [Original: English]*

1. At the twenty-eighth session of the Working Group, a proposal was made to include in the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication a provision to the effect of ensuring that certain terms and conditions that might be incorporated in a data record by means of a mere reference would be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of the data record. It was decided that the Working Group would address, in the context of a future session, the issue of incorporation of terms and conditions into a data message by means of a mere reference to such terms and conditions (A/CN.9/406, paras. 90 and 178).

2. The Working Group noted that its recommendation to the Commission that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment as soon as the draft Model Law was completed (A/CN.9/390, para. 158), had found general support in the Commission.<sup>1</sup> It was stated that related legal issues involving electronic registries were a necessary part of such a project (A/CN.9/406, para. 178).

3. As to the planning of future work, the view was expressed that the Working Group at its twenty-ninth session, after completing its consideration of the draft guide to enactment to be prepared by the Secretariat, could have a general discussion on negotiability and transferability of rights in goods. Another view was that the issue of incorporation by reference could also be considered at the twenty-ninth session for possible inclusion in the draft Model Law. A number of delegations expressed their willingness to prepare a brief paper to facilitate discussions on both topics. It was noted, however, that, while the Working Group might have sufficient time for a general discussion, it could not go into detail on either topic (A/CN.9/406, para. 179).

4. Following the twenty-eighth session of the Working Group, the Secretariat received from the delegation of the United Kingdom of Great Britain and Northern Ireland the text of a proposed article on the issue of incorporation by reference, with explanatory comments and the text of a note discussing legal issues of negotiable bills of lading in an EDI context. The draft article proposed by the United Kingdom together with the explanatory comments, and the text of the note are reproduced as annexes I and II to the present note as they were received by the Secretariat.

<sup>1</sup>Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), para. 201.



## ANNEX I

## INCORPORATION BY REFERENCE

## Note by the United Kingdom

1. In the UK, it is generally possible to incorporate terms in a contract by reference to other documents where the terms are set out. In this way, terms may be made to apply as between the parties to a contract even if they are not set out in the contractual documentation, provided that the contract clearly refers to another document where the full terms may be seen, or it is otherwise clear that the parties intended the terms to be incorporated in the contract.<sup>1</sup>

2. In some countries, the law, at least in some cases, requires actual approval of the terms by the party who is intended to be bound. Some countries, too, may require some terms to be in writing and approved by signature; for example clauses about limiting liability, cancelling or suspending a contract, restricting the ability to object to exceptions, restricting the freedom to contract with third parties etc.

3. The use of EDI does not give rise to any new problems in this context, but it often increases the number of communications from which the terms of the contract as a whole are to be derived. Even where a contract is formed by means of written communication, its terms may have to be pieced together from a number of different documents. With EDI, however, the number of brevity of messages in the course of concluding a transaction mean that the risk of fragmentation is exacerbated. For reasons of clarity and certainty, it is often desirable if the agreed terms can be collected up in a single body of text to which reference can be made. In closed user groups, accustomed to dealing with each other, this pre-arrangement is relatively easy. If open trading is desired, it is more important that clear identification is made, at the commencement of a fresh interchange, about which terms are to be applied and where the full statement of them can be found.

4. There are two principal ways in which the terms can be transmitted electronically. If they are set out in full and sent in a "free text" segment of a message, the sender can be confident that they will arrive at the party's computer; but to the recipient they are useless unless they are converted to human readable form. This interruption ruins the automated processing of data which is the main characteristic and purpose of EDI. Moreover, setting them out in this way is both cumbersome and expensive.

5. Alternatively, the terms can be transmitted in standardised format by using codes, so as to enable uninterrupted processing of the data. This will, however, require the prior agreement of the two parties that the coded abbreviations represent the full terms exactly and unambiguously; and further, that their reception by the receiving party's computer system constitutes a proper notification of the terms to him.

6. Where express acceptance of the terms is required, this requirement would also need to be covered in the prior agreement, and most probably the acceptance would be communicated in one or more of the messages exchanged at the time that the contract is formed.

<sup>1</sup>Even where terms are not incorporated by reference, terms may be incorporated in a contract where the terms themselves, and one party's intention to incorporate them, have been sufficiently brought to the notice of the party to be bound, before or at the time that the contract is made, by a document which a reasonable man would expect to contain contractual conditions, such as a railway or airline ticket. Terms may also be implied from an established custom of the trade or from the previous course of dealing between the parties, or by statute.

7. Where standard terms are used, these will often be subject to exceptions or variations in individual cases. Some of these will be dealt with specifically in the relevant message segments, but any text relating to them will have to be treated in a similar way to the text of the general terms, and be governed by the same prior agreements.

8. If there are several different versions or variants of the so-called standard terms, any one of which could be assumed to be appropriate in the absence of a clear stipulation, the party specifying the terms should identify which set is applicable, possibly using EDI codes, before the contract is concluded. Mere silence could be dangerous, because the terms which might be implied from custom of the trade or previous dealings might not be what is wanted.

9. Generally there should be no difficulty in incorporating terms by referring to external sources, provided that these have been identified by the parties concerned and accepted by them as applicable; and that the national courts, if necessary, will be convinced that this identification and acceptance has taken place.

*Third parties*

10. There appear to be few real problems in English law as regards third parties. As a general rule, the doctrine of privity of contract applies, and only the original parties to a contract are concerned with its terms. Nevertheless, a third party who acquires the benefit of a contract, or undertakes the burden of it, will wish to know its terms. In the case of maritime transport contracts, the consignees or indorsees or holders of bills of lading, or those to whom delivery is to be made under sea waybills or ship's delivery orders, will have transferred to them all rights of suit under the contract of carriage (Carriage of Goods by Sea Act 1924). They are therefore closely affected by the terms and will need them to be accessible.

11. If EDI is being used and the third party is in the same "EDI club" as the original parties (i.e. party to the underlying agreement to use EDI), and is using the same EDI communication techniques, standards and common rules, the terms can be made available to the third party by the same means as to one of the original parties. If the third party is not in the same "EDI club", however, it will be necessary for the EDI users always to make sure that other means are used to provide such third parties with the information which they require, or at least to indicate to them where it is available. In some countries, the courts can take a very stringent view about whether knowledge of the terms has been adequately given or made available to the third party.

12. EDI systems will need to take account of this. Where a contract is concluded pursuant to an earlier master agreement, it may be unwise to rely on the fact that the applicable standard terms were originally identified in the master agreement, without further reference to them. It is desirable to refer to them in the course of communications between the parties concluding the contract in question. In EDI systems, therefore, there should be an adequate "master" reference made, albeit by means of pre-arranged codes if possible, at the commencement of each series of messages which lead up to a contract or a group of related contracts. This reference could be made by means of a separate message. To make doubly sure that the references are adequate in those jurisdictions where courts will be looking for a very close connection, it may be

advisable for other messages in a series to contain references to the "master" reference itself.

13. Where the contract is not made pursuant to an earlier master agreement, the incorporation of terms which are ascertainable elsewhere will certainly require reference to them when the contract is made. This could be achieved by using the same sort of "master" reference as is mentioned in paragraph 12 above. This would identify what the terms are, and where they can be found. Additional references could also be used in individual subsequent messages.

14. In conclusion, there seem to be a number of respects in which there is a role for good practice to be applied when incorporating terms by reference in a contract formed by means of EDI. In some countries, there may be a need to encourage courts, within their existing discretion, to accept such good practice as being a sufficient means of notifying and agreeing contract terms. It is not clear, however, that there is a need for legal provision to require these good practices. On the other hand, if some countries have laws which restrict parties' ability to incorporate terms by reference in a contract formed by means of EDI, they may wish to consider whether any such restrictions could be modified with advantage, so as to accommodate the use of EDI, provided that certain conditions are met. If provision in the Model Law was thought desirable to encourage the modification of national law, the following might be considered:

"(1) Where a contract is formed by using a data message, or any of its terms are contained in a data message, any terms which are not set out in that data message, but to which reference is made therein, shall be taken to form part of the contract if the data message expressly indicates.

(a) an intention to incorporate in the contract the terms to which it refers; and

(b) the place where those terms can be found.

"(2) Where, by virtue of paragraph (1) above, any terms are incorporated in a contract by a data message, the terms so incorporated shall also be taken to form part of any other contract, which is formed by using a data message which expressly indicates that the incorporating data message shall apply for the purposes of that other contract."

15. In some cases, national law provides that terms incorporated by reference shall be ineffective insofar as they conflict with the other terms of the contract. For example, charter party terms incorporated into a bill of lading will not be effective insofar as they conflict with the terms of the bill of lading. Any such rule should not be affected merely because the contract is formed by using a data message. To meet this point, the following provision should be added:

"(3) Paragraphs (1) and (2) above are subject to any rule of law by virtue of which any terms so incorporated take effect subject to any other terms of the contract, to the extent of any inconsistency therewith."

16. It may be that certain countries have rules requiring notice of the terms to be given to any other party, or requiring the place where the terms can be found to be sufficiently accessible to the other party. If so, and if it is wished to preserve such rules, an additional provision might be considered as follows:

"(4) Paragraphs (1) and (2) above are subject to any rule of law which requires adequate notice of the terms to be given, or which requires the place where the terms may be found to be accessible to the other party."

## ANNEX II

### BILLS OF LADING

#### Note by the United Kingdom

1. This note concentrates on those aspects of the functions and use of a bill of lading which might be affected by the use of EDI communications instead of paper.

2. A bill of lading is:

(1) a receipt for the cargo by the carrier;

(2) good evidence of the contract of carriage:

(a) as to the general terms—some on the face but mostly on the back of the paper;<sup>1</sup>

(b) as to the particular details of vessel, loading and destination ports and nature, quantity and condition of the cargo - on the face of the paper; and

(3) a document giving the holder of it the right to be given delivery of the cargo at its destination. The named consignee, endorsee or holder of it is entitled to possession of the goods upon discharge, and can control to whom this entitlement is passed. It is therefore a document of title. As such, it may, for example, be deposited with a creditor as security for a loan.

<sup>1</sup>In addition, certain terms may be incorporated by treaty (e.g. the Hague or Hague/Visby Rules, and in the case of multimodal bills, the CMR, CIM and Warsaw Convention), or by a statute which gives effect to a treaty, or by reference (e.g. charter party terms).

#### *Receipt for the cargo*

3. The first function is easily performed by EDI. It is simply a transmission of information from carrier to shipper. Currently the UN/EDIFACT Message IFTMCS ("contract status") is used for this. (Note that the shipper will have previously used the IFTMIN ("shipping instruction") message in which he declares the details of the cargo he intends to ship, its destination and the consignee.)

#### *Evidence of the contract of carriage*

4. The second function can also be performed by EDI. It too is simply a transmission of information from carrier to shipper, and the same IFTMCS Message is used. The transmission of information (rights and terms etc.) can be managed quite satisfactorily by using EDI messages, provided there are proper security and authentication methods in place. Even the process of passing a piece of information down a chain of parties can be achieved with complete confidence that it can retain, and be shown to have retained, its integrity throughout and that the originating and successive parties in the chain are authentic.

5. Function (2)(b) above is easily performed because the standard IFTMCS message is structured to contain all these variable pieces of information (quantified and, where necessary, codified) in its standard segments. Function (2)(a) is not directly performed

by the IFTMCS message, nor by any other standard message. The general terms are not transmitted in full by EDI in the IFTMCS message. They are incorporated by reference to an extrinsic source, which will or should have been notified by the carrier to the shipper; and the evidence of them is to be found there.<sup>2</sup> By this incorporation the IFTMCS messages are in this respect, therefore, like a number of waybills, and they are also like the "short form" or "blank-back" bills of lading, which do not carry the full "small-print" terms on them either. In many trades such bills of lading are entirely effective — and so is the IFTMCS message.

#### *Document of title*

6. The third function is the one which presents most difficulty. A negotiable bill of lading is transferable by delivery, with any necessary indorsement, and its possession gives the holder of the bill control of the goods with the right to delivery of them and to deal with them before delivery. An EDI message can have no physical "holder" as such. Who has the entitlement to take delivery of the cargo at destination must be established by other means.

7. Of course, if the shipper's instruction and the carrier's receipt (in EDI, the "IFTMIN" and "IFTMCS" messages respectively) identify that the latter is to be treated like a waybill (for which purpose of identification there is an allocated code), then delivery may correctly be given to the named consignee if he identifies himself. (A sea waybill does not need to be presented at the port of discharge as evidence of entitlement to possession.) If the IFTMCS is to be treated like a consigned bill of lading, the named consignee will again be the person to whom delivery should be made. He will need to demonstrate by other means that he has been authorised by the shipper to apply for delivery. Paper documents may be used for this, but so may EDI messages, provided they are used with adequate authentication and security methods

<sup>2</sup>One way of making the reference to the extrinsic source can be as follows. In the UK EDI Association's "MIG" (message implementation guideline, sometimes known as a user manual) there are quite comprehensive texts in each message's section which set out the commercial and the legal significance of the message as a whole and its individual segments where applicable. The users of this MIG are bound to acceptance of these meanings and this is reinforced, for those who have signed the Association's standard interchange agreement, by one of the clauses in it.

One of the texts which applies to the IFTMCS message is:

"The parties accept that the goods referred to in a transport Contract Status message are to be subject, in respect of their receipt and of their carriage, to the terms, conditions and exceptions which the Carrier applies in the particular trade route being used.

"These terms, conditions and exceptions are those which

(a) are set out in the Carrier's own Waybill, or on a Waybill previously authorised by the Carrier as acceptable to him

AND (b) are set out on the Carrier's current Bill of Lading and which are, by incorporation through (a) above, applicable to the carriage of the goods as if the Waybill in (a) above were such a Bill of Lading.

AND, if applicable

(c) are, by way of additional qualification or exception, stated by the Carrier, in writing or by electronic transmission, to apply to the carriage of the goods.

"A copy of the terms, conditions and exceptions applied by the Waybill, (a) above, and set out in the Bill of Lading, (b) above, may be obtained from the office of the Carrier or from any of his authorised agents."

so as to preclude fraudulent or premature application for delivery. This process will enable the right to delivery (constructive possession; possessory title) to be withheld until, for example, the shipper or the banks<sup>3</sup> are satisfied as to payment.

8. The particular problem presented by EDI is how to provide a guarantee of uniqueness (or singularity)<sup>4</sup> equivalent to possession of a negotiable paper bill of lading. Reference has been made above to the possibility of transmitting information satisfactorily by EDI down a chain of parties. The same process can be used by any of the parties to transmit the information that he renounces his title in favour of another person. It can therefore be used to effect endorsements. However, if a person is to receive an exclusive benefit, such as possessory title, by receiving a particular EDI message, he will need to be satisfied that no identical message(s) could have been sent to any other person(s) by any preceding party in the chain, creating the possibility of other claimants to the title. Of course, in EDI no message can be actually the very same message as another; but so long as it is technically possible for a message, with no possibility of detection, to be replicated exactly and sent to someone else, there can be no guarantee of singularity.

9. Without this guarantee, negotiability for bills of lading cannot be provided by EDI. Passing the information, both about the cargo and about who is to receive title, from party to party may in fact be safe using EDI in particular cases, but at the moment there is no guarantee.

10. Until a technical solution is found — and some, based on combining time-stamping and other security techniques, have come close — the problem needs to be looked at from a different point of view. Methods of circumventing it have been, and are being, researched by various organisations. These depend on a "central registry" system, in which a central entity manages the transfer of title from one party to the next, cancelling the first party's rights and creating fresh rights for the second party and so on. This can be done using EDI communications. The basic principle of these systems is that all who would use them will share a universal confidence that the central registry can be trusted not to duplicate a message.

11. No doubt some of these schemes might provide elegant solutions to the problem, assuming that the commercial companies were prepared to take them up. Many companies have not yet appreciated that simple sea waybills (and their electronic equivalent) could be used anyway instead of bills of lading in many international transactions. It remains to be seen which of the current "central registry" schemes for emulating negotiability will prove popular.

12. There are, therefore, two approaches to the final problem of the "guarantee of singularity": the technical one and the central registry one. Commercial demand will show in due time which, if either, approach is sufficiently attractive to produce enough supporters to sustain development and implementation.

<sup>3</sup>UCP500, which sets out the requirements of banks in relation to documentary credit transactions, may, however, need amendment.

<sup>4</sup>In fact, two or three original bills of lading are frequently issued, stating on their face the number. Carriers are protected because delivery of the goods against production of one bill will render the others void.

#### **4. Proposal by the United States of America: note by the Secretariat** (A/CN.9/WG.IV/WP.67) [Original: English]

1. At its twenty-eighth session, the Working Group noted that its recommendation to the Commission that preliminary work should be undertaken on the issue of negotiability and

transferability of rights in goods in a computer-based environment as soon as the draft Model Law was completed (A/CN.9/390, para. 158) had found general support in the

Commission.<sup>1</sup> It was stated that related legal issues involving electronic registries were a necessary part of such a project (A/CN.9/390, para. 178).

2. As to the planning of future work, the view was expressed that the Working Group at its twenty-ninth session, after completing its consideration of the draft guide to enactment to be prepared by the Secretariat, could have a general discussion on negotiability and transferability of rights in goods. Another view was that the issue of incorporation by reference could also be considered at the twenty-ninth session for possible inclusion in the draft Model Law. A number of delegations expressed their willingness to prepare a brief paper to facilitate discussions on both topics. It was noted, however, that, while the Working Group might have sufficient time for a general discussion, it could not go into detail on either topic (A/CN.9/390, para. 179).

3. Following the twenty-eighth session of the Working Group, the Secretariat received from the delegation of the United States of America the text of a note discussing negotiability and transferability of rights in an EDI context. The text of that note is reproduced as an annex to the present note as it was received by the Secretariat.

## ANNEX

### NEGOTIABILITY AND TRANSFERABILITY IN ELECTRONIC COMMERCE AND THE UNCITRAL DRAFT MODEL LAWS FOR EDI

In accordance with the views of the Commission expressed at the 27th plenary session, and prior discussion of the Working Group, it is proposed that the Working Group examine the legal issues encountered in the negotiability and transferability of tangible goods in international commerce through electronic data interchange (EDI), with a view to making recommendations to the 28th plenary session as to whether such work should be continued. Achieving generally applicable or recognized rules to support negotiability and transferability through EDI could be a significant achievement by the Commission.

The following topics should be considered for initial discussion; all topics are directly or indirectly related to the subject of electronic registries, which is discussed below. It will also be necessary to discuss the relationship of proposed EDI rules with the United Nations Convention on Operators of Transport Terminals, and other relevant international legal texts.

(a) Establishing a preliminary list of areas of commercial practice which should be included in this effort.

(b) Draft rules for validation of agreements for negotiability and transferability through EDI of rights to tangible goods.

(c) Criteria if any for party(ies) to be holders in due course for the transfer of rights to goods or to subsequently negotiate such rights through EDI.

(d) Affect on third parties with or without notice.

(e) Default rules for allocation of risk.

(f) Electronic registries (see below).

While the draft Model Law provides the necessary and basic law to facilitate EDI, it should be supplemented by the Working Group for the more complicated functions expected to be needed

in electronic commerce, such as negotiability and transferability. To be able to address that, it would be useful to identify the potential uses of negotiability and transferability, which are likely to include bills of lading, warehouse receipts, leases and secured transactions, and possibly land sales and mortgages. Commodity trading, currency exchanges, bonds and securities should be dealt with, if at all, at a later stage, although legal issues related to those fields may be relevant now. Other uses could be identified as well.

Next it would be helpful to identify the areas of legal uncertainty surrounding these uses. It can be expected that each use would have its own needs, so it might be best to focus on the particular use most developed for EDI, which is bills of lading.

UN/EDIFACT is developing the message sets necessary to create an EDI bill of lading. CMI has provided voluntary rules for the use of such messaging. ICC, Paris, has sanctioned the use of electronic bills of lading in its INCOTERMS, 1990 and UCP500. So what then is lacking for the use of such bills of lading? Primarily an EDI infrastructure supported by appropriate rules which UNCITRAL may be in a position to formulate.

Even if the ocean carriers were to adopt the full set of UN/EDIFACT messages for ocean carriage, and the banking industry were to adopt messages and procedures for documentary credits, the system would still lack the legal underpinnings that would encourage negotiation and transfer in even the larger trade routes. Voluntary rules, such as the CMI Rules for Electronic Bills of Lading give way when they conflict with a State's laws. For that reason, model laws are needed that would permit or facilitate the use of EDI in establishing transfer of rights, including the use of registries as a means of documenting and supporting the transfer of goods or their enforcement is uncertain in the absence of laws formulated for this purpose.

Negotiation or transfer of any type, in the absence of paper, will require an understanding and supporting legal rules or standards as to who will be recording each transaction (and thus be able to effect the negotiation or transfer), what are the default standards for allocation of risks, and that the procedures are supported by, or at least are not contrary to, a State's laws which can be harmonized as to international transactions.

Three concepts of registries might be governmental, central and private. There may be other types that should be considered as well, but these three may be thought of as:

1. *Governmental*: an agency of the State records transfers as public records, and may authenticate or certify such transfers. Such a registry is important for high-value property such as ships, aircraft, land transactions etc. For public policy reasons, the State is usually not liable for any errors, and the cost is borne through user fees.

2. *Central*: where a commercial group conducts its transactions over a private network (such as SWIFT), accessible only to its members. This type of registry is needed where security and speed are critical. Its limited access permits party verification to be done quickly, facilitating speed and enhancing security. Access to the actual records of the transactions are usually limited to the users, but summaries of the transactions can be reported publicly in summary form (as in securities trading). The rules of the network usually govern the liabilities and costs. International rules or a model law to support the transborder application of such "system rules" is needed.

3. *Private*: conducted over open networks, where the issuer of the document (or the party having responsibility for delivery of the subject of the transaction) administers the transfer or negotiation process (as in the CMI Rules for Electronic Bills of Lading). The records are private, and the costs may be borne by each user. Liability parallels the present practice with paper, in that the administrator is obliged to deliver to the proper party unless excused

<sup>1</sup>Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), para. 201.

by another party's error, in which case local law may apply. This method avoids building added complexity and cost to transactions not presently done over central registries, but would also need international rules or harmonization through a model law, at least as to transborder cases.

A table of characteristics of these registries is enclosed.

In negotiation or transfer, as they presently exist, some party or system must stand behind the document issued and verify its authenticity. That function is in part likely to be filled by an electronic registry in EDI. It should be borne in mind that what is being "transferred" is not the paper or EDI message (that being just the medium), but the rights and/or title to the subject of the transaction.

Accordingly, a model law to guide the creation and use of registries, and to provide default standards for allocation of risks

in the use of registries, particularly for bills of lading\* should be the goal of this Working Group.

The *types of registry* contemplated by supporting rules should be appropriate to the type of transaction to avoid overcomplexity and/or extra costs, lest the effect be to discourage the use of such processes. *Security* should be appropriate to the types of transaction, and consistent with the model laws. *Apportionment of risks* would need to be addressed, taking into account commercial customs and practice, local law, and model international laws and rules, such as that currently under preparation by the Working Group, taking special care not to discourage commercial uses of EDI.

\*An area not well defined by the Hamburg Rules or other cargo liability schemes is the resolution of disputes arising out of the bill of lading itself. While possibly beyond the scope of this Working Group, the need for better definition in this area will, no doubt, become apparent as we explore these issues.

### Registries

	<i>Government</i>	<i>Central</i>	<i>Private</i>
Purpose	Record	Transfer and record	Transfer
Access	Public	Members	Private
Administrator	Government	Third Party	Issuer
Costs	User fee	Membership	Internal
Insurance	None	Network	Party
Allocation of risk	On user	On user	By law, custom or agreement
Security	Moderate	Highest	As needed
Uses	Real estate (deeds, and mortgages), leases, secured transactions	Securities, commodities, bonds, money, foreign currency	Bills of lading, warehouse receipts, cotton receipts

## E. Draft Model Law on legal aspects of Electronic Data Interchange (EDI) and related means of communication: compilation of comments by Governments and international organizations

(A/CN.9/409 and Add.1-4) [Original: English]

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## INTRODUCTION

1. The Commission, at its twenty-seventh session in 1994, requested the Working Group on Electronic Data Interchange to present to it at its twenty-eighth session in 1995 draft model statutory provisions on electronic data interchange.<sup>1</sup> The Working Group, at its twenty-eighth session (Vienna, 3-14 October 1994), approved a text of the draft Model Law on legal aspects of electronic data interchange (EDI) and related means of communication and presented it to the Commission for its consideration (A/CN.9/406, paras. 175-176).

2. The text of the draft Model Law as approved by the Working Group was sent to all Governments and to interested international organizations for comment. The com-

ments received as of 15 February 1995 from 3 Governments, 7 intergovernmental international organizations and 1 non-governmental international organization are reproduced below.

## COMPILATION OF COMMENTS

### A. STATES

#### Poland

*[Original: English]*

#### *General remarks*

Poland supports the general idea of adopting a model regulation of the legal aspects of electronic data interchange. The provisions of the draft could be largely incorporated into Polish national law, in particular in the regulations concerning banking settlements, both internal and international

<sup>1</sup>Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), para. 200.



involving the participation of the Polish banks. Such an incorporation could be accomplished within the framework of the law of contracts, through an appropriate construction of relevant contracts.

In a long-term perspective however, an introduction of some adjustments in the relevant legal provisions might be required, in particular with regard to:

- i. The possibility of making declaration of will with the use of computer without hand-written signature of a given person;
- ii. The possibility of recognizing the computer printouts as a document.

#### *Detailed remarks*

##### 1. Article 5. *Writing (written form)*

Support is given to the tendency expressed in this article to grant the electronic messages legal effectiveness equivalent to their paper-bound counterparts (documents).

Some reservations however raises the proposal contained in point 1 of the article 5 stating that "Where a rule of law requires information to be in writing or to be presented in writing, or provides for certain consequences if it is not, a data message satisfies that rule if the information contained therein is accessible so as to be usable for subsequent reference". It seems that this is a too general formulation and as such may cause some difficulties with its practical implementation. Therefore an insertion of an additional provision might be considered, stipulating that the electronic messages sent in accordance with the digital identification procedure (digital signature) would have an evidential value equivalent to the written documents.

##### 2. Article 6. *Signature*

A modification of the contents of this article might be considered, giving also in this case preference to the digital signature which seems to fulfil most properly traditional functions of hand-written signature (identification of the originator of the document and indication of the originator's approval of the information contained therein). Such a modification would also allow other methods of substituting the traditional hand-written signature, if the contracting parties find it appropriate.

##### 3. Article 12. *Acknowledgment of receipt*

The contents of this article might be supplemented with an additional point 6 stating that in case a message being sent contains digital signature, such an acknowledgment is redundant.

4. Renewed consideration should be given to a proposal of including within the framework of the draft Model Law a provision regarding the responsibility of the parties to contracts agreed upon under the EDI system in the formulation contained in article 15 of the previous draft of the Model Law.

Singapore

[Original: English]

#### *Title*

The phrase "... LEGAL ASPECTS OF ..." is too vague and adds nothing to the preceding phrase "... MODEL LAW ...".

The phrase "... AND RELATED MEANS OF COMMUNICATION ..." was adopted so that the model law could encompass various possible technologies or combinations of technologies. However, since there was a divergence of views at the 28th session as to the precise words to be used and the fact that the Working Group did not specifically focus on any particular related technology, perhaps this phrase should be deleted.

For the above reasons, we suggest changing the title to:

#### "DRAFT MODEL LAW ON ELECTRONIC DATA INTERCHANGE".

##### Article 1. *Sphere of application*

The phrase "This Law forms part of commercial law." is superfluous. The drafting style also does not follow that used in the first articles of other UNCITRAL texts. For example, article 1(1) of the UNCITRAL Model Law on International Commercial Arbitration reads, "This Law applies to international commercial arbitration ..." and article 1(1) of the UNCITRAL Convention on International Bills of Exchange and International Promissory Notes reads, "This Convention applies to an international bill of exchange ...".

For the above reasons, we suggest amending article 1 as follows:

*"This Law applies to commercial transactions where information in the form of a data message is used."*

For similar reasons, we suggest amending the footnote to article 1 relating to the sphere of application (for States who wish to restrict such application) as follows:

*"This Law applies to international commercial transactions where information in the form of a data message is used."*

##### Article 2(a). *Definition—"Data message"*

The concluding phrase "including, but not limited to, electronic data interchange (EDI) ... or telecopy," is unnecessary and may even extend the scope of the model law beyond what was originally intended.

We also suggest the use of the word "retained" in place of "stored" so as to be consistent with article 9.

We therefore suggest the following definition:

*"'Data message' means information generated, retained or communicated by electronic, optical or analogous means;"*

##### Article 2(c). *Definition—"Originator"*

The generation or storage of data messages does not create legal problems. It is the sending of such messages which has given rise to legal uncertainties. Therefore, the purpose for defining this term should be confined to that of determining who the sender of a data message is (other than an intermediary) as opposed to who generated or stored the data message.

We therefore suggest the following definition:

*"'Originator' of a data message means a person by whom, or on whose behalf, the data message purports to have been communicated, but it does not include a person acting as an intermediary with respect to that data message;"*

### Article 3. Interpretation

While the present formulation emphasizes the need to interpret so as to be able to apply the model law uniformly between different countries, it should also highlight the fact that the model law is intended to facilitate the use of EDI and analogous means of communication in commercial transactions.

For this reason, we suggest the following change:

*"(1) In the interpretation of this Law, regard is to be had to its international source, the need to promote uniformity in its application and the observance of good faith, as well as its purpose to facilitate the use of electronic data interchange and analogous means of communication in commercial transactions."*

### Article 4. Legal recognition

Other than stating the principle that a data message is to be legally recognized, this provision does not serve any purpose because it does not preclude an objection to a data message on any other ground. It is felt that articles 6-9 are more than sufficient to give legal recognition to a data message.

We therefore recommend deleting article 4.

### Article 6. Signature

In respect of article 6(1)(b), we suggest the insertion (immediately after paragraph (1)(b)) of the following considerations in determining the reliability of the method used to identify the originator:

*"In determining whether that method is reliable, regard shall be had to the following:*

- (i) the relative bargaining positions of the originator and the addressee in their choice of the method of identification;*
- (ii) the importance and value of the information in the data message;*
- (iii) the availability of alternative methods of identification and the cost of implementation;*
- (iv) the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the data message was communicated; and*
- (v) the state of science and technology at the time the method was agreed upon."*

### Article 7. Original

With regard to article 7(1)(a), we have the following comments:

(a) We fail to see the relevance for imposing this requirement that the information be displayed to the person to whom it is to be presented;

(b) The requirement ignores the reality that in many EDI systems, the processing of data messages is automated with little or no human intervention. This means that the data message may not be displayed to any person at all nor is there a need to do so; and

(c) The requirement to display information raises the question as to whether the raw information (usually in the form of unintelligible machine language) should be displayed or the processed and intelligible information in the form of the final data message be displayed. Such a data message in its processed form is never "original". A sample copy of an EDI EDIFACT data message which is made up of unintelligible alpha-numeric characters is enclosed to illustrate this point.\*

As for article 7(1)(b), we feel that the concept of a "reliable assurance" is completely vague and difficult to apply. What exactly is an "assurance" as compared to a "method" which is the term used in article 6 and what is the acceptable standard of reliability?

For these reasons, we propose that paragraph (1)(a) be deleted and article 7(1) be drafted as follows:

*"Where a rule of law requires information to be presented in its original form, or provides for certain consequences if it is not, a data message satisfies that rule if the integrity of the information between the time when it was first generated in its final form, as a data message or otherwise, and the time when it is received by the addressee is maintained."*

In respect of article 7(2), we recommend substituting in paragraph (2)(a) the words "normal course of communication, storage and display; and" with the words "normal course of communication and storage." and deleting paragraph (2)(b). Article 7(2) in our proposed form would read:

*"Where any question is raised as to whether paragraph (1) of this article is satisfied, 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 and storage."*

### Article 8. Admissibility and evidential value of data messages

We recommend the following changes:

- (a) In the title, "value" be replaced with "weight";
- (b) In article 8(1), "admission" be replaced with "admissibility";
- (c) In article 8(1)(a), "grounds" be replaced with "sole ground";
- (d) In article 8(1)(b), the words "in writing, signed or" be inserted after the word "not";
- (e) In article 8(2), "presented" be deleted;
- (f) In article 8(2), "stored" be replaced with "retained"; and
- (g) In article 8(3), the words "in writing, signed or" be inserted after the words "on the grounds that it is not".

### Article 10. Variation by agreement

We suggest replacing the word "storing" with the word "retaining" so as to be consistent with article 9.

\*Note by the Secretariat: The sample copy is not reproduced in the present document.

**Article 12. Acknowledgment of receipt**

In article 12(5), it is desirable to state clearly what type of acknowledgment of receipt is being contemplated. This is because EDI systems are able to generate two types of acknowledgment messages: functional acknowledgment and system acknowledgment. The latter is system generated i.e. triggered the moment the addressee reads or down-loads the data message.

**Article 13. Formation and validity of contracts**

At the end of article 13(1), we suggest that the words "a data message was" be replaced with the words "one or more data messages were".

**Article 14. Time and place of dispatch and receipt of data messages**

The present formulation of this article does not provide for the situation where a data message is dispatched and enters an information system of the addressee's intermediary which information system was neither designated by nor belonging to the addressee.

**United Kingdom of Great Britain and Northern  
Ireland**

[Original: English]

**Article 2(c)**

The effect of this definition as drafted is that, where a data message is communicated to an addressee, and stored by that addressee, the person who communicated the data message and the addressee will both be an "originator" of it. This is likely to cause confusion. For example, article 6 provides that any rule of law requiring a signature can be satisfied by using a reliable method to identify the originator.

It is important to recognize that messages may be stored without necessarily being communicated; but, whether or not the data message is communicated, the person designated as the "originator" should be the person who generated the data message, and no other person. To ensure that this is the case, the words "stored or communicated" should be replaced by "*whether to be stored or to be communicated*".

This amendment would also greatly simplify the definition because the exclusion of intermediaries would be achieved without any need for the final words ("but it does not include a person acting as an intermediary with respect to that data message"). These words could therefore be deleted.

**Article 2(d)**

The intention is that this definition should cover only the person with whom the originator intends to communicate by transmitting the data message. At present, the definition could also catch persons to whom the originator intended the addressee to copy or pass on the message. Article 2(d) should therefore be amended to read:

"(d) 'Addressee' of a data message means a person with whom the originator intends to communicate by transmitting the data message."

This would also enable the reference to an "intermediary" to be deleted.

**Article 2(e)**

The definition, as it now appears, is too wide. It covers any person who acts as an agent in receiving, transmitting or storing a data message, and is not limited to professional intermediaries in the sense in which the term is normally understood. Furthermore, the term "intermediary" is not used in the substantive provisions of the Model Law. It appears only in the definitions in article 2(c) and (d). As indicated above, these references to an "intermediary" are better avoided. The inclusion of a definition is therefore both unnecessary and confusing. It should be deleted.

**Article 2(f)**

To define "information system" in terms of a "system" is circular. Moreover, the word "system" in English has a number of possible meanings (for example, methodology), and is too vague. The UK considers that "information system" should be defined as meaning:

*"the equipment, software and operational control which permit information to be generated, communicated, received or stored in a data message".*

**Article 4**

The principle of this provision is accepted, provided that it can be drafted satisfactorily. There are two points on the drafting.

Firstly, the intention is not to affect requirements for particular formalities. (These are dealt with by articles 5, 6 and 7). The provision as drafted, however, does not make it clear that requirements for particular formalities (such as writing, or an original or a deed) are not affected where the inevitable and automatic consequence of using a data message is that the requirement is not satisfied. In such cases it would be possible to say: "The information is in a data message; *therefore* the necessary requirement (e.g. for writing etc.) has not been satisfied". As drafted, article 4 could thus be read as striking down the requirement in question. Since that is not the intention, some clarification is needed.

Secondly, the provision says that information shall not be denied legal effectiveness etc. It is not information as such, however, which has legal effectiveness. Documents, records and transactions may have legal effectiveness. Information does not. There is no such thing as legally effective information; information is merely disembodied data. (For this reason, too, it is awkward to refer to information as *being* "in the form of a data message". Information as such has no form, although it may be "recorded in the form" or "communicated in the form" of a data message.)

To take account of these points, the UK would suggest redrafting the provision as follows:

*"The use of a data message to record or communicate information shall not affect the legal consequences of the record or communication or of what is recorded or communicated, provided that no particular requirement applies which the use of a data message does not satisfy."*

## Article 5(1)

Where a transmission is only valid if it is in writing, the date that it is put into writing becomes important.

If the transaction is concluded orally, and is only subsequently recorded in a data message, or a series of data messages, it is essential that the requirement for writing is only satisfied as from the date that the relevant data message is generated. As drafted, article 5 would have the effect that in such a case a subsequent data message could satisfy the requirement *retrospectively*.

Article 5 merely states that "a data message satisfies that rule", i.e. any data message, regardless of when it was generated. This would include a subsequent data message, and the article would therefore have the effect that a subsequent data message satisfied the rule as from the date that the rule became applicable. Yet when an oral transaction is subsequently put into writing, the written document can only be relied on, as satisfying the requirement that the transaction must be in writing, as from the date that the written document is generated. The same principle should apply to data messages.

The UK therefore considers that, after the words "data message", there should be inserted:

*"generated at the relevant time".*

The reference to "the relevant time" here would mean the time in respect of which the rule is applicable. It is the significant time, the time at which it is significant to know whether the rule was satisfied for the purpose of determining any issue.

## Article 11

*Paragraph (2):* The word "ascertained" should be replaced by "*took appropriate steps to ascertain*". As drafted, the word "ascertained" implies that the addressee was able to establish *as a fact* that the data message was that of the originator. In those circumstances, the provision would be unnecessary. All that is intended is that the provision should apply where the addressee carried out the agreed procedure.

*Paragraph (3):* The words "Where paragraphs (1) and (2) do not apply" should be replaced by "*Where paragraph (1) has not been shown to apply*". Alternatively, these opening words should be deleted.

Whilst it is true that paragraph (3) should not apply where it is known that the communication was authorised, neither should it apply where it is known that the communication was *not* authorised. As drafted, paragraph (3) applies (and only applies) where the data message was *not* communicated by the originator or by another person who had the authority to act on behalf of the originator. Instead, paragraph (3) should only apply where there is *uncertainty* as to whether paragraph (1) applies.

For this purpose, it is not necessary to refer to paragraph (2). All that is necessary is that there should be uncertainty as to whether paragraph (1) applies.

As regards the choice between the words in square brackets, the UK considers that the presumption should be rebuttable, and the word "presumed" should therefore be chosen.

*Paragraph (3)(b):* The word "ascertained" should be replaced by "*took appropriate steps to ascertain*". As in paragraph (2), the word "ascertained" implies that the addressee

established as a fact that the data message was that of the originator. All that is intended is that the addressee used a reasonable method of verifying.

*Tailpiece to paragraph (3):* The words "subparagraphs (a) and (b) do not apply" should be replaced by "*this paragraph does not apply*." The operative part of the paragraph which is disapplied is in the *chapeau*. (Subparagraphs (a) and (b) merely set out the conditions where the *chapeau* applies.)

In addition, after the words "any agreed procedure", in the tailpiece to paragraph (3), there should be inserted "for ascertaining". At present, the connection with the words that follow is missing.

To make this sentence less cumbersome, it could perhaps be redrafted as follows:

*"However, this paragraph does not apply if the addressee knew that the data message was not that of the originator, or should have known that it was not, by the exercise of reasonable care or the use of any agreed procedure for ascertaining whether it was."*

*Paragraph (4):* As a minimum, certain amendments would be needed to attempt to make sense of the second sentence. However, the UK strongly believes that logic requires the second sentence to be deleted, because it was conceived on the basis that the presumption in the first sentence was to be irrebuttable, and this is no longer the case.

The presumption in the first sentence is rebuttable. As drafted, however, the second sentence applies where there has, as a matter of fact, been an error in the content. This conjunction of a rebuttable presumption with the premise that there has been an error is contradictory, because where there has, *as a matter of fact*, been an error in the content, the presumption in the first sentence will inevitably be rebutted in any event, and the second sentence will therefore be superfluous.

In addition, the second sentence is actually incorrect in applying the presumption by implication, where there has as a matter of fact been an error of which the addressee was *unaware* (and where the addressee was not negligent). There cannot be a rebuttable presumption that the content was correct where the known fact is that there was an error.

If the second sentence is to be retained, therefore, it needs to be revised along the following lines. (The suggested alterations are italicized.)

*"However, where the originator alleges that the transmission has resulted in an error in the content of a data message ... the content of the data message is not presumed to be that received by the addressee insofar as the data message is alleged to have been erroneous, ..."*

This would make it clear that the presumption only applies in case of *uncertainty* as to whether the originator is correct in alleging an error.

In addition, the drafting does not work at present in the case of an erroneous duplication of a data message. In such a case, the addressee believes that there were two data messages. It does not therefore make sense to say that the content of the data message (singular) is not presumed to be that received by the addressee. To meet this point, the wording would need to be revised as follows:

*"... the content of the data message or messages received by the addressee is not presumed to be that transmitted by*

*the originator insofar as the data message or messages are alleged to have been erroneous, ..."*

However, if it can be shown that an addressee knew of an alleged error, or that an alleged error would have been apparent if the addressee had exercised reasonable care, it will generally be possible, and indeed easier, to show that the alleged error actually existed. It is therefore superfluous to provide a rebuttable *presumption* that the error existed in those circumstances.

The second sentence of paragraph (4) should therefore be deleted altogether.

In the UK's view, this defect in the current draft has arisen in the following way. The second sentence of paragraph (4) was drafted on the assumption that the presumption in the first sentence was to be *irrebuttable* ("deemed"). On that basis, the second sentence makes sense. The UK agreed with the policy decision to make the first sentence a rebuttable presumption; but now this has been done, the logical *consequence* of making the presumption rebuttable is that the second sentence should be deleted.

#### Article 12(5)

The first sentence of paragraph (5) covers two situations. The first is where there is a dispute about whether it was the addressee or another person who sent the acknowledgement of receipt. The second is where it is agreed that the addressee sent the acknowledgement of receipt, but there is nevertheless a dispute about whether the addressee received the originator's message.

The first situation is already covered by article 11, and should not be covered here. Moreover, the position under this provision is inconsistent with article 11(2) and (3), because under this provision the mere receipt of the acknowledgement is in effect sufficient to give rise to a presumption that the acknowledgement was sent by the addressee.

The first sentence of paragraph (5) should therefore be confined to the case where it is accepted that the acknowledgement was sent by the addressee, but it is disputed that the addressee received the originator's data message. The situation where there is a dispute as to whether the acknowledgement originated from the addressee will then be covered by article 11.

To achieve this result, the following words should be inserted after "Where the originator receives an acknowledgement or receipt":

*"transmitted by or on behalf of the addressee".*

#### Article 13

The UK considers that a similar point arises here as on article 4. In the UK's view, the end of the second sentence of paragraph (1) should be amended, by replacing the words "on the sole ground that a data message was used for that purpose" by the following:

*"on the grounds that a data message was used for that purpose, provided that no particular requirement applies which the use of a data message for that purpose does not satisfy."*

The UK understands that the intention of this sentence is not to affect requirements that a contract, or a particular kind of contract, must be in writing.

As drafted, however, the second sentence appears to prevent a statutory requirement that a contract, or a particular kind of contract, must be in writing from having the effect of invalidating a contract concluded by means of data messages, in a case where the contractual agreement of the parties, or the terms to which they agree, are never expressed in writing.

If it is possible to say that, *because* the contract was only ever expressed in data messages, the requirement for writing has not been satisfied, then it would seem to be the case that the sole ground for denying the validity or enforceability of the contract is that data messages were used for this purpose. Article 13(1) would therefore render the statutory requirement ineffective. Since we understand that this is not the intention of the Working Group in drafting the second sentence, a clarification is needed as suggested above.

The reference to "the sole ground" is likely to lead to difficult semantic argument as to whether a contract is being denied validity or enforceability on the sole ground that a data message was used, in a case where the objection is made that the contract was concluded by means of data messages, and *therefore* was not in writing as required. The word "sole" should therefore be deleted, and instead (as stated above) there should be added, at the end of the sentence, a new proviso that no particular requirement applies which the use of a data message for this purpose does not satisfy.

#### Article 14(4)

Insofar as it relates to the deemed place of despatch, this rule may be unnecessarily restrictive. If the originator specifies in the data message the place from which it was actually despatched, this should not be overridden by a rule which artificially deems the message to have been despatched from somewhere else.

The UK therefore considers that, in the first sentence, the words "at the place where the originator has its place of business" should be amended to read:

*"at the place specified by the originator in the data message, or, in the absence of such specification, at the place where the originator has its place of business".*

### B. INTERGOVERNMENTAL INTERNATIONAL ORGANIZATIONS

#### Asian Development Bank

*[Original: English]*

The Bank's Legal Office has reviewed the draft text of the Model Law and we have no comments to make on the document.

#### European Union

*[Original: English]*

#### Article 1. Sphere of application

In the first footnote to chapter I it is mentioned that "this Law does not override any rule of law intended for the protection of consumers". In paragraph 78 of the deliberations of the Working Group it is stated that the Working Group found the substance of the footnote to be generally acceptable.

The European Commission considers that the term "consumers" is perhaps too narrow. We presume that this Model Law, even though it may (also) be applicable to natural persons, does not purport to override any fundamental freedoms and rights of natural persons as recognized in international treaties, constitutions and other laws. Explicit reference is made to article F(2) of the Treaty on European Union, which reads:

"2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of human rights and fundamental freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of community law."

As a pertinent example of the application of these rights within the European Community, reference is made to the proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Com (92) 422 final - SYN 287. It is expected that a common position will be reached by the Council of Ministers on 20 February 1995 with a view to the adoption of this proposal.

In light of the foregoing, the European Commission proposes to change the above-mentioned footnote as follows:

"This law does not override any rule of law intended for the protection of fundamental rights and freedoms of individuals or for the protection of consumers."

#### **Food and Agriculture Organization of the United Nations (FAO)**

*[Original: English]*

FAO has no comments to make.

#### **International Labour Office (ILO)**

*[Original: English]*

The Model Law would seem to fall largely outside the area of the ILO's mandate, and our comments are thus restricted to the possible impact it might have in the labour field.

The sphere of application specifies that the Model Law "forms part of commercial law." The definition of commercial law in the footnote states that it should be given a wide interpretation. Although it does not appear that the Model Law is intended to govern contracts of employment or other relationships between employers and employees, this is not explicitly excluded. To avoid such an impression, it might be better to explicitly exclude such contracts and relationships.

Alternatively, consideration might be given adding a reference to workers in the first footnote, which would then read, "This Law does not override any rule of law intended for the protection of consumers or workers."

Should this understanding, i.e. that the Model Law is not to apply to the employer/employee relationship, be incorrect, the Office would be quite willing to provide additional comments on the text. These would relate in particular to concerns regarding the confidentiality of data retained, in the interest of workers' privacy.

#### **International Maritime Organization (IMO)**

*[Original: English]*

It appears that the draft legislation would not be of immediate relevance to the activities of IMO. However, it may become applicable in respect to the International Ship Information Database (ISID) currently being developed. While it is unclear to what extent the model legislation would be applicable, insofar as the objectives and structure (including users, providers and access) of the ISID are still being formulated, the following observations concerning matters of general relevance to ISID are offered for consideration. These comments relate to specific articles of the draft model law set forth in document A/CN.9/406, 17 November 1994, at annex.

##### **(1) Article 6. Signature**

In respect to the method used to identify the originator of the data message, article 6(b) provides that: "... that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, ...". This provision could be seen to be insufficiently clear as to the standard of reliability applicable to the method used to identify the originator. Perhaps consideration could be given to identifying with greater specificity the applicable criteria relating to the term "reliable" and the intended standard of reliability.

##### **(2) Article 7. Original**

Article 7(2)(b) makes reference to "the standard of reliability required" regarding originals. The standard can be seen to be insufficiently clear, and perhaps consideration could be given to providing objective criteria for the applicable standard of reliability, or appropriate clarification in a guide to enactment.

It may perhaps be useful to clarify what this standard of reliability applies to; that is, whether it applies to the "reliable assurance as to the integrity of the information" under article 7(1)(b), or, for example, to the manner in which the data record was generated, stored, communicated or authenticated.

##### **(3) Article 8. Admissibility and evidential value of data messages**

Article 8(2) refers to reliability in relation to data messages and to the integrity of information. The standard of reliability to be applied is unclear and perhaps consideration could be given to establishing objective criteria for the applicable standard of reliability, or appropriate clarification in a guide to enactment.

##### **(4) Article 11. Attribution of data messages**

The final paragraph of article 11(3) provides: "However, subparagraphs (a) and (b) do not apply if the addressee knew, or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator."

One matter which could cause some concern is whether this provision should include the situation where the addressee "should have known, had it exer-



cised reasonable care", inasmuch as this would appear to impose a subjective standard of insufficient clarity as to the burden placed on the addressee, where consequences of liability for damages could be involved. Perhaps this matter could be taken into consideration in the preparation of the analytic commentary.

### Organization for Economic Co-operation and Development (OECD)

[Original: English]

While having no specific suggestions to make for amendment, the OECD wishes to recommend to the attention of UNCITRAL the following Guidelines, which have been adopted and implemented by 25 OECD Member countries as well as by hundreds of private enterprises:

- 1992 OECD *Guidelines for the Security of Information Systems*, in particular the definitions of "data", "information" and "information systems", the nine principles of the Guidelines, and the provisions for implementation; and
- 1980 OECD *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*.

### United Nations Economic Commission for Latin America and the Caribbean (ECLAC)

[Original: English]

ECLAC has no comments to make.

## C. NON-GOVERNMENTAL ORGANIZATIONS

### Banking Federation of the European Union

[Original: English/French]

#### I. General observations

The Banking Federation believes that the draft model law should be reviewed in regard to the use of concepts. The method used—which is to seek the functional equivalents, in terms of electronic data interchange, for writing (article 5), for a signature (article 6) and for the original (article 7), does not seem to us to be the best. Data processing and EDI clearly give rise to entirely new legal problems which appear inappropriate to resolve by traditional means.

We furthermore think that the French version of this document calls for criticism due to lack of clarity in the wording.

#### II. Observations on the articles of the draft model law

##### 1. Chapter I. General provisions

##### Article 1. Sphere of application

The purpose of including the statement that the law only relates to commercial law could be questioned, given that the text is produced by UNCITRAL - United Nations Commission on International Trade Law.

##### Article 3. Interpretation

Article 3(2) refers to the general principles on which the law is based. This reference is too imprecise and risks giving rise to differences in interpretation and even conflict.

##### 2. Chapter II. Application of legal requirements to data messages

##### Article 4. Legal recognition of data messages

This article prohibits the denial of any legal effectiveness, validity or enforceability to a "data message".

This provision seems much too vague to be acceptable in its current form.

##### Articles 5 and 6. Writing—Signature

These provisions (which give the "data message", with respect apparently to the validity of agreements, equal force to writing accompanied by a hand-written signature) remove any specific value from writing when the latter is required "*ad solemnitatem*". It must be asked whether problems of enforceability *vis-à-vis* third parties could not arise.

Reference should be made in article 5(1) to the requirement for the information to be sound. A question also arises as to whether "subsequent reference" would be on a unilateral or bilateral basis.

In addition, since article 6 is included in chapter II, this provision cannot be varied by agreement. The possibility provided for under article 10 only applies to the provisions of Chapter III. It should be ensured that the obligations of a technical nature established by this article do not create excessively burdensome constraints.

With regard to article 6(1)(b), who decides whether this method is reliable? In addition, this provision could lead to fears that, despite the existence of an agreement between the originator and the addressee establishing a particular identification procedure, the signature on the data message could be called into question on the basis that the identification process was not reliable.

##### Articles 7 and 8. Original—Admissibility and evidential value of data messages

These provisions confer on "data messages" an evidential value equivalent to writing, leaving it to the courts to assess the weight of the evidential value.

What is meant by "reliable assurance" in article 7(1)(b)?

In article 7(2)(a) mention is made to "whether the information has remained complete and unaltered". Who will determine whether and how this is the case?

Article 8(1) (whereby "nothing in the application of the rules of evidence shall apply so as to prevent the admission of a data message in evidence") and article 8(1)(b) (which provides for the application of any other rule of law "if it is the best evidence that the persons adducing it could reasonably be expected to obtain") would seem to be contradictory.

##### Article 9. Retention of data messages

These provisions warrant greater detail, in particular as regards proof that the data transmitted and received are identical and that they can be reproduced in legible form.

Since it is impossible to alter the provisions of this article by agreement, it should be ensured that this article does not impose excessive constraints.

We also feel that the phrase "where it is required by law" in the first sentence of the article is ambiguous. In general, it may be presumed that the retaining of data messages is always required by law. Proof must be retained of the performance or transmission of an order. But if this is the meaning to be given to this phrase, the provisions of this article would impose disproportionate constraints. It would be more realistic to limit the scope of this article to cases where the law requires specific retaining of documents for reasons of general interest.

Article 9(1)(c) is difficult to understand in its current wording. It should at least be altered as follows "... including, but not limited to, *information associated with the originator, addressee(s), and date and time ...*"

### 3. Chapter III. Communication of data messages

#### Article 10. Variation by agreement

This article enables the parties to derogate by agreement from the provisions of this chapter, except as otherwise provided.

The question is whether it can rightly be concluded, in contrast, that the provisions of the other chapters are binding.

#### Article 11. Attribution of data messages

Article 11(2) contains a contradiction in that it states that the data message can be presumed to be that of the originator if the addressee has *ascertained* that the message emanated from the originator.

The solutions provided in article 11(3)(a), (b) and the last paragraph (which either make it possible to attribute to the originator a data message which cannot be presumed, under articles 11(1) and (2), to emanate from him, or on the contrary exclude this possibility) make reference to imprecise data (see in particular "... whose relationship with the originator ..."), which appear to make them difficult to apply.

How can it be determined whether "reasonable care" — provided for under article 11(3), last paragraph, and article 11(4)—has been exercised?

Article 11(5), whereby any legal effect of presuming that a message emanated from the originator "will be determined by this Law and other applicable law", would seem to conflict with article 10.

#### Article 12. Acknowledgement of receipt

The meaning of and justification for article 12(4)(b) are not easy to see. Indeed, if an acknowledgement of receipt is not a prerequisite for performance of the instructions contained in the data message, how can it be presumed (in the event that an acknowledgement of receipt is not received within a given deadline) that the data message had never been transmitted (since it might have been received and been performed)?

What is meant moreover by the phrase "exercise any other rights it may have"?

#### Article 13. Formation and validity of contracts

The provisions of chapter III apply directly to data messages received outside the contractual framework. This would be the case, for example, with an order received by fax, electronically or otherwise. Under the provisions of chapter II, such an order could not *per se* be systematically deemed to have been invalidly issued. It is essential that the addressees, and in particular banking institutions, retain the possibility of refusing to execute orders which are only presumed to have come from the originator.

It would therefore be appropriate for the model law to establish the principle whereby the addressee can always demand confirmation in another form of the data message and article 13(1) should be reworded as follows: "In the context of contract formation, unless otherwise agreed by the parties or a contrary view is expressed by one of the parties, ...".

Finally, can the originator not withdraw the offer before it is received or known to the addressee?

#### Article 14. Time and place of dispatch and receipt of messages

The references to "unless otherwise agreed" in article 14(1), (2) and (4) serve no purpose since article 10 is included in chapter III (see article 10).

With regard to article 14(2)(a), what are the procedures or possibilities of control at the disposal of the originator to check that the data message has genuinely been received?

[A/CN.9/409/Add.1]

### COMPILATION OF COMMENTS

#### A. STATES

##### Japan

[Original: English]

Japan considers that the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, approved by the UNCITRAL Working Group on EDI in its 28th session, is of great importance, since it constitutes a solution at the international level to the difficult problem of removing legal obstacles to the use of EDI in commercial transactions. In general, this draft Model Law is formulated in a flexible manner, as it should be, given the diversity in national legal systems and the principle of party autonomy. It is expected that this Model Law, when adopted, will serve as a useful point of reference for any country intending to amend its national laws to meet the needs of an age of electronic commerce. Nevertheless, it is our view that in its present form, the draft Model Law contains provisions which leave room for improvement. The following comments are offered without prejudice to our final position on the draft Model Law.

#### Article 2

According to the paragraph (a) definition of "data message", a key notion of this Model Law, information becomes

a data message when it is generated, stored or communicated by any of the means covered by that paragraph. The notion of a data message in this Model Law is there defined in such a way as to mean the information thus processed through electronic means. On the other hand, the expression "information in a data message" used in paragraph (f) suggests that the term "data message" might mean a container of information, as it were, something distinct and separate from the information itself. It will, therefore, be desirable for the guide to the Model Law to give a comprehensive explanation of the notion of "data message" as used in the Model Law.

#### Article 7

Although there is some doubt as to whether the requirement of subparagraph (a) of paragraph (1) should be an essential element of the notion of "original", if the purpose of this subparagraph is to make it clear that the display of information through an electronic device may substitute for the presentation of information in paper documents required by law, then it would be more appropriate to use the same terminology as in article 5 *Writing*, where, in addressing the question of presentation of information in an EDI environment, the expression "accessible" is used instead of "display".

With regard to subparagraph (b) of paragraph (1) of article 7, we fear that the words "it was first composed in its final form" might create problems with regard to application. In an EDI environment, the same information could be recorded in different forms at one time, as well as at different times. In such an environment, what does "its final form" mean? How should, or could, the question of when the information was first composed in its final form be decided? The guide to the Model Law should address the point by illustrating how this subparagraph would operate in practice.

#### Article 8

As a matter of principle, the question of weight of evidence should be left to the trier of fact. Any provisions of this Model Law in this area should be limited to stipulating factors or guidelines to be taken into account in evaluating the evidential value of a data message so as to avoid the risk of interfering with the free discretion of judges (see A/CN.9/373, para. 102). From this point of view, the first sentence of paragraph (2) of article 8 is unnecessary, as it is self-evident that any information, in whatever form, should be given due evidential weight, once admitted as evidence. To delete this sentence and retain only the second sentence will suffice for the purpose of this paragraph.

The reference to article 8, in paragraph (3), should be to article 7. In any case, however, paragraph (3) should be deleted, as the purport of this paragraph is already sufficiently covered by article 7 and the second sentence of paragraph (2) of article 8.

#### Article 9

If subparagraph (c) of paragraph (1) is to require the retention of transmittal information in an EDI environment even where the retention of such information is not required by the relevant provisions of national law in a paper-based

environment, this subparagraph might be too restrictive, as it imposes a more stringent requirement regarding the retention of information in the form of data messages than in the form of paper documents. The guide to the Model Law should explicitly state that this article is not intended to burden information in the form of a data message with requirements beyond what is required by national law in respect to the retention of transmittal information.

#### Article 11

As a matter of drafting, the word "deemed" used in paragraph (1) is considered to be inappropriate. That a message communicated by the originator or by any authorized person is that of the originator goes without saying. There is no need to "deem" such a message to be that of the originator by operation of law. The words "deemed to be" should be deleted and, consequently, the entire paragraph (1) might be said to be unnecessary.

With respect to paragraph (3) of article 11, if the opening words "Where paragraph (1) and (2) do not apply" are to be retained, the logical conclusion would be to choose the word "deemed" in brackets in the *chapeau*, because, if these opening words are retained, the prerequisite for the application of paragraph (3) might be considered as that it has been established that paragraph (1) is not applicable, namely that a data message was neither communicated by the originator himself nor by a person authorized by him. Obviously, this prerequisite serves as counter-proof to rebut the presumption that the data message is that of the originator. Hence, choosing the word "presumed" in the *chapeau*, while at the same time retaining the opening words, would be self-contradictory.

On the other hand, however, if paragraph (3) is made a "deem" provision, a policy problem will arise, as an addressee who properly applies a procedure agreed to by the originator is, as the draft now stands, protected only by a presumption under paragraph (2). It does not seem reasonable to give greater protection to an addressee who does not apply such a procedure.

We are of the view that in order to maintain a proper balance between paragraphs (2) and (3), paragraph (3) should be a presumption provision, which would then protect the addressee who, for one reason or another, did not, or was not able to, apply an agreed procedure properly, but nevertheless deserves the protection of the presumption. Assuming that the substance of the present subparagraphs (a) and (b) of paragraph (3) is to be maintained as requirements for such protection, which might be questionable if paragraph (3) is to provide for a presumption, the following new paragraph (3) is suggested with a view to clarifying the subject matter of the presumption.

#### New paragraph (3)

"Without prejudice to paragraphs (1) and (2),

(a) a person whose actions resulted in the data message as received by the addressee is presumed to have the authority to act on behalf of the originator in respect of that data message if the relationship of that person with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify the data message as its own; or

(b) a data message is presumed to be that of the originator if the addressee ascertained that the data message was that of the originator by a method which was reasonable in the circumstances.

However ... [unchanged]"

In this connection, the guide to the Model Law should provide explanation as to the character and scope of the "relationship" in subparagraph (a) of paragraph (3). For instance, should a person entrusted with the task of developing the originator's information system, and thus knowing the method for identification, be regarded as falling within the scope of this subparagraph? Moreover, in view of the similarity of and possible conflict between article 11 of this Model Law and article 5 of the UNCITRAL Model Law on International Credit Transfers, the guide to the Model Law should clarify how these two Model Laws interrelate with each other in application.

As regards paragraph (4), by virtue of the presumption provided in the first sentence of that paragraph, the burden of proof for establishing that the data message as received by the addressee contains an error is on the person claiming the existence of such an error. In our view, establishing that transmission resulted in an error in the content of a data message or in the erroneous duplication of a data message should be sufficient to rebut the presumption, whether or not it is established that the addressee knew or should have known of the error, thus, being irrelevant. Accordingly, the words "if the addressee knew ... in transmission" in the second sentence of this paragraph should be deleted.

On the other hand, we note that there are cases where there is an agreement between the originator and the addressee as to a method for ascertaining the integrity of a data message apart from an agreement as to a method to identify the origin of a data message as envisaged in paragraph (2). It could be argued that an addressee who ascertained the integrity of a data message in accordance with such an agreement deserves more protection than that of a mere presumption provision. If this argument is accepted, there would be a need for a provision, either in the form of a redrafted paragraph (4) or a new paragraph, to the effect that the content of a data message is deemed to be that received by the addressee, if the addressee ascertained the integrity of the data message by properly applying a procedure previously agreed to by the originator, unless the addressee knew or should have known, had it exercised reasonable care, that the data message contained an error.

Paragraph (5) is unnecessary, as it states the obvious.

#### Article 12

The present formulation of paragraph (3) gives the addressee the option of sending the acknowledgement at any time it considers it advantageous to give effect to the originator's message, where the originator has not specified the time within which the acknowledgement must be received. In order to avoid the addressee's being permitted to speculate at the risk of the originator, the words "until the acknowledgement is received" should be replaced by the words "unless the acknowledgement is received within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time".

Furthermore, since it is our understanding that the question of whether or not a data message conditional upon receipt of the acknowledgement has any legal effect should be governed by applicable law, the expression "the data message has no legal effect" in this paragraph is inappropriate. The same wording as used in subparagraph (b) of paragraph (4), that is, "the originator may treat the data message as though it had never been transmitted, or exercise any other rights it may have", is preferable.

Paragraph (4) contemplates a situation where the originator, while specifying the time within which the acknowledgement must be received, does not state that the data message is conditional on receipt of the acknowledgement. It is difficult, however, to imagine that such a situation will occur in practice, since it may reasonably be assumed that a data message is conditional on receipt of the acknowledgement, when a time for receipt is specified, or agreed to. The words "within the time specified or agreed or ... specified or agreed" should, therefore, be deleted.

#### Mexico

[Original: Spanish]

With reference to the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, the following are proposed comments by the Government of Mexico:

1. The Mexican Government welcomes the completion by the Working Group of the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, and trusts that this Working Group, at its next session, will complete the guide for the enactment of the Model Law, so that both documents can be considered at the next plenary session of the United Nations Commission on International Trade Law.

The significance of the use of electronic communication media is increasing daily, in both domestic and international commerce. An important effect of the use of these electronic media in the communication and archiving of trade information will be the multiplication of trade exchanges and the reduction of their cost.

In spite of the fact that the use of electronic media is such a daily practice, already forming part of the culture of the business world, it lacks specific legal regulation, since there are practically no laws in force, judicial precedents or legal traditions recognizing its value and legal consequences; as a result, there is a major legal vacuum.

The discrepancy between commercial practice and legal regulation is a cause of uncertainty and an obstacle to international trade. This obstacle, to the extent possible, should be removed through the drafting of legal rules aimed at providing juridical solutions which will remove the doubts and uncertainties of commercial operators.

It is highly probable that, in the future, practice and jurisprudence will lead to an evolution in the provisions offered by the draft. Electronic commerce is a very recent phenomenon, and a legal culture, derived from experience, is still lacking; only long practice can generate such a culture. In spite of this, the set of provisions in the draft Model Law will serve as a starting-point for the evolution in question and, what is more important, will help to guide legislators in

drafting a minimum of legal provisions to regulate the phenomenon.

The Mexican Government considers that the draft, as offered by the Working Group, is a satisfactory result and can be adopted by the Commission at its next session. Nevertheless, we think that it would be useful to suggest some points for discussion with the aim of improving the final drafting.

2. The title of the Model Law should be changed to "Model Law on Legal Aspects of Electronic Commerce".

This suggestion was made almost at the end of the last session of the Working Group and, given its novelty, did not obtain the necessary support to be adopted (see document A/CN.9/406, paras. 75-77).

We consider the arguments in favour of changing the title to be valid, since the use of the term EDI is, at least, confusing; this term covers only one of the means of communication regulated. On the other hand, the reference to "related means of communication" is vague and says little to anyone who is not fully familiar with the content of the Model Law. In other words, the title may lead to confusion and, as was said in the Working Group, it is "not very commercial".

The expression "electronic commerce", on the other hand, is becoming increasingly widespread and accepted in practice. Reference in the title to "electronic commerce" will give anyone who did not participate in the preparatory work a quicker and more exact indication of the content and importance of the Model Law.

Moreover, the fact that the sphere of application is clearly delimited, as can be seen from article 1 and subparagraphs (a) and (b) of article 2, will avoid any doubt regarding the sphere of application of the Law and the absence of a definition in it of the concept of "electronic commerce". The title does not describe the scope of application and is no more than a summary indication of the content of the document.

3. The definition of the term "intermediary" can and should be deleted, with any necessary explanations given in the guide to enactment. The definition is unnecessary. What is more, it suggests, at first reading, that the Model Law is concerned with intermediaries, which is not the case. The Working Group decided to deal with the relationship between the originator and the addressee and not the relationship between these parties and any intermediary.

At the end of the deliberations, the definitions were reviewed and it was noted that the term "intermediary" was used only in two of the definitions and not in any other article. The definitions in question are those of "originator" and "addressee" in subparagraphs (c) and (d) of article 2, where the expression "any third person" can easily be used. If thought necessary, the relevant explanations would be provided in the guide to enactment (see A/CN.9/406, paras. 146-148).

4. Consideration should be given to the deletion of article 7 concerning the "original". Unless negotiable documents are referred to, there is no case in fact in commerce, and particularly in international commerce, of a rule of law requiring information to be presented in its original form. The Model Law is not concerned with "negotiable documents"; negotiability will be discussed as part of the Group's planned future work.

When the requirement for an original arises from an agreement between the parties, it will be for the parties, in their agreement, to specify the cases in which a communication by electronic means will satisfy the required conditions.

If any customary procedure requires the presentation of originals, the procedure itself will gradually change in a natural way, to adapt to the practices of the type of trade in question or of the region where the procedure is followed.

Thus, the usefulness of article 7 is limited. Its text, on the other hand, is ambiguous and subject to various interpretations in the case of expressions like "the standard of liability required ... in the light of the purpose for which the information was composed and in the light of all the relevant circumstances" and "the criteria for assessing integrity shall be whether the information has remained complete and unaltered". There are also conditions that are difficult to fulfil such as that "there exists a reliable assurance as to the integrity of the information ...".

It would be preferable to delete this article and instead to state that:

"This Law does not deal with negotiable documents [or with cases in which a rule of law requires information to be presented in its original form]".

5. Article 10, concerning variation by agreement, which is to be found in chapter III on communication of data messages, should be moved back to where it was during the first stages of the draft, since it is applicable to the whole law and not only to the case of communication of messages.

The article was moved in order not to allow parties, in the use of contractual freedom, to derogate from mandatory rules, and it was agreed to restrict such contractual freedom to communications between the parties. These arguments are erroneous and lead to results that are not intended and that are more restrictive, even, than when parties carry out their operations, or record them, through media documented on paper.

In any case, one must distinguish between the legal relationship between the parties and the effects of their acts on third parties. In the case of private relationships, of a commercial nature, between subjects of private law, the restriction of contractual freedom, with a few exceptions, is an obstacle to trade that should be removed.

For example, nothing should prevent the parties from agreeing otherwise than is laid down in article 8 regarding the admissibility and evidential value of data messages, when it is a question of settling a dispute between these parties through arbitration or even in the courts of the State. The same is true regarding what is laid down with reference to the retention of data messages as covered by article 9, as long as the agreement between the parties affects only the relationship between these parties themselves.

It will be different if the agreement is intended to be capable of causing effects in respect of the rights and obligations of third parties outside the relationship. Should it be thought necessary to clarify this point if the article is put back in chapter I, containing general provisions, the following paragraph could be added:

"The agreement between the parties shall not affect the rights and obligations of third parties."

6. It would be useful for article 13 to be expanded to cover not only cases of contract formation but all cases of manifestation of will, since there is no reason to limit the declaration of validity to the offer or acceptance of a contract. Consequently, it is suggested that paragraph (1) of article 13 should say:

*"(1) Unless otherwise agreed by the parties, any manifestation of will expressed by means of a data message shall have legal force. A contract or any other juridical act shall not be denied validity or enforceability on the sole ground that a data message was used in bringing it about, where this is the case."*

#### Namibia

*[Original: English]*

We are generally in agreement with the suggested changes and analytic comments from the UNCITRAL Working Group on the Model Law on Legal Aspects of Electronic Data Interchange, and advise that we have no specific comments to make at this stage.

### B. INTERGOVERNMENTAL INTERNATIONAL ORGANIZATIONS

#### Bank for International Settlements (BIS)

*[Original: English]*

We appreciate the efforts undertaken by UNCITRAL to harmonise certain legal aspects arising in connection with Electronic Data Interchange. At present, however, the Bank is not directly involved in the computerised exchange of standardised trade data, apart from SWIFT messages. Due to the particular nature of the Bank as bank for central banks, we also do not have direct relationships to "trading partners" that make use of EDI.

Therefore, despite being very interested in the legal issues of EDI and closely following the respective developments, we are unable at this stage to provide specific comments on the draft Model Law.

[A/CN.9/409/Add.2]

### COMPILATION OF COMMENTS

#### A. STATES

##### China

*[Original: English]*

China appreciates the efforts of UNCITRAL of drafting the above-captioned Model Law and deems that the Model Law, which will harmonize national legislation in this relation, will serve to remove the legal hurdles to the developments of EDI and related means of communication in international trade.

Generally, China considers that the present text of Model Law reflects the discussions made during the sessions of UNCITRAL EDI Working Group and meets the growing need in the area of electronic commerce, particularly, the legal certainty. Furthermore, China would like to make a few comments on the Model Law.

#### 1. Title of the Model Law

Basically, the present title defines the technological scope governed by this Model Law while it may still contain some uncertainty and ambiguity, which would result in difficulties when enacting States formulate titles for their national laws modelled on the Model Law. It was suggested in a previous Working Group session that "Model Law on Electronic Commerce" may be a more desirable substitute, this suggestion is worth reconsideration.

#### 2. Article 2. Definitions

As for the notion of EDI, due regard shall be had to the work of other international organizations (for example, UN/ECE/WP.4) in this respect, namely, the technical definition of EDI shall be in conformity with internationally-accepted notion in order to pave a sound technological groundwork for the Model Law.

#### 3. Article 8. Admissibility and evidential value of data messages

China has some difficulties with the term "best evidence" in (1)(b) as this is not a well acceptable notion within the context of Chinese legal terminology.

4. China has no specific comments on the rest of the Model Law.

#### Denmark

*[Original: English]*

Denmark welcomes the completion of the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication by the UNCITRAL Working Group on EDI in October, 1994, and of the draft guide for the enactment of the Model Law that was completed earlier this year. For the consideration of UNCITRAL at its next session, Denmark proposes the following changes to the Model Law:

#### 1. Re Article 2: Definitions

This article defines "Data message" as "information generated, stored or communicated by electronic, optical or analogous means ...". The use of the words "analogous means" may give many readers the understanding that "analogous" refers to "analog" (as opposed to "digital"). Thereby, the definition will refer to any set of data, including spoken words. Since it is quite important for the delimitation of the Model Law, Denmark suggests that the provision is modified as follows:

*"'Data message' means digital information generated, stored or communicated by electronic, optical or similar means, including ... (etc.)."*



This definition points to digitalization as the essential characteristic of computerized information — the characteristic that makes information programmable and reproducible, among other things.

Alternatively, Denmark suggests that a clear explanation as to the meaning of “analogous” be included in the Guide to the Model Law.

## 2. *Re Article 14: Time and place of dispatch and receipt of data messages*

Article 14, subsection (2)(b) assumes that anyone is under obligation to have received data messages at his “information system”. As it has already been said by various delegates during discussions of the Working Group, this consequence might have far reaching consequences for communicating parties with several information systems (for example, several e-mail addresses).

Denmark suggests that this provision be deleted from the Model Law. In consequence of this, the communicating party will have to approach the other party by other means.

Alternatively, Denmark suggests that subsection (2)(b) only applies to information systems that the addressee has already applied in his communication with the originator. According to this proposal, the provision would read:

“(2)(b) If the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee by which the addressee has already communicated with the originator”.

### Oman

[Original: English]

The Government of the Sultanate of Oman shall not be able to provide, at this time, its comments on the draft Model Law on Legal Aspects of Electronic Data Interchange.

## B. INTERGOVERNMENTAL INTERNATIONAL ORGANIZATION

### United Nations Conference on Trade and Development (UNCTAD)

[Original: English]

The UNCTAD Secretariat has no comments on the draft Model Law.

[A/CN.9/409/Add.3]

## COMPILATION OF COMMENTS

### STATES

#### France

[Original: French]

### Article 1. *Sphere of application*

The notion of “international commercial law” should replace that of “commercial law” in the first paragraph of

article 1, the possibility of extending the scope of the Model Law to data messages of a domestic nature being accordingly allowed for in the footnote. This amendment is more in keeping with the object of UNCITRAL, which, as its name indicates, deals with international trade law.

## Article 2. *Definitions*

(b) The agreed definition of “electronic data interchange” (EDI), i.e. “electronic transfer from computer to computer ...”, should be supplemented in the guide to enactment by an explanation as to whether or not the physical transmission of disks is covered.

(c) The term “originator” (“*initiateur*”) should be replaced by “sender” (“*expéditeur*”), since “*initiateur*” has no meaning in French. Moreover, the definition of “*expéditeur*” meets the intention of some delegations, namely generation of the information without communication; thus, in terms of substance, there is no obstacle to the proposed change.

(e) The term “intermediary” should be defined and retained as appearing in the draft Model Law; the reference to this intermediary in the definitions of sender and addressee should also be maintained. The guide should specify the role and powers that can be assigned to the intermediary, since the Model Law is deficient on this point, which the French delegation considers to be very important (cases where the parties dispense with an intermediary are rare; indeed, only a few very large enterprises can operate direct from one point to another without using the services of third parties or telecommunications systems).

(f) The words “a system for” should be replaced by the phrase “an ensemble of technical means of”, as was put forward as an option by the Working Group at its previous sessions. In our view, the phrasing “Information system means a system ...” is inappropriate both from a drafting viewpoint and in terms of substance, since the information system is in actual fact characterized by an ensemble of technical means.

## Article 3. *Interpretation*

This article refers to the international source of the Model Law, which is justification for the suggested inversion in article 1, i.e. to establish the principle of the sphere of application as that of international commerce. The footnote will enable States that so wish to apply it to commercial law.

## Article 5. *Writing*

It would be desirable to replace the existing text of paragraph (1) of article 5 by that of the second paragraph of article 6 of the proposed wording submitted by France (document A/CN.9/WG.IV/XXVII/CRP.2 of 1 March 1994), which reads:

“Where a law or usage requires a written or original document, a (trade) data message exchanged by one of the means of communication covered by these Rules shall be considered to have legal validity provided that it faithfully reproduces what the parties exchanged and that it is recorded in an intelligible and reproducible form”.

The guide should also add that a writing is a support (paper-based or electronic), an item of information and a medium (ink in the case of paper), in order to explain more clearly the functional approach adopted in the Model Law.

Paragraph 63 of the guide should state that the message must be retained in the form in which it was received, in order to include a reference to the integrity of the message.

#### Article 6. *Signature*

According to the draft text, the function of the signature is to identify the sender and also to approve the content of the information, provided that the method used is reliable, having regard both to the message and to any agreement made between the parties. The guide should specify that the term "circumstances", which appears in paragraph (1)(b), applies also to commercial practice and trade usage.

#### Article 7. *Original*

The phrase "information ... first composed in its final form" can be regarded as being equivalent to the French term "*information d'origine*" or "*information originaire*" ("original information"). Nevertheless, the guide should introduce a parallel, with a view to the possible incorporation of this article into the French legal system.

In paragraph (2)(b), the term "*fidélité*" would be preferable to "*intégrité*" ("integrity").

Paragraph (2)(a) contains the word "*endossement*" ("endorsement"). It would be more appropriate to refer to "*marque*" ["mark"] or "*marquage*" ["marking"], since "*endossement*" has a very specific meaning in French law; no ambiguity is then possible, even if the guide explains that in this Model Law the term does not have the meaning attributed to it in French law.

#### Article 8. *Admissibility and evidential value of data messages*

Rectify the clerical error in the French version: the reference to article 8 should be changed to article 7.

#### Article 9. *Retention of data messages*

Paragraph (3) should make express reference to intermediaries providing services for purposes of retention of data messages. The text would benefit from being more specific on this point.

#### Article 11. *Attribution of data messages*

In paragraph (4), since a simple presumption is involved, the word "presumed" is preferable to "deemed". Indeed, where the message is that of an originator, its content is presumed to be (it may be disputed) that received by the addressee. Where there is an error or an erroneous duplication of the message, the content is not presumed to be that received in so far as the addressee knew of the error or if the addressee had exercised reasonable care or had used an agreed procedure. This article should not be amended.

#### Article 14. *Time and place of dispatch and receipt of data messages*

This article does not establish any conflict-of-laws rule.

## Nigeria

[Original: English]

The Working Group may wish to consider in its formulation of the legal provisions on the transaction of electronic data exchange the fact that computers and telefax could acknowledge receipt of information. For example an electronic message could be sent by fax or computer exchange to our office, our fax or computer that receives the message could acknowledge the receipt of the message, without any person or officer at this office giving this acknowledgement, because these electronic gadgets have been so programmed. Now if a person sends an electronic message and receives an acknowledgement issued, automatically, by the electronic receiving machine, is he to assume that the electronic message has been received or accepted by the other person to whom actually the message is sent?

We looked at the definition of "originator" and are of the humble opinion that it will be far much easier if the definition is made to address a "person" and then this definition be extended to include an "originator" of an electronic message. Because of the development of computer banks, a person could select a pre-programmed message and command the computer to transmit or send the message. This person is not the originator of the pre-programmed electronic message and yet is the sender of that particular electronic message.

Premised on the foregoing observations we made an attempt to redraft some of the provisions. Our redraft of article 11 is something like this:

1. A person that is sending a data message may, before sending the data message or in the data message, request that the person receiving the data message should acknowledge receipt of the data message.
2. The person that is sending the data message may request that the acknowledgement of receipt of the data message should be in a particular form.
3. A person that receives a data message may:
  - (a) acknowledge receipt of the data message in the particular form stated by the person sending the data message;
  - (b) acknowledge receipt of the data message, where the person sending the data message has not stated a particular form of acknowledging receipt, by any communication or conduct sufficient to indicate to the person sending the data message that the data message has been received.
4. A person that receives a data message shall not, where the person sending the data message has requested acknowledgement of receipt of the data message, rely on the data message for any purpose, until an acknowledgement has been received by the person sending the data message.
5. A person that sends a data message and has not received any acknowledgement of receipt of the data message within the time the acknowledgement is to have been made or within a reasonable time, may give notice to the person to whom the data message was sent that he is treating the data message as though it had not been received.

[A/CN.9/409/Add.4]

## COMPILATION OF COMMENTS

INTERGOVERNMENTAL INTERNATIONAL  
ORGANIZATION

## United Nations Environment Programme (UNEP)

[Original: English]

The following information has been compiled from input provided by UNEP ELI/PAC, UNEP/EDPU (Electronic Data Processing Unit) and UNICEF:

*General comments*

1. The draft constitutes an important initiative in the field and should be further elaborated.
2. As currently written, the draft's text is fairly clear and concise.
3. Provisions in the draft indicate there is a need for more technical input, particularly with regard to electronic mail systems and other varieties of electronic data interchange.
4. Although the draft addresses some of the important issues in the field, a few provisions could be strengthened/clarified and additional important questions considered by the working group should be resolved/incorporated.
5. The question of how to prevent or minimize fraudulent use of electronic data interchange systems has not been, and should be, adequately addressed.

*Specific comments*

*Title:* The reference to "model law on legal aspects" seems redundant. In fact, the document is not a complete model law but rather an incomplete set of model provisions.

*Article 1 (sphere of application):* Although the Draft's limitation to commercial law is understandable, its ramifications for other fields should be acknowledged.

*Article 2 (definitions):* The definition of "data message" should include "telex". The definition of "originator" could be made more protective (i.e. to prevent plagiarism). The definition of "intermediary" might include a reference to the provision of "value-added services". A definition for the word "record" as "durable representation of information, either in or capable of being converted into an intelligible form" could be useful.

*Article 3 (interpretation):* Is an "interpretation" section needed for a model law? It seems reasonable that this or another section should provide (a) a purpose or objective for

the law and (b) an explanation of the principle of party autonomy *vis-à-vis* the mandatory nature of the model as a statement of minimum requirements. These ideas could be elaborated in the anticipated implementation guide.

*Article 4 (legal recognition):* It would be useful to address the incorporation of terms and conditions into a data record by mere reference.

*Article 6 (signature):* This section should be further strengthened and elaborated, as this is one of the most critical issues regarding the use of electronic data interchange systems. Reference to "a method" leaves virtually unresolved the question of identity verification.

*Article 7 (original):* To determine when a message is created, it might be better to focus on the point of transmittal rather than generation or creation. In this sense, a message is not a message until it is sent. The definition of original should include a reference to those changes which may arise (e.g. additional headers, routers or commands) that do not alter the content of the message. In other words, alterations can occur so long as they do not affect the original content.

*Article 9 (retention):* The text does not take into account a system's limitations on storage (e.g. length of time or amount of data) and does not consider the implications of an unanticipated computer disaster.

*Article 11 (attribution):* This section does not seem to give adequate consideration to fraudulent activities from whatever sources, e.g. "hackers".

*Article 12 (acknowledgement):* The latest e-mail software may lessen problems associated with acknowledgement and receipt (i.e., via automatic indications of receipt). On the other hand, some e-mail software, which allows deletion before receipt, may invalidate the protection afforded by this article. Can a computer system breakdown during the communication process also affect legal obligations?

*Article 14 (time/place):* The distinction between *creating* a message and *transmitting* it should be very clear. In an e-mail system, it may not be possible to determine the actual time when a message enters an information system. The best indication of receipt is when the message is opened by the recipient. Current language in the text shows an orientation to telefax and telex rather than e-mail systems. Issues concerning (a) whether a system is able to and does deliver a message, (b) whether a message is "intelligible" when it is sent in encrypted, condensed form and (c) whether the addressee wilfully or negligently caused the malfunctioning of its information system are worth addressing in the future. The definition of "place of receipt" does not really take into account the mobility of e-mail (i.e. the ability to access e-mail from a variety of locations).

*Article 15 (liability):* There should be a reconsideration of this article in light of the concern regarding fraud expressed by technical personnel.

### III. INTERNATIONAL COMMERCIAL ARBITRATION

#### Draft Notes on Organizing Arbitral Proceedings: report of the Secretary-General (A/CN.9/410) [Original: English]

The decision by the Commission to commence work on this project was taken at its twenty-sixth session in 1993.<sup>1</sup> Pursuant to that decision, the Secretariat prepared "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings" (document A/CN.9/396/Add.1), which the Commission discussed at its twenty-seventh session in 1994 (document A/49/17, paras. 111-195). That draft was also discussed at several national and international meetings of

arbitration practitioners, among which the most prominent was the XIIth International Arbitration Congress, organized by the International Council for Commercial Arbitration (ICCA) at Vienna from 3 to 6 November 1994.<sup>2</sup> On the basis of those discussions in the Commission and elsewhere, the Secretariat has prepared a revised draft, which appears in the annex.

<sup>1</sup>Official Records of the General Assembly, Forty-eighth session, Supplement No.17 (A/48/17), paras. 291-296.

<sup>2</sup>Working Group I of the Congress considered the UNCITRAL project. The reports of the Congress will be published in the *International Council for Commercial Arbitration Congress Series No. 7*.

#### ANNEX

##### DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS

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## I. PURPOSE AND ORIGIN OF THE NOTES

1. The purpose of the Notes on Organizing Arbitral Proceedings, prepared by the United Nations Commission on International Trade Law (UNCITRAL),<sup>1</sup> is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed procedural decisions may be useful.

### *Non-binding character of the Notes*

2. The Notes are merely suggestions for consideration that do not affect the procedural prerogatives of the arbitral tribunal in conducting the arbitration. The arbitral tribunal remains free to use the suggestions as it sees fit and is not required to give reasons for disregarding them.

3. The Notes are not suitable to be used as arbitration rules, since they do not establish any obligation of the arbitral tribunal or the parties to act in a particular way. Accordingly, the use of the Notes cannot imply any modification of the arbitration rules that the parties may have agreed upon.

<sup>1</sup>The Commission finalized the Notes at its twenty-eighth session (held at Vienna, from 2 to 26 May 1995). In addition to the 36 member States of the Commission, representatives of many other States and of a number of international organizations participated in the deliberations. In preparing the draft materials, the Secretariat consulted with experts from various legal systems, national arbitration bodies, as well as international professional associations.

The first draft, entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings" (A/CN.9/396/Add.1), was considered by the Commission at its twenty-seventh session in 1994. That draft was also discussed at several meetings of arbitration practitioners, including the XIIth International Arbitration Congress, held by the International Council for Commercial Arbitration (ICCA) at Vienna from 3 to 6 November 1994.

The considerations in the Commission are reflected in the reports on the work of its twenty-sixth, twenty-seventh and twenty-eighth sessions (*Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17)*, paras. 291-296; *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)*, paras. 111-195; and *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17)* paras. 315-369).

### *Discretion in conduct of proceedings and usefulness of timely procedural decisions*

4. Arbitration rules agreed upon by parties typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings.<sup>2</sup> This is useful in that it enables the arbitral tribunal to take procedural decisions that best meet the circumstances of the case such as the type and complexity of issues of fact and law, the expectations of the parties and the members of the arbitral tribunal as to the best way to proceed, and the need for a cost-efficient resolution of the dispute.

5. Such discretion may make it desirable for the arbitral tribunal to give the parties a timely indication as to the manner in which the tribunal intends to proceed. This is particularly desirable in international arbitrations, where the participants may be accustomed to differing procedural styles. Without such guidance, a party may find aspects of the proceedings unpredictable and difficult to prepare for. That may lead to misunderstandings, delays and increased costs of proceedings.

### *Process of making procedural decisions*

6. While some decisions are taken by the presiding arbitrator or sole arbitrator alone, others are taken pursuant to consultations; consultations may be limited to the members of the arbitral tribunal or may involve also the parties. Limiting consultations to the arbitrators might generally be more time efficient and easier to organize than when the parties are also involved. However, consulting with the parties may offer advantages, including that the arbitral tribunal can better ascertain the expectations of the parties, assess whether it is appropriate to invite the parties to enter

<sup>2</sup>A prominent example of such rules are the UNCITRAL Arbitration Rules, which provide in article 15(1): "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."



into a procedural agreement, and that decisions formulated with the benefit of the parties' views are likely to favour increased predictability of the proceedings and an improved procedural atmosphere.

7. The consultations, whether they involve only the arbitrators or also the parties, can be held in a meeting at the place of arbitration or at some other appropriate place, or can be carried out by correspondence or telecommunications such as telefax or conference telephone calls.

8. If a meeting is held for consultations, it can be devoted only to procedure; alternatively, the meeting can be held in conjunction with a hearing on the substance of the dispute. Special procedural meetings of the arbitrators and the parties separate from hearings are in practice referred to by expressions such as "preliminary meeting", "pre-hearing conference", "preparatory conference", "pre-hearing review", or terms of similar meaning. The terms used partly depend on the stage of the proceedings at which the meeting is taking place.

#### *List of procedural matters in the Notes*

9. The Notes discuss matters on which the arbitral tribunal may wish to formulate procedural decisions. The discussion does not provide comprehensive guidance on possible procedural decisions; practice in international arbitration is so varied that it would be impossible to reflect all its aspects.

10. The list of procedural matters is quite complete so as to provide a reminder for a broad range of circumstances; however, in many arbitrations only a limited number of the issues mentioned in the list will need to be considered. Yet, the list is not exhaustive.

11. If, prior to formulating procedural orders, the arbitral tribunal decides to meet and consult with the parties, it is useful that the parties be given advance notice of the topics to be discussed. This will help them to participate efficiently in the consultations. The following listing of issues may serve as a checklist in preparing such an agenda.

## **II. PROCEDURAL MATTERS FOR POSSIBLE CONSIDERATION**

### **1. Deposits for costs**

#### *(a) Amount to be deposited*

12. It is customary for the arbitral tribunal, soon after its establishment, to assess the amounts to be disbursed by the arbitral tribunal and to request a deposit to cover the disbursements. The assessed amount typically includes travel and other expenses incurred by the arbitrators, expenditures for administrative assistance required by the arbitral tribunal and the fees for the arbitrators. Many arbitration rules have provisions on this matter, including on whether both parties or only the claimant should be requested to make a deposit.

#### *(b) Management of deposits*

13. In administered arbitration, the assessment of the amounts to be deposited as well as related administrative tasks are usually the responsibility of the arbitral institution. In non-administered arbitration, it may be useful to clarify matters such as the type and location of the account in which the money will be kept and how the deposits will be managed.

#### *(c) Supplementary deposits*

14. If during the course of proceedings it emerges that the costs will be higher than anticipated (e.g. because of a decision of the arbitral tribunal to appoint an expert), the arbitral tribunal will require supplementary deposits.

## **2. Set of arbitration rules**

#### *Would the parties wish to agree on a set of arbitration rules*

15. Sometimes parties do not include in the arbitration agreement a stipulation that a set of arbitration rules will govern the arbitral proceedings (e.g. the UNCITRAL Arbitration Rules or another set of rules). In such a case, the arbitral tribunal might consider it appropriate to enquire whether the parties now wish to enter into such a stipulation. However, caution is advisable in raising this question, as the consideration of a set of arbitration rules might unduly delay the proceedings or give rise to an unnecessary controversy.

## **3. Language of proceedings**

16. Many rules and laws on arbitral procedure empower the arbitral tribunal to determine the language or languages to be used in the proceedings, if the parties have not reached an agreement thereon.

#### *(a) Will translation of documents, in full or in part, be needed*

17. When documents annexed to the statements of claim and defence or submitted later are not in the language of the proceedings, it may be considered whether, in the interest of economy, some of those documents or parts thereof need not be translated into the language of the proceedings. Such documents may be, for example, business records (e.g. invoices, transport documents, construction records) or texts concerning the law applicable to the substance of the dispute (e.g. statutes, court decisions or commentaries).

#### *(b) Will interpretation of oral presentations be needed*

18. If interpretation will be necessary during oral hearings, it is advisable to consider whether the arrangements should be the responsibility of a party or the arbitral tribunal. In administered arbitration, interpretation as well as translation services are often arranged by the arbitral institution.

### (c) *Cost of translation and interpretation*

19. In taking decisions about translation or interpretation, it is advisable to decide whether the costs will be paid out of the deposits and apportioned between the parties along with the other arbitration costs or whether they are to be paid directly by a party.

## 4. Place of arbitration

### (a) *Determination of the place of arbitration*

20. Arbitration rules usually allow the parties to agree on the place of arbitration, with possible limitations in arbitrations administered by some arbitral institutions. If the place has not been so agreed upon, it is typically in the power of the arbitral tribunal to determine the place of arbitration.

21. Among the more prominent factors influencing the choice of the place of arbitration, whose relative importance varies from case to case, are: (a) convenience of the parties and the arbitrators, including the travel distances; (b) availability and cost of support services needed; (c) suitability of the law on arbitral procedure of the place of arbitration; (d) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (e) location of the subject-matter in dispute and proximity of evidence; (f) perception of a place as being neutral.

### (b) *Possibility of meetings outside the place of arbitration*

22. Many sets of arbitration rules and laws on arbitral procedure allow the arbitral tribunal to hold meetings elsewhere than at the place of arbitration. For example, the arbitral tribunal may, subject to any contrary agreement of the parties, decide to meet at any place it considers appropriate for consultations among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents. The purpose of this discretion is to permit arbitral proceedings to be carried out in a manner that is most efficient and economical.

## 5. Administrative services

### (a) *Which administrative services need to be procured*

23. Depending on the circumstances, various of the following may need to be arranged: travel and hotel bookings; a hearing room and possibly ancillary space (e.g. for deliberations of the arbitral tribunal and for persons appearing on behalf of a party to be able to consult in private or have documents typed); facilities for photocopying, word-processing, telecommunication, tape-recording or displaying images; a secure place to keep files.

### (b) *Sources of administrative services*

24. When the parties have submitted the case to an arbitral institution, the institution will usually provide all or a

good part of the required administrative support. When an arbitration administered by an arbitral institution takes place away from the seat of the institution, the institution may be able to arrange for administrative services to be obtained from another source, often an arbitral institution; some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in servicing arbitral proceedings.

25. When the case is not administered by an institution, or the involvement of the institution does not include providing administrative support, usually the administrative arrangements for the proceedings will be made by the arbitral tribunal or the presiding arbitrator; it may also be acceptable to leave some of the arrangements to the parties, or to one of the parties subject to agreement of the other. Even in such cases, a convenient source of administrative support might be found in arbitral institutions, which often offer their facilities to arbitrations not governed by the rules of the institution. Otherwise, some services could be procured from entities such as chambers of commerce, hotels or specialized firms providing secretarial services.

26. Administrative services might be secured by engaging a secretary of the arbitral tribunal (also referred to as registrar, clerk, administrator or rapporteur), who carries out the tasks under the direction of the arbitral tribunal. Some arbitral institutions routinely assign such persons to the cases administered by them. In non-administered arbitrations, some arbitrators frequently engage such persons, at least in certain types of cases, whereas many others normally conduct the proceedings without them.

27. To the extent the tasks of the secretary are purely organizational (such as those mentioned above in paragraph 23), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is not distinguishable from tasks incumbent on the arbitrators, or if the secretary's tasks imply the presence of the secretary during the deliberations of the arbitral tribunal. Such a role of the secretary is in the view of some commentators inadmissible or is admissible only under certain restrictions, such as that both parties agree thereto.

## 6. Confidentiality

28. While arbitration rules seldom contain detailed provisions on confidentiality, the parties may have common expectations in this regard. It may be useful for the arbitral tribunal to record any agreed principles on confidentiality of information relating to the proceedings (e.g. that the arbitration is taking place, the identity of the arbitrators, use in other proceedings of evidence presented in the arbitration, content of the award).

**(a) Confidentiality afforded by electronic means of communication**

29. In considering the use of electronic means of communication such as telefax and electronic mail, confidentiality may be a factor. For example, the equipment from which or to which messages are sent may be shared by several users, or electronic mail over public networks may not be sufficiently protected against other users of the network gaining access to the messages. (For general remarks on electronic means of communication, see below, paragraphs 33-36.)

**(b) Confidentiality of documents handed over by a party to the other party**

30. When a party is entitled to request that the other party hand over a document, the requested party may have a particular interest in maintaining confidentiality of the document. If so, the arbitral tribunal might make the duty to produce the document subject to an express commitment by the recipient to keep the document confidential or to allow access to it only to specified persons or categories of persons. (The right of a party to request a document from the other party is commented on below in paragraphs 50-54.)

**(c) Confidentiality of hearings**

31. Many arbitration rules provide, or it is typically assumed by the parties and the arbitrators, that hearings are to be confidential. The arbitral tribunal may wish to discuss with the parties measures to be taken to protect the confidentiality of the hearings. (On hearings generally, see below, paragraphs 75-86.)

**7. Routing of writings among the parties and the arbitrators**

32. To the extent the question how writings should be routed among the parties and the arbitrators is not settled by the applicable arbitration rules, the arbitral tribunal may wish to decide the question early so as to avoid misunderstandings and delays. A possibility is that the writings are exchanged directly between the parties, with copies being sent to the arbitrators. Another possibility is that a party transmits the appropriate number of copies to the arbitral tribunal, or to the arbitral institution if one is involved, which then forwards them as appropriate.

**8. Telefax and other electronic means of sending writings**

**(a) Telefax**

33. Despite its advantages, telefax may, depending on the type of equipment and safety devices used, still raise some concerns about the possibility to verify the source of a communication or about distorted communications; it might thus be considered appropriate to decide that certain types of documents should not be sent by telefax (e.g.

statements of claim and defence and written pieces of evidence). Nevertheless, to avoid rigidity, it may be appropriate for the arbitral tribunal to retain discretion to accept an advance copy of a document by telefax for the purposes of meeting a deadline, provided the document is received within a reasonable time thereafter.

**(b) Other electronic means (e.g. electronic mail, magnetic or optical disk)**

34. The parties might agree to exchange documents not only in paper-based form, but also in electronic form (e.g. as electronic mail, or on a magnetic or optical disk), or only in electronic form. The purpose of using electronic means may be, for example, to reduce the volume of paper to be handled, to enable a party to use word-processing files prepared by the other party in preparing a reply, or to facilitate searching for particular pieces of information. If both paper-based and electronic means are to be used, it is advisable to decide which one is controlling and, if there is a time-limit for submitting a document, which act constitutes submission.

35. Even if the parties have agreed to exchange documents related to the arbitration in electronic form, the arbitral tribunal may decide to receive them only in paper-based form; alternatively, it may decide that the information exchanged between the parties in electronic form should be given in that form also to the arbitral tribunal, either in addition or instead of paper documents.

36. When the exchange of documents in electronic form is planned, it might be useful to address the following questions: the types of documents that will be transmitted by such means (e.g. statements of claim and defence and subsequent submissions); data carriers to be used (e.g. computer disks or electronic mail) and their technical characteristics; type of electronic files to be transmitted (e.g. word-processing files or data bases); computer software used in preparing the files and any other features relevant to retrieving them; procedures when a message is lost or the communication system otherwise fails; measures to avoid problems (e.g. logs and back-up copies of communications sent and received; indicating on the labels of disks information such as the originator, recipient, computer program, and titles of files; sending together with the disks print-outs of directory-listings; indicating back-up methods used; and identifying persons who can be contacted if a problem occurs).

**9. Timing of written submissions**

37. After the parties have initially stated their claims and defences, they may wish, or the arbitral tribunal might request them, to present further written submissions so as to prepare the hearings or to provide the basis for a decision without hearings. In such submissions, the parties, for example, make claims, present or comment on allegations and evidence, cite or explain law, or make or react to proposals. Often, such submissions are not planned in advance, but are a consequence of the developments in the proceedings. In practice they are referred to variously as,

for example, statement, memorial, counter-memorial, brief, counter-brief, reply, *réplique*, *duplique*, rebuttal, rejoinder; the terminology is a matter of linguistic usage and the scope or sequence of the submission.

***Time-limits for presenting written submissions;  
consecutive or simultaneous submissions***

38. It is advisable that the arbitral tribunal set time-limits for written submissions. In enforcing the time-limits, the arbitral tribunal may wish, on the one hand, to make sure that the case is not unduly protracted; on the other hand, it may wish to reserve a degree of discretion and allow late submissions if appropriate under the circumstances. The arbitral tribunal may decide that a late submission would only be allowed if an explanation is given for the delay.

39. Written submissions on a particular issue may be made consecutively, i.e., the party who receives a submission is given a period of time to react with its counter submission. Another possibility is to give the parties the same time-limit for transmitting to the arbitral tribunal a submission on the issue; the submission of each party is then forwarded to the respective other party simultaneously. The approach used may depend on the type of issues to be commented upon and the time in which the views should be clarified. With consecutive submissions, it may take longer than with simultaneous ones to obtain views of the parties on a given issue. Consecutive submissions, however, allow the reacting party to comment on all points raised by the other party, which simultaneous submissions do not; thus, simultaneous submissions might possibly necessitate further submissions.

**10. Practical details concerning written submissions and evidence (e.g. copies, numbering of items of evidence, references to documents, numbering of paragraphs)**

40. It may be helpful to establish practical arrangements on details such as the following:

- Number of copies in which each writing is to be submitted;
- A system for numbering items of evidence, and a method for marking them, including by tabs;
- Form for references to documents (e.g. by the heading and the number assigned to the document or its date);
- Paragraph numbering in written submissions, in order to facilitate precise references to parts of a text;
- Inclusion of translations in the same volume as original texts or in separate volumes;
- Desirable paper size for written submissions so as to facilitate orderly maintenance of files.

**11. Defining points at issue**

***(a) Should a list of points at issue be prepared***

41. In the process of identifying the parties' allegations and arguments that are disputed, as opposed to the ones

that are undisputed, it may be useful to prepare a list of the points at issue. Such a list, which may be drawn up by the arbitral tribunal or by the parties, might help to concentrate on the essential matters, to reduce by agreement of the parties the number of points at issue, and to select the best and most economical process for resolving the points at issue.

***(b) In which order should the points at issue be decided***

42. While it is often appropriate to deal with all the points at issue collectively, the arbitral tribunal might decide to take them up in a particular order. The order may be due to a point being preliminary relative to another (e.g. a decision on the jurisdiction of the arbitral tribunal is preliminary to consideration of substantive issues, or the issue of responsibility for a breach of contract is preliminary to the issue of the resulting damages). A particular order may be decided also when the breach of various contracts is in dispute or when damages arising from various events are claimed.

43. If the arbitral tribunal has adopted a particular order of deciding points at issue, it might consider it appropriate to issue a decision on one of the points earlier than on the other ones. This might be done, for example, when a discrete part of a claim is ready for decision while the other parts require extensive consideration, or when it is expected that after deciding certain issues the parties might be more inclined to settle the remaining ones. Such earlier decisions are referred to by expressions such as "partial", "interlocutory" or "interim" awards or decisions, depending on the type of issue dealt with and on whether the decision is final with respect to the issue it resolves. Questions that might be the subject of such decisions are, for example, liability of the defendant, segment of the damages claimed, jurisdiction of the arbitral tribunal, or interim measures of protection.

**12. Possible settlement negotiations and their effect on scheduling**

44. Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Having regard to the divergence of practices in this regard, the arbitral tribunal should only suggest, or participate in, settlement negotiations with great caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations.

**13. Documentary evidence**

***(a) Time-limits for submission of documentary evidence; consequences of late submission***

45. Often the written submissions of the parties contain sufficient information for the arbitral tribunal to fix the time-limit for submitting evidence. Otherwise, in order to set realistic time periods, the arbitral tribunal may wish to enquire with the parties about the time they would require.

46. The arbitral tribunal may wish to clarify that evidence submitted late will as a rule not be accepted. It may wish not to preclude itself from accepting a late submission of evidence if the party shows sufficient cause for the delay.

**(b) *Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate***

47. It may be helpful to conduct the proceedings on the basis that, unless a party protests within a specified period of time: (a) a document is accepted as having originated from the source indicated in the document, (b) a copy of a dispatched communication (e.g. letter, telex, telefax) is accepted without further proof as having been received by the addressee, and (c) a photocopy is accepted as correct. An agreement or decision to that effect can simplify the introduction of documentary evidence and discourage unfounded and dilatory objections, at a late stage of the proceedings, to the probative value of documents. It is advisable to provide that the time-limit for objections will be disregarded if the arbitral tribunal considers the delay justified.

**(c) *Are the parties willing to submit jointly a single set of documentary evidence***

48. The parties may consider submitting jointly a single set of documentary evidence whose authenticity is not disputed. The purpose would be to avoid duplicate submissions and unnecessary discussions concerning the authenticity of documents, without prejudicing the position of the parties concerning the content of the documents. Additional documents may be inserted later if the parties agree. When a single set of documents would be too voluminous to be easily manageable, it might be practical to select a number of frequently used documents and establish a set of "working" documents. A convenient arrangement of documents in the set may be according to chronological order. It is useful to keep a table of contents of the documents, for example by their short headings and dates, and agree that the parties will refer to documents by those headings and dates.

**(d) *Should voluminous and complicated documentary evidence be presented through summaries, tabulations, charts, extracts or samples***

49. When documentary evidence is voluminous and complicated, it may save time and costs if such evidence is presented by a report of a public accountant. The report may present findings in the form of summaries, tabulations, charts, extracts or samples. Such presentation of evidence should be combined with arrangements that give the interested party the opportunity to review the underlying data and the methodology of preparing the report.

**(e) *How the arbitral tribunal intends to deal with a request of a party that the other party produce documentary evidence***

50. Procedures, practices and views differ widely as to the conditions under which a party should have a right to

request a document in the possession of the other party. When the agreed arbitration rules do not provide specific conditions, and the arbitral tribunal expects that the parties have different notions about the right to request documents, the arbitral tribunal might consider it useful to clarify to the parties, in advance of requests for documents, the manner in which it intends to deal with such requests.

51. In considering how requests for documents should be dealt with, the arbitral tribunal may wish to bear in mind circumstances such as the nature of documents that might be requested, the character of the relationship between the parties and the parties' expectations as to the scope of a right to request a document.

52. If formulating a set of conditions is appropriate, this might be done, for example, along the following lines: the document must be described with reasonable particularity; the document must be such that it would likely contribute to the clarification of the case; the document must be within the control of the party from whom production is sought; and the seeking party must have made reasonable but unsuccessful efforts to obtain the document. A further condition that might be included is that the document must have passed between the requested party and a third party who is not a party to the arbitration, a condition that would exclude requests for purely internal documents; if, however, it is considered that there might be situations in which the arbitral tribunal should have the power to order a party to disclose an internal document, the arbitral tribunal might be given discretion to disregard the last condition.

53. Alternatively, instead of laying down specific conditions in advance, the arbitral tribunal may consider it preferable to give only general indications as to the criteria it will use in dealing with any requests for documents.

54. It may be useful to establish a time-limit for requests for documents and for their production. The parties might be reminded that, if the requested party fails to comply with a proper request, the question as to whether the refusal was justified will be decided by the arbitral tribunal and that the arbitral tribunal would be free to draw its conclusions from the failure.

## **14. Physical evidence other than documents**

55. For understanding facts it may be necessary to assess physical evidence other than documents, for example, by inspecting samples of goods, viewing a video recording or demonstrating the functioning of a machine.

**(a) *What arrangements should be made if physical evidence will be submitted***

56. If physical evidence will be submitted, the arbitral tribunal may wish to fix the time schedule for presenting the evidence, make arrangements for the other party to have a suitable opportunity to prepare itself for the presentation of the evidence, and possibly take measures for safe-keeping the items of evidence.

**(b) *What arrangements should be made if an on-site inspection is necessary***

57. If an on-site inspection of property or goods will take place, the arbitral tribunal may consider matters such as timing, meeting places and the need to avoid communications between arbitrators and a party about points at issue without the presence of the other party.

58. The site to be inspected is often under the control of one of the parties, which typically means that employees or representatives of that party will be present to give guidance and explanations. It should be borne in mind that statements of those representatives or employees are not testimony and should not be treated as evidence in the proceedings.

### 15. Witnesses

59. While laws and rules on arbitral procedure typically leave broad freedom concerning the manner of taking evidence of witnesses, practices on procedural points are varied. In order to facilitate the preparations of the parties for the hearings, the arbitral tribunal may consider it appropriate to clarify, in advance of the hearings, some or all of the following issues.

**(a) *Advance notice about a witness whom a party intends to present; written witnesses' statements***

60. To the extent the applicable arbitration rules do not deal with the matter, the arbitral tribunal may wish to require that each party give advance notice to the arbitral tribunal and the other party of any witness it intends to present. As to the content of the notice, the following is an example of what might be required, in addition to the names and addresses of the witnesses: (a) the subject upon which the witnesses will testify; (b) the language in which the witnesses will testify; (c) particulars concerning the relationship with any of the parties, qualifications and experience of the witnesses, and how the witnesses learned about the facts on which they will testify.

61. Instead of requiring merely an indication of the subject of the testimony, the parties may be required to submit either the summaries of the statements of the witnesses or the full signed statements. If a signed witness's statement should be made under oath or a similar affirmation of truthfulness, it may be necessary to clarify by whom the oath or affirmation should be administered.

62. The indication of the subject of testimony in the advance notice or the submission of a written witness's statement may expedite the proceedings by making it easier for the opposing party to prepare for the hearings or for both parties to identify uncontested matters. However, it may not be necessary to require such an indication or a written statement, in particular if the thrust of the testimony can be clearly ascertained from the party's allegations; furthermore, the benefits of a written witness's statement might be outweighed by its disadvantages, such as the time and expense involved in obtaining the written statement.

63. The arbitral tribunal may wish to make it clear that it reserves the right to refuse to hear a witness if the required notice has not been given in time.

**(b) *Manner of taking oral evidence of witnesses***

**(i) *Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted***

64. One of the various possibilities is that a witness is first questioned by the arbitral tribunal, whereupon questions are asked by the parties, first by the party who called the witness. Another possibility is for the witness to be questioned by the parties in the appropriate order, while the arbitral tribunal might pose questions after the parties on points that in the tribunal's view have not been sufficiently clarified. Differences exist also as to the degree of control the arbitral tribunal exercises over the hearing of witnesses. For example, some arbitrators prefer to permit the parties to pose questions freely and directly to the witness, but may disallow a question if the other party objects; other arbitrators tend to exercise more control and may, apart from interceding in the process with their own questions, disallow a question on their initiative or even require that questions from the parties be asked through the arbitral tribunal.

**(ii) *Whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made***

65. Practices and laws differ as to whether oral testimony is to be given under oath or affirmation. In some legal systems, the arbitrators are empowered to put witnesses on oath, but it is usually in their discretion whether they want to do so. In other systems, oral testimony under oath is either unknown or may even be considered improper as only an official such as a judge or notary may have the authority to administer oaths.

**(iii) *May witnesses be in the hearing room when they are not testifying***

66. Some arbitrators favour the rule that, except if the circumstances require otherwise, the presence of a witness in the hearing-room is limited to the time the witness is testifying; the purpose is to prevent the witness from being influenced by what is said in the hearing room, or to prevent that the presence of the witness would influence another witness. Other arbitrators consider that the presence of a witness during the testimony of other witnesses may be beneficial in that possible contradictions may be readily clarified or that their presence may act as a deterrent against untrue statements. Another possible approach may be that witnesses are not present in the hearing-room before their testimony, but stay in the room after they have testified. The arbitral tribunal may prefer to decide the matter ad hoc during the hearings or may give guidance on the question in advance of the hearings.

**(c) *In which order will the witnesses be called***

67. When several witnesses are to be heard and longer testimony is expected, it is likely to reduce costs if the

order in which they will be called is known in advance and their presence can be scheduled accordingly. Each party might be invited to suggest the order in which it intends to present the witnesses, while it would be up to the arbitral tribunal to approve the scheduling and to make departures from it.

**(d) *Interviewing witnesses prior to their appearance at a hearing***

68. In some legal systems, parties or their representatives are permitted to interview witnesses, prior to their appearance at the hearing, as to their recollection of the relevant events. In other systems such contacts with witnesses are considered improper. In order to avoid misunderstandings, the arbitral tribunal may consider it useful to clarify what kind of contacts a party is permitted to have with a witness in the preparations for the hearings.

**(e) *Hearing representatives of a party***

69. According to some legal systems, certain persons affiliated with a party in dispute may only be heard as representatives of the party but not as witnesses. In such a case, it may be necessary to consider ground rules for determining which persons may not testify as witnesses (e.g. certain executives, employees or agents) and for hearing statements of those persons.

## **16. Experts and expert witnesses**

70. Many arbitration rules and laws address the participation of experts in arbitral proceedings. A frequent solution is that the arbitral tribunal has the power to appoint an expert to report on issues determined by the tribunal; in addition, the parties may be permitted to present expert witnesses on points at issue. In other cases, it is for the parties to present expert testimony, while the power of the arbitral tribunal to appoint an expert is restricted.

**(a) *Expert appointed by the arbitral tribunal***

71. If the arbitral tribunal is empowered to appoint an expert, one possible approach is for the tribunal to proceed directly to selecting the expert. Another possibility is to consult the parties as to who should be the expert; this may be done without mentioning a candidate, by presenting to the parties a list of candidates, or by soliciting proposals from the parties. For the selection process, the arbitral tribunal may wish to establish the expert's "profile", i.e. the qualifications, experience and abilities the expert should have.

**(i) *The expert's terms of reference***

72. The purpose of the expert's terms of reference is to indicate the questions on which the expert is to provide clarification, to avoid opinions on points that are not for the expert to assess and to commit the expert to a time-schedule. While the discretion to appoint an expert normally includes the determination of the expert's terms of

reference, the arbitral tribunal may decide to consult the parties before finalizing the terms. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report information on the method used in arriving at the conclusions and the evidence and information used in preparing the report.

**(ii) *The opportunity of the parties to comment on the expert's report, including by presenting expert testimony***

73. Arbitration rules that contain provisions on experts usually also have provisions on the right of a party to comment on the report of the expert appointed by the arbitral tribunal. The arbitral tribunal may, in light of those provisions, consider it opportune to determine, for example, the time period for presenting written comments of the parties, or, if hearings are to be held for the purpose of hearing the expert, the procedures for interrogating the expert by the parties or for the participation of any expert witnesses presented by the parties.

**(b) *Expert opinion presented by a party (expert witness)***

74. In the case a party is permitted to present an expert opinion, the arbitral tribunal might consider requiring, for example, that the opinion be in writing, that the expert should be available to answer questions at hearings, and that, if a party will present an expert witness at a hearing, advance notice must be given, as in the case of other witnesses (see above, paragraphs 60-63).

## **17. Hearings**

**(a) *Decision whether to hold hearings***

75. National laws often have provisions as to whether oral hearings must be held and as to the cases in which the arbitral tribunal has discretion to decide whether to hold hearings. The right of a party to request a hearing is usually considered a fundamental right which the arbitral tribunal must respect.

76. If it is up to the arbitral tribunal to decide whether to hold hearings, the decision is likely to be influenced by factors such as that it is usually quicker and easier to clarify points at issue in oral proceedings than by correspondence, the travel and other cost of holding hearings, and that the need of finding acceptable dates for the hearings may considerably delay the proceedings.

**(b) *Whether one period of hearings should be held or separate periods of hearings***

77. Attitudes vary as to whether hearings should be held in a single period of hearings or in separate periods, especially when more than a few days are needed to complete the hearings. According to some arbitrators, the entire hearings should normally be held in a single period, even if the hearings are to last for more than a week. Other arbitrators



in such cases tend to schedule separate periods of hearings. Advantages of one period of hearings are that it involves less travel costs, memory will not fade, and it is unlikely that people representing a party will change. On the other hand, the longer the hearings, the more difficult it may be to find early dates acceptable to all participants. Separate periods of hearings are easier to schedule and they leave time for analysing the records and for negotiations between the parties aimed at narrowing the points at issue by agreement.

**(c) *Setting dates for hearings***

78. Typically, firm dates will be fixed for hearings. Exceptionally, the arbitral tribunal may wish to set only "target dates" as opposed to definitive dates. This may be done at a stage of proceedings when not all information necessary to schedule hearings is yet available, with the understanding that the target dates will either be confirmed or rescheduled within a reasonably short period. Such provisional planning can be useful to participants who are generally not available on short notice.

**(d) *Whether there should be a limit on the aggregate amount of time the parties have for oral arguments and questioning witnesses***

79. Some arbitrators consider it useful to limit the aggregate amount of time each party has for any of the following: (a) making oral statements, (b) questioning its witnesses, and (c) questioning the witnesses of the other party. In general, the same aggregate amount of time is considered appropriate for each party, unless the arbitral tribunal considers that a different allocation is justified. Before deciding, the arbitral tribunal may wish to consult the parties as to how much time they think they will need.

80. Such planning of time, provided it is realistic, fair and subject to judiciously firm control by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and arguments, reduce the likelihood of running out of time towards the end of the hearings, and avoid that one party would unfairly use up a disproportionate amount of time.

**(e) *The order in which the parties will present their arguments and evidence***

81. Arbitration rules and national laws on arbitral procedure typically give broad latitude to the arbitral tribunal to determine the order of presentations at the hearings. Procedural patterns differ, for example, as to whether opening or closing statements are heard and their level of detail; the sequence in which the claimant and the defendant are to present their opening statements, arguments, witnesses and other evidence; and whether the defendant or the claimant should have the last word. In view of such differences, it may foster efficiency of the proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner of conducting oral hearings, at least in broad lines.

**(f) *Length of hearings***

82. The length of a hearing primarily depends on the complexity of the issues to be argued. The length also depends on the procedural style used in the arbitration. Some practitioners prefer to have the issues clarified, as much as possible, in writing before the hearings, which thus can be limited to the issues that remain to be clarified. Those practitioners will generally tend to plan shorter hearings than those practitioners who prefer that most if not all evidence and arguments are presented to the arbitral tribunal orally and in full detail. In order to facilitate the parties' preparations and avoid misunderstandings, the arbitral tribunal may wish to clarify to the parties, in advance of the hearings, the intended use of time and style of work at the hearings.

**(g) *Arrangements for a record of the hearings***

83. The arbitral tribunal should decide, possibly after hearing the views of the parties, on the method of preparing a record of oral statements and testimony during hearings. One possibility is that the members of the arbitral tribunal take personal notes. Another is that the presiding arbitrator during the hearing dictates to a typist a summary of oral statements and testimony. A useful, though costly, method is for professional stenographers to prepare verbatim transcripts, often within the next day or a similarly short time period. A written record may be combined with tape-recording, so as to enable reference to the tape in case of a disagreement over the written record.

84. If transcripts are to be produced, it may be considered how the persons who made the statements will be given an opportunity to check the transcripts. For example, it may be agreed that the changes to the record would be approved by the parties or, failing their agreement, would be referred to one of the arbitrators or to the arbitral tribunal.

**(h) *Whether and when the parties are permitted to submit notes summarizing their oral arguments***

85. Some legal counsel are accustomed to giving notes summarizing their oral arguments to the arbitral tribunal and to the other party. If such notes are presented, this is usually done during the hearings or shortly thereafter; in some cases, the notes are sent already before the hearing. In order to avoid surprise, foster equal treatment of the parties and facilitate preparations for the hearings, advance clarification is advisable as to whether handing over such notes is acceptable and the time for doing so.

86. The decision of the arbitral tribunal to close the hearings will normally be made after it has been told by the parties that they have no further proof to offer or submissions to make. Therefore, when notes are handed over to be read after the closure of the hearings, the arbitral tribunal may find it worthwhile to stress that the notes should be limited to summarizing what was said orally and in particular should not refer to new evidence or new argument.

## 18. Multi-party arbitration

87. A single arbitration that involves more than two parties ("multi-party" arbitration) may arise from different kinds of situations. Among the many examples of multi-party arbitration, one is a case in which a particular event gives rise to disputes between different pairs of parties. For example, in the construction of a building, one construction defect may give rise to two disputes, one between the purchaser and the designer and another one between the purchaser and the contractor; while both disputes arise from the same event and some of the evidence may be the same, the disputes are separate in the sense that the outcome in one dispute does not necessarily prejudice the outcome in the other one. Another example is an arbitration arising out of a multilateral contract such as a joint venture or consortium.

88. In order to establish a multi-party arbitration, it is generally required that all the participating parties have consented to arbitrate in a single arbitration. However, if specified conditions are met, a few national laws allow a court-ordered multi-party arbitration even if not all the parties have agreed to hold a single arbitration. Some national laws authorize courts to assist the parties in establishing, and laying down the ground rules of, a multi-party arbitration if all parties make the appropriate request.

### *Types of procedural decisions that may facilitate multi-party proceedings*

#### *(i) The order in which issues are to be considered*

89. In multi-party disputes it is often possible to identify issues that are interdependent in that a decision on one issue influences the outcome regarding another issue. For example, liability of a party found to exist *vis-à-vis* one claimant may affect the decision in another dispute in the multi-party setting. When such interdependence exists, it might be useful to divide the multi-party proceedings into stages that will deal with the issues in the appropriate order. It is, however, important to bear in mind that, since a

decision on one issue may affect the position of a party in another issue, each interested party must be given an opportunity to present its arguments on the issues affecting that party.

#### *(ii) Other procedural decisions*

90. Because of the need to deal with more than two parties, multi-party proceedings can be more complicated to manage than bilateral proceedings. In order to avoid unnecessary delays and costs, it is advisable to consider the anticipated course of the proceedings and take appropriate decisions on matters such as the scheduling of meetings; flow of communications among the parties and the arbitral tribunal; the manner in which the parties will participate in the taking of evidence of witnesses; appointment of experts and the participation of the parties in considering their reports; the order in which the parties will make statements; and the apportionment of the deposits for costs.

## 19. Possible requirements concerning filing or delivering the award

91. Some national laws require that arbitral awards be filed or registered with a court or similar authority, or that they be delivered in a particular manner or through a particular authority. Those laws differ with respect to, for example, the type of award to which the requirement applies (e.g. to all awards or only to awards not rendered under the auspices of an arbitral institution); time periods for filing, registering or delivering the award (in some cases those time periods may be rather short); or consequences for failing to comply with the requirement (which might be, e.g. invalidity of the award or inability to enforce it in a particular manner).

### *Who should take steps to fulfil the requirement*

92. If such a requirement exists, it is useful, some time before the award is to be issued, to plan who should take the necessary steps to meet the requirement and how the costs are to be borne.

## IV. POSSIBLE FUTURE WORK

### A. Cross-border insolvency: report on UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency: note by the Secretariat

(A/CN.9/413) [Original: English]

#### INTRODUCTION

1. The present note contains a description of the information presented and conclusions drawn at the Judicial Colloquium on Cross-Border Insolvency, held on 22 and 23 March 1995 at Toronto by the secretariat of the United Nations Commission on International Trade Law and the International Association of Insolvency Practitioners (INSOL). The purpose of the Colloquium was to obtain for the Commission the views of judges, and of Government officials concerned with insolvency legislation, on judicial cooperation in cross-border insolvency cases (hereinafter referred to as "judicial cooperation"), and the related topics of court access for foreign insolvency administrators and recognition of foreign insolvency proceedings (hereinafter referred to as "access and recognition"). The Colloquium was designed to assist the Commission as it embarks on work on those aspects of cross-border insolvency.

2. Over 60 judges and Government officials from 36 States took part, representing a broad range of practical experience and the perspectives of diverse legal systems. It provided an opportunity to obtain at a formative stage of the Commission's work the views of those who would be the end-users of a legal instrument devised by the Commission to deal with cross-border insolvency. The Colloquium also provided a unique opportunity for judges to have contact with each other and further their understanding of the various national approaches to dealing with cross-border insolvency cases, a type of contact that has value in itself in furthering judicial cooperation.

3. In connection with its decision to undertake work on those aspects of cross-border insolvency, the Commission had decided at its twenty-seventh session to hold the Colloquium. That decision in turn was taken in the light of views expressed at the first UNCITRAL-INSOL Colloquium (Vienna, 17-19 April 1994), which involved insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders. That Colloquium reported on difficulties currently arising in cases of cross-border insolvency, and the resulting undesirable economic and other effects, both as to asset value available for creditors and the feasibility of saving businesses and employment. It was recommended that the Commission could make a useful contribution in a relatively short time with a project specifically designed to facilitate judicial cooperation and access and recognition. It was further suggested that a hearing of the views of judges would be a useful first step, not only

in further assessing the desirability and feasibility of such work, but also in gathering the information necessary to initiate work.<sup>1</sup>

#### UNCITRAL-INSOL JUDICIAL COLLOQUIUM ON CROSS-BORDER INSOLVENCY

##### A. Background report of expert group

4. The participants at the Judicial Colloquium were aided in their discussion by a background paper on cross-border insolvency prepared by a group of experts assembled by INSOL. That paper will be finalized taking into account the views expressed at the Judicial Colloquium and will be of use in the Commission's work on cross-border insolvency.

5. The paper summarized the current legal environment in which solutions to cases of cross-border insolvency must be crafted. That environment was characterized by diversity and often inconsistency in legal approaches applied in cross-border insolvency, including the degree of discretion that might be available to judges in the absence of statutory authorization. This situation may jeopardize in any given case the possibility of implementing a liquidation or reorganization plan that maximizes the value of the debtor's assets and saves as much employment as is possible. For example, some States adhere to a "territoriality" principle which may deny recognition to foreign insolvency proceedings and assert control over domestic assets, while States in a bilateral or multilateral treaty arrangement might be bound to apply approaches aiming at a single or common administration of the insolvency (e.g. Montevideo Treaties of 1889 and 1940; Nordic Bankruptcy Convention), or at harmonization among any concurrent proceedings.

6. The report described the legislation found in a limited number of States specifically dealing with judicial cooperation, access and recognition in the insolvency context.

<sup>1</sup>The Commission's current work on cross-border insolvency dates back to a proposal made at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century", which the Commission decided at its twenty-sixth session to pursue further. The previous deliberations and decisions of the Commission leading up to its current work on cross-border insolvency are reported in the reports of the Commission on the work of its twenty-sixth session (*Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17)*, paras. 302-306) and on the work of its twenty-seventh session (*Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)*, paras. 215-222). The papers presented to the Commission for its deliberations included A/CN.9/378/Add.4, and A/CN.9/398 (report on the Judicial Colloquium, Vienna, 17-19 April 1994).

Typical characteristics or effects of such statutes include: the possibility for a foreign insolvency representative to open secondary or "ancillary" proceedings; the power of the court to stay at the behest of the foreign representative commencement or continuation of actions against the debtor or the debtor's property or to enforce a judgement against the debtor; and the turnover of property of the estate or proceeds of such property to the foreign representative.

7. Such legislation varies in the extent to which cooperation and assistance are mandatory or subject to the discretion of the requested court, as regards both the questions of access and recognition and the degree of cooperation to be given. For example, in one country there is a two-tiered approach, in which recognition and assistance are mandatory for proceedings from certain prescribed countries, based on an assessment as to the nature of the proceedings carried out in those other countries or perhaps other aspects of compatibility of legal systems. For other countries the approach is one of discretion.

8. Another approach is to authorize cooperation and assistance across the board to all countries, but to leave the actual extent of cooperation and assistance afforded in any given case to the discretion of the court, with the possibility of including in the statute factors to guide exercise of discretion. Those factors include, for example, the just treatment of all creditors, and substantial consistency between legal systems involved as to the distribution of proceeds.

9. Yet another variant mandates assistance to proceedings from prescribed countries, as certified by State officials; the exercise of discretion as to the type of cooperation in individual cases is to be guided in particular by the rules of private international law.

10. Also described were various techniques and notions employed in pursuit of judicial cooperation and access and recognition in particular in the absence of a specific legislative or treaty framework. Those techniques include: application of the doctrine of comity by courts in common law jurisdictions; issuance for equivalent purposes of enabling orders (*exequatur*) in civil law jurisdictions; conclusion of ad hoc protocols to establish cooperation among jurisdictions involved in a cross-border insolvency case and to facilitate cross-border administration of an insolvency; enforcement of foreign insolvency orders by way of general legislation on recognition of foreign judgments and procedures such as letters of request (letters rogatory) from foreign jurisdictions. Annexes were included in the report containing more detailed descriptions and comparisons of approaches taken in various countries to judicial cooperation and access and recognition.

11. The report made a number of tentative conclusions and recommendations, including:

(a) States should be encouraged to enact in their legislation some basic rules to apply in cases of cross-border insolvency;

(b) recognition should normally follow expeditiously from establishing the basic elements of: the commencement of a valid insolvency proceeding, the control of the business affairs and assets of the debtor, the presence in the

foreign jurisdiction of business interests or assets of the debtor or of persons or information relating to the business affairs and assets of the debtor;

(c) The rules on recognition and its consequent effect should foster predictability;

(d) Applications for recognition and enforcement should be through judicial processes;

(e) An applicant for recognition should not be deemed to have submitted fully to the jurisdiction of the foreign country when appearing in connection with the insolvency;

(f) Upon recognition, such cooperation and assistance should be available as is not inconsistent with the law of the foreign country, with the relevant court being given the discretion to provide such aid and assistance as may be appropriate in the circumstances.

## B. Judicial Colloquium programme

12. The first portion of the Judicial Colloquium was devoted to presentations on six major cases of cross-border insolvency by individuals involved in the cases. The presentations were made by presiding judges from various countries and differing legal systems that presided over proceedings in some of those cases, as well as by insolvency administrators and other court-appointed insolvency officials. That was followed by a presentation of the report, observations of leading academics in the field of insolvency law, and a closing evaluation by a multinational panel of judges. In addition, interspersed in the programme were several open-floor segments, which substantially added to the range of experiences and views presented.

13. Views and issues raised at the Judicial Colloquium are summarized below, by reference to the principal elements of the work being undertaken by the Commission: judicial cooperation, as well as access and recognition.

### 1. Judicial cooperation

14. The experiences and views reported at the Judicial Colloquium reflected the general willingness and interest of judges to cooperate in cases of cross-border insolvencies. At the same time, judicial cooperation was hindered by disparity or inadequacy of laws regarding judicial cooperation. It was generally felt that a text from UNCITRAL, for example in the form of model legislative provisions, could usefully support extensions of cooperation and assistance by judges from legal systems where such judicial activity would require a statutory authority. Moreover, even in jurisdictions where judges were given broad discretionary power, it had been shown that a legislative framework could provide added predictability as regards resolution of cross-border insolvencies.

15. There was support for exclusion of consumer insolvencies from the scope of the instrument to be prepared by the Commission. It was not intended, however, to limit thereby the scope exclusively to insolvency of legal persons, since there could be cases of individuals conducting economic enterprises of a commercial nature, without the formal garb of a corporate entity. There was less agreement

as to whether the legal text to be prepared by the Commission should venture into attempts to harmonize notions such as "claim", "future claimants", and "discharge". A concern was that such attempts might go beyond what was needed to facilitate judicial cooperation and access and recognition, and adversely affect the feasibility and acceptability of the text.

16. Views were expressed in favour of including in co-operation legislation some version of an automatic stay of execution of claims. This would provide at least a minimum period of time to examine the request of the foreign insolvency representative before a liquidation or dismemberment of the insolvent estate. Favourable views were expressed regarding the potential benefits of a judge appointing a neutral third party, for example, to help harmonize concurrent proceedings, to facilitate agreement, mediate disputes and limit polarization among the various parties, and to resolve impediments to reorganization plans.

17. It was reported that communications between judges in cross-border insolvency cases could be particularly useful for clarifying conflicting information, keeping track of foreign proceedings, obtaining explanations of foreign law, and developing insolvency plans and solutions agreeable to parties in both jurisdictions. Various perspectives were presented as to such communications, some favouring a relatively unbridled right of judges to communicate directly, and others favouring varying degrees of restriction and procedure. The suggested restrictions on judicial communications sprang from concerns as to the propriety and fairness of conducting such communications in the absence of the parties. Possible procedural requirements mentioned included a record of the communication, notice to the parties of the communication, or an opportunity for the parties to be present.

18. A suggestion not directly related to the work of UNCITRAL, but one intended to facilitate judicial cooperation, was the establishment of a method of accreditation of insolvency representatives, so as to increase the confidence of judges requested to act by foreign insolvency representatives.

## 2. Access and recognition

19. A consensus supported the inclusion in the text to be prepared by UNCITRAL of provisions on access and recognition. As to the type of proceedings to be recognized, a view was expressed that the provisions should be limited to proceedings in which the debtor was actually insolvent. The suggestion not to cover voluntary insolvency proceedings and proceedings in which the debtor was left in possession of the assets during the insolvency proceedings, or could be seen as "trading while insolvent", sought to take into account that such cases were either not recognized universally or were treated differently by States.

20. It was noted that the background paper had proposed a way that might overcome such differences among legal systems, by focusing on the nature of the proceeding rather than on whether the debtor was insolvent. The essential elements of a covered proceeding would include: commencement pursuant to insolvency law; the aim of collec-

tive communal benefit of creditors; and effective external control of the management of the business interests and assets of the debtor by an administrator (whether such administrator was an independent administrator or the debtor itself).

21. Other issues suggested for attention in legislative provisions on access and recognition included: providing some enforcement effect to recognition of foreign proceedings; providing for limited appearances by foreign insolvency representatives, that would not submit them to the full jurisdiction of the court; granting equal access to creditors and doing away with automatic priority of local creditors; providing a rule on allocation of primary proceedings, with the effect that all other proceedings would be secondary or ancillary. It was noted that the question of which of these issues to address would be considered bearing in mind the advantages as regards both feasibility and acceptability of developing an instrument that was not overly extensive as to the issues that it attempted to deal with.

## CONCLUSIONS

22. The Judicial Colloquium reflected a consensus view that the development by UNCITRAL of a legislative text of limited scope (e.g. in the form of model statutory provisions facilitating judicial cooperation and access and recognition) was both desirable and feasible. The urgency of giving attention to this matter was emphasized in view of the increasing incidence of cross-border insolvency.

23. The Commission may wish at this stage to assign a working group to consider in detail the views and information presented at the Judicial Colloquium. Two working group sessions might be scheduled prior to the twenty-ninth session, taking advantage of the availability of the information gathered in the expert group report and elicited at the colloquia that have been held.

24. The working group could also consider proposals made as to the possible form and content of the Commission's work (e.g. model legislative provisions containing a "menu of options" for legislators, possibly inspired by alternative approaches followed in existing legislation on judicial cooperation and access and recognition; see paragraphs 6-9, above).

25. Such a method would present to States various possible approaches that they may wish to adopt with respect to the two basic questions of: (a) access and recognition of a foreign insolvency representative; and (b) the determination of the degree of cooperation to be extended in any given case. On the question of access, one approach, for example, would be to have mandatory access with respect to proceedings from prescribed countries, based on an assessment of factors such as compatibility of legal systems, with discretionary access as regards proceedings from other countries. Another approach would be discretionary with respect to all countries. An additional layer of options presented to States would concern the scope of the types of measures possibly to be granted in support of foreign proceedings, and the conditions to be met to obtain those measures.

**B. Build-operate-transfer projects: note by the Secretariat  
(A/CN.9/414) [Original: English]**

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**INTRODUCTION**

1. At the Congress on International Trade Law held in May 1992 in New York in the context of the twenty-fifth session of the Commission, it was proposed that the Commission consider undertaking work in the field of the "build, operate and transfer" (hereinafter referred to as "BOT") project financing concept. Subsequently, at its twenty-sixth session, the Commission had before it a note on possible future work (A/CN.9/378), in which the Secretariat informed the Commission that it was monitoring the work by the United Nations Industrial Development Organization (UNIDO) on the preparation of "Guidelines for the Development, Negotiating and Contracting of BOT Projects". At the Commission's twenty-seventh session, the Secretariat presented a note apprising the Commission on the progress of work on the UNIDO Guidelines (A/CN.9/399) and suggesting possible areas in which the Commission could consider taking up future work. The Commission emphasized the relevance of BOT and requested the Secretariat to present a note to the Commission at its twenty-eighth session on possible future work on BOT projects.

2. Preparation of the Guidelines by UNIDO is now at an advanced stage. It is expected that the final text of the Guidelines will be issued by April 1995. The UNCITRAL secretariat has closely followed the work done on the Guidelines, in particular those aspects that relate to possible future work by the Commission. The Guidelines are geared towards describing the main policy concerns that States should address when deciding whether or how to implement BOT projects. They begin with a chapter introducing the BOT concept, which also discusses the various considerations that a government should bear in mind before deciding to carry out a project by way of BOT; the following chapters deal with the main issues that arise with regard to BOT projects such as the role of government, financial analysis, operation and maintenance, and the transfer of ownership. Since the Guidelines cover the subject of BOT in its entirety, they do not deal in extensive

detail with the issues discussed in this note (see also paragraph 51, below).

**I. THE BUILD-OPERATE-TRANSFER CONCEPT**

3. In its most basic form, BOT is a form of project financing where a Government grants a concession for a period of time to a private consortium (hereafter referred to as the "project company") for the development of a project; the project company then builds, operates and manages the project for a number of years, recoups the construction costs and derives its profit from the proceeds generated by the operation and commercial exploitation of the project. At the end of the concession period, the project is transferred to the Government. Although the generic term used for this type of project is "build-operate-transfer", other terms used to describe this form of project financing include "build-own-operate-transfer" (BOOT), "build-own-lease-transfer" (BOLT) and "build-rent-transfer" (BRT). Although these different terms denote the variations in which some of the projects are structured, they all contain the basic elements of a scheme by which a Government grants concessions for projects to be implemented and operated through private-sector financing.

4. In this arrangement, the repayment of any loans borrowed to implement the project is generally not guaranteed by the Government of the host country, but depends on the revenue generated by the project. Unlike the traditional project financing structure in which the owner (the Government) guarantees the repayment of borrowed funds, in BOT the project company arranges for guarantees to the lenders of the project covering repayment of the borrowed funds. The loans are made against the project's anticipated cash flow. This provides a number of benefits to the host Government. Among these benefits is that, since direct funds from the public budget are not required, the Government will experience reduced pressure of public borrowing. Private sector financing also generally allows for the transfer of the financial, industrial and other risks to the private

sector. Furthermore, since the project is built and, during the concession period, operated by the project company, the Government gains the benefit of private sector expertise in operating and managing such projects.

5. Traditionally, contracts for the construction of infrastructure or other works stipulate that the owner takes over the facility when its construction is completed in accordance with the construction contract. The financing is arranged by the owner who pays the contractors, either by drawing money from a loan or from its own resources. In such contracts, the basic duty of the contractor is to build and to equip the contracted facility, while the economic viability and profitability of the project are the concern of the owner. In a BOT project, however, the project company has not only to organize the financing but also to ensure that the project will be profitable. The project company therefore has an interest in the feasibility and design of the facility and in ensuring that the legal and commercial conditions necessary to construct and operate the facility in a profitable manner are in place and will remain basically unchanged during the period of the concession.

6. Two of the factors that may lead to lengthy and often complicated negotiations are the financing and contractual arrangements. With regard to financing, the main problems arise because, with the lack of sovereign guarantees, the project company and the lenders have to find the means by which to cover the attendant risks including by way of insurance and various other forms of guarantees. The risk distribution schemes in BOT can therefore be quite complex.

7. In the area of contracting, some of the problems arise due to the fact that a BOT project normally involves a high number of contractually interrelated parties. Beside the host Government and the project company, other parties usually include the lenders, the construction company and the equipment suppliers, independent investors of capital and the purchasers or end users of the project's product. In most instances, the project company will itself be a consortium of construction companies, engineering equipment suppliers and other private investors, and the operator of the project. There may also be involvement by way of capital contributions by institutional investors and multi-lateral development agencies.

8. Because of the various novel aspects necessary for the successful realization of a BOT project, an important ingredient is the support of the host Government. The host Government not only has to authorize the project but will be the ultimate owner of the facility. The Government has to oversee the implementation of the concession agreement and may, in some instances, be a participant in some of the debt or the equity. In order to ensure long term private sector participation, the Government has to ensure a stable political base and a legal climate that is conducive to long term private investment. This will range from the establishment of a legal framework for private investments to putting in place the necessary administrative machinery for the timely, fair and objective issuance of any required approvals, permits or licenses.

9. Due to a number of factors, including the benefits mentioned above (paragraph 4), there has been a substantial increase in many States in the number of BOT projects being implemented. Chief among the factors that have led to the interest in BOT projects is the potential for mobilization of private sector resources for infrastructure development without the necessity to raise the public debt. This is particularly so at a time when there is an increase worldwide in privatization of various sectors previously reserved for the public sector, coupled with decreasing availability of public sector funds for infrastructure development. The other advantages include increased involvement of the private sector in the management of public infrastructure, increased potential for direct foreign investments and the opportunity for Governments to use the BOT facilities as a benchmark for the performance of similar projects in the public sector.

10. Many of the BOT projects that have so far been implemented have been large infrastructure projects, in particular in the areas of power generation and transport (toll roads, bridges and railways). However, as the potential for BOT is more widely realized, smaller and medium-sized projects such as water treatment schemes, hotels and medical facilities are being proposed for implementation by way of BOT.

## II. LEGAL PROBLEMS IN THE IMPLEMENTATION OF BUILD-OPERATE-TRANSFER PROJECTS

11. Despite the advantages mentioned above and the potential that exists for BOT projects, various legal and practical obstacles can make it difficult to implement such projects. Legal obstacles may arise because of the lack of a proper legal and regulatory framework to attract long-term private-sector involvement in such projects. Since the private investors and financiers carry most of the risk for the performance of the project, they have a keen interest in the existence of a legal infrastructure that enables a fair return on their investment and the enforceability of the contractual obligations entered into by the various parties.

12. Additional obstacles may arise, for example, in the area of procurement. Unlike the normal practice in procurement for traditional projects, where the Government solicits tenders on the basis of a well defined project within predetermined specifications, in BOT the call for tenders may precede any design work. To the extent that there may be a lack of clear guidelines on the basis of which to evaluate tenders or proposals that will in all likelihood contain varied solutions to a set of problems, a lengthy and therefore costly bidding process may ensue, one that runs the risk of compromising the integrity of the procurement process. The Government also has to define clearly how to deal with unsolicited proposals since, in many instances, the private sector is encouraged to take the initiative in project identification.

13. Yet another obstacle to implementation of BOT projects is the limited experience, in particular on the Government side, on negotiating simultaneously with a multiplicity of parties, many of whom will be contractually interrelated. Although most of the contracts entered into to



implement BOT projects might not, in themselves, present any novel issues, the BOT context presents some problems in that all the various contracts have to fit into a composite contractual package.

#### A. Inadequacies in the legal framework

14. As noted earlier (paragraph 10), the BOT concept has so far mainly been used in the implementation of large infrastructure projects, which involve the expenditure of substantial amounts of money by private investors. The predominant proportion of the funds used to implement such projects is generally obtained by borrowing from commercial banks and other financial institutions. However, the repayment of borrowed funds and the return for the equity investors take place over an extended period of time. The lenders to the project and the equity investors will therefore look for a clear manifestation by the host Government of its intention to encourage long-term private investments and that such investments will be protected from expropriation or nationalization without fair compensation.

15. One of the means by which the host Governments can manifest such intention is by providing a sound legal framework that encourages private investment and ensures recovery of the returns on the investment. Most of this will be in the form of legislation that governs investments and other commercial matters in general and that is not necessarily geared towards BOT projects specifically. The existence of such general legislation not only provides confidence to the private investors willing to engage in a BOT project but also makes the negotiation process for specific projects easier. This is because, in the absence of such legislation, parties to a BOT contract will normally insist that certain issues and guarantees that would otherwise be covered by legislation be negotiated and provided for in various contracts, which may make the negotiating process more involved.

16. Such general legislation that is relevant to one degree or another to BOT projects falls into two categories. The first category includes legislation primarily geared towards promotion of foreign private investment. The terms of such legislation that will be of particular interest to sponsors of BOT projects and to their lenders will include provisions on private ownership of land and other assets, on repatriation of profits and on foreign exchange convertibility. The second category includes the general commercial legislation of the host country, in particular, legislation on incorporation or formation of commercial enterprises, legislation on securities arrangements as well as a liberal framework governing commercial contracts and dispute settlement procedures. The existence of such legislation provides the participants in the BOT project with a solid legal basis for their investment and therefore contributes to the reduction of the risk of the investment, thus decreasing the cost of the project.

17. In some of the areas of law just mentioned, harmonized legal texts exist which States would be advised to consider for adoption, including texts prepared by the Commission. Those texts include the United Nations Convention on Contracts for the International Sale of Goods,

the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Model Law on International Credit Transfers and the UNCITRAL Model Law on Procurement of Goods, Construction and Services.

18. Beyond the need for such general legislation, there is a need, in many instances, to provide legislation for the implementation of certain aspects of BOT projects. Legislation geared specifically towards implementation of BOT projects not only provides clear signals to potential investors of the interest of the Government in carrying out such projects but also provides and facilitates private sector participation in public sector projects. For example, in most States, public infrastructure has traditionally been financed and run, to a large degree, by public sector institutions usually operating as monopolies. In most such instances, there might be a need to provide a legislative basis for private sector participation and, in particular, the right to charge the public for the use of the facility to be built or for its product. In some States, there might be a need to provide for the regulatory framework for such concessions.

19. Legislative approaches differ among those States that have enacted legislation for BOT projects. In some States, BOT legislation only regulates the implementation of such projects in a particular sector, for example, power generation. Typically, such legislation will include provisions on: which aspects of the regulated sector can be implemented by way of BOT; the extent of governmental involvement, including what may be granted by the Government to the project company (e.g. land rights); issuance of approvals; and authorization for profit recovery, possibly including detailed calculations on the rates and charges that may be levied by the project company for the sale of the end product of the project. Such legislation sometimes also includes special provisions on how procurement for the projects is to be carried out.

20. Other States have adopted legislation aimed at regulating the implementation of BOT projects generally. Such legislation is normally not as detailed as the legislation aimed at a specific sector and differs from State to State. There are, however, two main approaches to such legislation. In one approach, the legislation only sets general parameters within which government agencies can negotiate BOT contracts. This has the advantage of providing flexibility to negotiate the contracts in a manner that suits the particular circumstances of each project. Typical provisions of such legislation include, for example: the authorization to grant concessions to the private sector for BOT projects; an indication of those sectors in which BOT projects may be carried out; and general rules on how financing may be raised and on incentives that may be granted to entities that wish to carry out BOT projects, including various forms of tax relief. Provisions on procurement, including on methods of solicitation and evaluation of tenders or proposals, are sometimes also included in such legislation.

21. Another legislative approach to regulating BOT projects generally is to establish fairly comprehensive provisions on how a BOT project may be implemented, with the parties having to negotiate only the detailed terms and conditions for each project. Typically, such legislation will

include provisions that define the basic content of contractual obligations for the implementation of a project, including provisions on such matters as the maximum period of time for which concessions may be granted, extent of possible government support, detailed procurement rules, the means of debt repayment and repatriation of profits, and conditions for the operation and transfer of the project.

22. The divergences in legislative approaches and in the scope of the legislation may indicate that, generally, legislative efforts have been primarily aimed at dealing with problems as they arise as opposed to a comprehensive approach aimed at dealing with all the issues that need legislative action for the proper implementation of BOT projects. This is particularly so with regard to legislation aimed at regulating BOT projects only for a particular sector. Although legislation might be easier to implement for a sector in which BOT projects are foreseen or planned and the problems are clearly definable, this also means that further legislation would have to be considered if BOT projects come up in other sectors. To that extent, it might be preferable to enact general enabling legislation on BOT and, in those instances when certain peculiar aspects of one sector may demand legislation to implement BOT in that sector, then such particular circumstances may be addressed by way of regulations.

23. In legislation aimed at regulating BOT projects generally, it might be preferable to consider dealing with as many of the issues as arise in the implementation of such projects as can be dealt with legislatively. This is of particular importance in those instances where the underlying legal infrastructure does not deal with such issues in a comprehensive manner. Such an approach would have the benefit of providing the parties with the general parameters within which to negotiate the contractual details of each project. This, however, has to be balanced with the need to provide those negotiating the contracts with some flexibility so as to enable them to take into account particular circumstances that may arise in specific projects.

## **B. Procurement aspects**

24. The expenditures involved in the procurement of goods, construction and services for large infrastructure facilities can be quite large. Furthermore, most of the projects tend to be fairly complex technically and in the financing arrangements. Therefore, the means by which procurement is carried out is of vital importance in ensuring that the project turns out to be economically viable, of good quality, and that it is completed at a reasonable cost. However, because of a number of factors peculiar to BOT projects, the risk that procurement may be carried out in a less than efficient manner is increased and may jeopardize successful implementation of the projects.

25. Because of the size of most projects, preparing bids for BOT projects can be difficult and costly. Most of the potential project sponsors will therefore prefer not to be involved in a procurement process unless they are confident that the process is fair and transparent. At the same time, in proportion to the significance of the project, the Government normally wants to ensure that it gets the most

economically viable project, at the best possible terms, objectives which are more likely to be achieved by engaging in an open, fair and competitive procurement process conducive to potential sponsors offering their best terms.

26. In typical construction project procurement, the Government normally identifies the project, calls for tenders on the basis of fairly well defined specifications, and evaluates the tenders on the basis of established and pre-disclosed criteria. However, in BOT projects, the Government will normally want to maximize private sector innovation in project design and management and will therefore, in many instances, not be in a position to draw up a single set of specifications which would form a common basis for the evaluation of the tenders or proposals. Additionally, even in those instances where it is possible to define the parameters of the project, potential bidders might offer technical solutions alternative to those envisaged by the Government. Furthermore, since the project company arranges the financing, it will also have an interest in a cost efficient project and will therefore want to have an input in the design of the project. It may therefore be difficult to engage in open competitive tendering on the basis of similar and pre-defined specifications.

27. Governments may therefore view negotiations with contractors as an alternative to competitive tendering and as the means to obtain the best terms. However, the Government is not always in a position to prepare proper guidelines on which to base such negotiations. This may give rise to lengthy negotiations, sometimes involving multiple contractors at the same time, thus increasing the possibility of abuse and loss of integrity in the procurement process. It is therefore important for the Government to establish clear and transparent guidelines for procurement based on as competitive, transparent and objective means of procurement and to avoid unstructured negotiations. The procuring entity also should have a clear system by which to compare and evaluate tenders or proposals whose design and technical specifications can be fairly different.

28. A further complicating factor in the procurement process is that it is not always clear to what extent the cost of the project should be a criterion by which Governments evaluate bids since the Government does not provide the financing. To some extent, the financiers and operators of the project have a stronger interest in reasonable costs for the project. But as the ultimate owner of the project, and since the cost of the project has an impact on the rates or tariffs charged to the end users for the product of the project, the Government will want to ensure that the project is well designed and that the costs are reasonable. This, coupled with the fact that the procuring entity may not be able to draw up a single set of specifications, usually means that some form of negotiations are held as part of the procurement process.

29. The other area in which procurement for BOT projects differs substantially from typical construction project procurement is in the financing component. Proper structuring of the financial package is normally the most difficult, and usually the most important, aspect of a BOT project. Potential lenders to a project will need to be assured of a secure source of revenue to cover the debt and

operating costs of the project and to provide a fair return to the equity investors. Beyond the terms aimed at ensuring the economic viability of the project, the security mechanisms aimed at covering and distributing the various pertinent risks are part of the financial package.

30. Notwithstanding that putting together the financing is the obligation of the project company, the Government will have an interest in ensuring an attractive financial package as this impacts on the overall economic viability of the project. In most instances, therefore, the Government will aim at making the attractiveness of the financial package part of the evaluation criteria. However, from a procurement perspective, it is sometimes not clear of what importance, as a criterion for evaluation, the structure of the financial package is to the Government, since the Government does not provide any sovereign guarantee for the repayment of the loans. Furthermore, because of the frequent changes in the terms and conditions in the financial markets, most lenders are unable to commit to specific financing terms over a long period of time without a binding contract. Yet, as the eventual owner of the project, the Government has to protect its interests by ensuring the long-term financial viability of the project.

31. As to the operational phase of the project, in most instances the operator of the facility will be part of the project company. In some instances, however, the project company may enter into an operating contract with an independent operator. From a procurement perspective, this should not necessarily present any problems to the Government. This is because the interest of the Government lies in ensuring that the terms of the operational phase, for example, as to transfer of technology and maintenance, are as beneficial to it as possible, which terms are capable of being clearly defined and quantified in advance and made part of the evaluation criteria. However, attempting to ensure the most beneficial terms usually leads to negotiations on the terms of the operational phase which not only makes the procurement process lengthy but may also lead to abuse.

32. Yet another problem that arises with regard to procurement for BOT is that of unsolicited proposals. Unlike the practice with typical construction projects where the Government identifies and sets the parameters for the projects, the practice in the context of BOT is generally to encourage the private sector to propose possible projects. This is of advantage to the Government in that it encourages private sector innovation and financing in areas in which the Government might not be able to undertake work on the strength of its own resources. The possibility of making unsolicited proposals is of advantage also to the private sector which does not then have to always wait for the Government to formulate possible projects. However, from a procurement perspective, unsolicited proposals deny the Government the benefits that accrue from competition in procurement, since the main incentive for those who make the proposals is that they will be awarded the project. Governments are therefore faced with the dilemma of how to offer adequate incentives so as to encourage unsolicited proposals, while at the same time building an adequate degree of competitive procurement into the process.

33. One means of dealing with many of the problems that arise with regard to procurement for BOT is to have in place modern procurement legislation which promotes the objectives of competition, fairness and integrity while maximizing economy and efficiency in the procurement process. The UNCITRAL Model Law on Procurement of Goods, Construction and Services provides an internationally accepted model for such modern procurement legislation. The Model Law sets forth the procedures for a number of procurement methods which equip the procuring entities with the ability to select suppliers and contractors in a variety of circumstances and in order to meet various types of procurement needs. Some of these procurement methods and procedures may have specific application in the BOT context. For example, two-stage tendering and request for proposals are methods that allow for solicitation of differing tenders or proposals.

34. In two-stage tendering, the procuring entity, during the first stage, invites tenders only for the purpose of developing the technical and quality specifications of a particular project. Under this method, the procuring entity may then hold negotiations with the contractors who have submitted tenders with the aim of arriving at a single set of specifications. In the second stage, the procuring entity then invites tenders on the basis of the single set of specifications that result from the first stage. The other method in the Model Law suitable for BOT procurement is request for proposals, which also provides a vehicle for the solicitation of various technical proposals, while providing a structure for objective comparison and evaluation. Under this method, the procuring entity invites proposals on how to best meet its needs and holds negotiations with the contractors who have submitted proposals after which negotiations they may then submit their best and final offers. The procuring entity then evaluates the proposals on the basis of pre-disclosed criteria, and awards a contract to the proponent of the proposal that best meets the needs of the procuring entity.

35. However, in order to deal with some of the problems that are peculiar to procurement for BOT, Governments would benefit from guidance on how to conduct procurement for BOT in a manner that promotes competitiveness, fairness and integrity in the process. Such guidance would take into account some of the peculiar aspects of BOT projects such as the difficulty that the procuring entity may encounter in establishing a common basis on which to compare certain aspects of the tenders or proposals, while at the same time encouraging private sector innovations. Some practical solutions on how to avoid unstructured negotiations with multiple parties, which is the problem that may lead to abuse and to loss of confidence by the contractors in the procurement process, would be particularly useful. With regard to unsolicited proposals, it would be useful to provide some guidance on possible ways of balancing the advantages provided by private sector project proposals with the advantages of competitive procurement.

### C. Complexity in contracting

36. BOT projects differ substantially from traditional construction projects also with regard to the contractual

arrangements. In regular construction projects involving a government, the main party to the contracts for implementing the project from the standpoint of the host country is the Government. The financing contracts with the lenders and the construction contract with a contractor are the principal contracts. Normally, therefore, the main parties to the contracts implementing such a project are the Government, the lenders and the contractor. In most instances, any financing arrangements that the Government has to enter into are legally separate from the construction contract which terminates upon completion of the project. The repayment of financing could take place over a long period, but usually would not depend on whether the facility is eventually profitable.

37. The main characteristic of BOT projects in contrast to traditional construction contracting is the large number of parties involved in the implementation of the project with many of these parties being contractually interrelated. Furthermore, most of these contractual relationships extend over a long period of time. The principal contracts in a typical BOT project include the project agreement, the joint venture or consortium agreement, the construction contract, the equipment-supply contract, the operation and maintenance contract and the contracts that form the financial package, including the insurance contracts and other security arrangements. Negotiations to put together the contractual package can therefore be complicated and time consuming, thus increasing the cost of the project and the risk of its failure.

38. Although the precise contractual arrangements differ from project to project, the central contract in a BOT project is the concession or project agreement between the Government and the project company. In this agreement are set out the main terms of the concession, such as the length of the concession period, the amount and method of payment for the project end product, any performance conditions, the extent of the monopoly granted to the project company, and the terms and conditions for the operation and maintenance of the facility, and of its transfer to the Government at the end of the concession period. Where the underlying legal infrastructure might not adequately address certain issues, for example, repatriation of profits or certain tax incentives, these may be dealt with in the project agreement. Although the agreement is between the Government and the project company, some of the other parties involved in the project will have an interest in the terms of the contract. For example, the financiers and the operating company will be interested in the length and the exact terms of the concession period, both of which will impact on the loan repayments and on the terms regarding the operational period.

39. The fact that the financiers have no recourse to the Government in case of the projects' failure (non-recourse financing) gives rise to certain factors which usually complicate the negotiations of the contracts that form part of the financial package. Non-recourse financing imposes greater risk on the financiers and the project company than is the case in traditional construction projects. Most of the difficult factors are therefore related, in varying degrees, to the question of how to allocate various risks among the parties. One of the principal factors is that the lenders will

require commitments from the project company and also from the Government that the project will be financially viable over the long term in order to ensure repayment of borrowed funds.

40. Depending on the type of project, these commitments can be arranged in a number of ways. For example, revenues from tolls for roads and bridges may be assured by the Government committing itself to a minimum level of traffic below which the project company would be released from certain commitments. This may involve, for example, the possibility of extending the life of the concession or the provision of some form of re-financing to offset any revenue shortfalls that might otherwise adversely affect the servicing of the debts. In the case of BOT power plants, adequate revenue source is normally assured by means of a long term contract with a Government-owned utility to purchase the power. Thus, although such types of contracts may be separate from the financing contracts between the lenders and the project company, they are a crucial element in successfully putting together the financial package and the lenders and equity investors will therefore have an interest in what these contracts provide.

41. The other means by which lenders normally protect themselves is by negotiating a security package that ensures that repayment of the loans has priority over other claimants to the projects' cash flow, also in case of default or failure of the project. This is normally structured through various mechanisms including establishment of offshore revenue accounts into which the proceeds are deposited and to which the BOT lenders have priority, assignment of certain contracts to trustees who hold them on behalf of the lenders, and by establishing the right of the lenders to take over the project in case of serious default by the project company. Putting together a package in which the lenders will have confidence can be a difficult task in particular in those States without a highly developed capital and securities market.

42. Because of the non-recourse nature of the financing, the financiers and the project company have to find ways in which to handle other attendant risks, principal among them being the country risk (political risk) and currency risk (arising mainly from inflation and currency depreciation). Since these are beyond the influence of the project company or the lenders, one way in which they will attempt to mitigate some of these risks is by engaging export credit agencies to support part of the financing by guaranteeing payments for exports involved in implementing the project. Multilateral development agencies such as the World Bank and regional development banks have been involved in providing investment risk coverage, for example, through the World Bank's Multilateral Investment Guarantee Agency or similar entities. Involvement of multilateral institutions may also increase the confidence of potential lenders.

43. Some of the risks in a BOT project are similar to those in typical construction projects. For example, for the construction phase, the construction-completion risk is normally covered by a firm-date, turnkey construction contract between the project company and a contractor, which contract is typically supported by performance guarantees.

Furthermore, the insurance industry provides cover for some of the more common risks (for example, third-party liability). In some of the developed insurance markets, cover may also be provided for some of the BOT-peculiar risks such as the risk of cash-flow shortfalls.

44. Notwithstanding the above-mentioned financial risk management techniques, a number of practical factors may make negotiations on risk management for BOT projects fairly complicated. Among these are that all the main parties have an interest in the manner in which the various risks are allocated and therefore will want to be involved in all the negotiations. In many instances, this is further complicated by the lack of experience in negotiating with multiple parties on these aspects of BOT projects. This may lead to the parties holding unrealistic positions regarding risk allocation, with the private sector, and in particular the lenders, aiming to reduce their risk exposure to very low levels, while the Government aims to transfer all the risk to the private sector.

45. Beyond the contracts that form part of the financial package, there are various other contracts in which the Government, the lenders and the project company, being the three main parties, all have an interest. An example of this is the operating and maintenance contract. In some instances, the project company will enter into a contract with an independent operator to manage the operational phase of the project. But, even though the parties to the contract will be the project company and the operator, the lenders will want to be satisfied with the terms of the contract with a view to ensuring that the project is managed on an economically viable basis with adequate returns. The Government will also have to ensure that its interests are adequately addressed in the contract with regard, for example, to matters such as the transfer of technology and good technical maintenance of the facility to guarantee that the facility is transferred in a good technical condition at the conclusion of the concession period. The interest of these other parties in a contract to which they may not directly be party can further complicate the contract negotiation process.

46. It would seem that the predominant problems that arise in BOT contracting are not related to the uniqueness of the individual component contracts as such, since most of such types of contracts have been utilized in the implementation of typical non-BOT projects. Guidance on the contractual issues that should be considered in the context of such traditional projects can, for example, be found in the UNCITRAL Legal Guide on Drawing up Contracts for the Construction of Industrial Works. It is the BOT context, however, in which a large number of interrelated contracts form a comprehensive contractual package, that gives rise to practical problems in the process of putting the contracts together. The timing, priority and manner in which the negotiations are conducted has therefore to be very well managed if the process is to be concluded in a timely and successful fashion.

### III. CONCLUSION

47. From the above discussion, it may be concluded that Governments and other contracting parties involved in

carrying out BOT projects could benefit from assistance as to how to deal with some of the legal problems that might hinder proper and economical implementation of projects. The Commission may therefore wish to consider taking up work on BOT projects in particular as regards the legal infrastructure, the means of procurement and contracting. One form of such work could be the preparation of guidelines to assist States in establishing a legal framework that is conducive to the implementation of BOT projects, including guidance on the means of carrying out procurement for BOT in an economic and efficient manner. Another additional form of work, relating to contracting questions would be initiated by a study by the secretariat on the problems encountered in contracting for BOT, which study would include consideration of the means by which the Commission could carry out work in this respect.

48. With regard to guidelines for creation of an enabling legal infrastructure, this could address the types of general business, investment and commercial legislation that would provide a sound legal basis for carrying out BOT projects, together with model legislative provisions that could be used by States wishing to prepare specific legislation to govern the implementation of such projects. Model legislative provisions for BOT-specific legislation could deal with such issues as the legal basis for the granting of the concession, the extent of possible Government support, the regulatory framework for the management and operation of BOT projects, and possible incentives that the Government may wish to grant.

49. As to procurement, the work could include guidance to Governments on means of carrying out procurement in a manner that best promotes competition and transparency and avoids negotiations conducted in a manner that may cause loss of confidence in the procurement process. This could include guidance on preparation of solicitation documents, preparation of criteria for evaluation and the means of carrying out the evaluation in different circumstances. Means by which such guidance could be provided may include preparation of model procurement regulations or of model bid solicitation documents for BOT. This could also include guidance on how to deal with unsolicited tenders or proposals in a manner that balances the interests of the proponent of such tenders or proposals with those of the Government to inject competition in the process.

50. With regard to contracting, it might be more useful, at this stage, for the Secretariat to continue to monitor and study developments on contracting for BOT with a view to considering how the Commission could carry out work in this area. This could possibly include preparation of a supplement on BOT contracting to the UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works, in which would be discussed the mechanisms for BOT contracting, including a discussion on how the provisions in the principal contracts may be structured in the BOT context.

51. It is envisaged that, in the three areas of possible work referred to, the Commission's work would be tailored so as not to duplicate work already carried out by UNIDO on BOT projects. For example, in the UNIDO Guidelines,

issues regarding the legislative framework are discussed in a chapter on Government support for BOT project implementation. Although that chapter discusses the main features of such legislation and the problems that may arise due to the lack of a proper legislative framework, it remains to develop a comprehensive legislative guide as to what the different aspects of the legal framework should cover and, in particular, possible model provisions that may be included in BOT-specific legislation. The Guidelines also set out some of the problems that are encountered

in the area of procurement. In this regard, as proposed in the present note, States would further benefit from practical guidance on how to avoid some of the problems discussed. As for contracting, the Guidelines describe the contents of some of the contracts with the main contracts, such as the project agreement, being given more detailed treatment. In this aspect also, States might benefit from more comprehensive guidance on the mechanics of BOT contracting and on the types of provisions that are the key to arriving at a balanced contractual package.

**C. Assignment in receivables financing: discussion and preliminary draft  
of uniform rules: report of the Secretary-General  
(A/CN.9/412) [Original: English]**

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## INTRODUCTION

1. At its thirteenth session (New York, 14-25 July 1980), the Commission considered a report by the Secretariat on security interests in different kinds of assets, including receivables.<sup>1</sup> At that session, the conclusion was reached that "worldwide unification of the law of security interests ... was in all likelihood unattainable" since the subject was too complex. It was noted that it was advisable for the Commission to await the outcome of the work on the retention of title by the Council of Europe and on factoring by the International Institute for the Unification of Private Law (UNIDROIT), prior to the Commission undertaking any further work of its own.<sup>2</sup> Subsequently, at the Congress on International Trade Law held by the Commission in conjunction with its twenty-fifth session in May 1992 in New York, it was suggested that work should be undertaken by the Commission on assignment of claims, an issue beyond the scope of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("the Sales Convention").

2. Pursuant to that suggestion, at its twenty-sixth session (Vienna, 5-23 July 1993), the Commission considered a note by the Secretariat concerning certain legal problems in the area of assignment of claims and of past and current work on assignment and related topics (A/CN.9/378/Add.3). The Commission then requested the Secretariat to prepare a study on the feasibility of unification work in the field of assignment of claims.<sup>3</sup> In response to that request, the Secretariat presented to the Commission, at its twenty-seventh session (New York, 31 May-17 June 1994), a report on legal aspects of receivables financing (A/CN.9/397). The report focussed on assignment of claims for financing purposes (i.e. for raising income or credit) and suggested that a number of assignment-related problems could be addressed by uniform rules. At that session, the Commission requested the Secretariat to prepare a further study that would discuss in more detail the issues that had been identified and would be accompanied by a first draft of uniform rules.<sup>4</sup>

3. The present report has been prepared pursuant to that request. The first part discusses the possible scope of work; the second part addresses a number of assignment-related issues and suggests some possible solutions to problems arising in the context of receivables financing. Interspersed in the report are first, preliminary drafts of uniform rules on certain of the issues ("the draft uniform rules").

4. The purpose of such rules would be to respond to the practical commercial need to utilize receivables to obtain financing. At present, in view of divergences among legal

systems, cross-border assignments (in which the assignor, the assignee and the debtor would not be in the same country) may be unenforceable against the debtor or be challenged by creditors of the assignor in another country. This is particularly the case with respect to recognition of the validity of bulk assignments of future receivables, which is the usual form in which receivables financing takes place. Such difficulties are particularly likely to be evidenced, for example, in case of the insolvency of the assignor, and when conflicting claims arise as to the receivables. The practical result is that the use of commercial receivables to obtain needed financing is hindered or may be more costly.

5. As envisaged in the present report, the uniform rules would build on the rules contained in existing international instruments, such as the Sales Convention and the UNIDROIT Convention on International Factoring (Ottawa, 1988) ("the Factoring Convention"), which enters into force on 1 May 1995 for France, Italy and Nigeria. With a view to furthering harmony of law, they would presumably also take into account solutions reflected in the Convention on the Law Applicable to Contractual Obligations (Rome, 1980) ("the Rome Convention").

6. In the context of its cooperation with interested international and national organizations, the Secretariat made a preliminary draft of this report available to UNIDROIT, the Hague Conference on Private International Law, the European Bank for Reconstruction and Development (EBRD), the International Bank for Reconstruction and Development (IBRD) and, in the United States, the National Conference of Commissioners on Uniform State Laws for their comments.

## I. SCOPE OF WORK

## A. General remarks

7. It is assumed in the present report that work by the Commission would focus on assignments in receivables financing, i.e. assignments effected for raising income or credit on the basis of receivables. As described in chapter I, section C of the present report, such receivables financing takes various commercial forms, including factoring, forfaiting, refinancing, securitization and project financing. The "assignment" in each of those forms involves a transfer by the original creditor (assignor) to a new creditor (assignee) of receivables arising from a contract ("the original contract"; e.g. a sales contract) between the assignor and a third party (debtor); the transfer may be by way of sale, by way of security, or otherwise.

8. In receivables financing, the assignment is effected in connection with a contract between the assignor and the assignee to transfer receivables, in connection with which the assignee provides financing to the assignor. An important characteristic of such assignment is that it establishes a "triangular relationship" between the assignor, the assignee and the debtor, in the sense that while the payment claim is transferred, the obligation to perform the original contract remains with the assignor. The assignment can produce effects against other third parties, such as the assignor's creditors and the trustee in the bankruptcy of the assignor.

<sup>1</sup>A/CN.9/186, reproduced in *UNCITRAL Yearbook*, vol. XI: 1980 (United Nations publication, Sales No. E.81.V.8), part two, chap. III, sect. D, for a full list of the relevant reports of the Commission's work on this topic, see A/CN.9/378/Add.3, footnote 2.

<sup>2</sup>*Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, paras. 26-28 (*UNCITRAL Yearbook*, vol. XI: 1980, part one, chap. II, sect. A).

<sup>3</sup>*Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17)*, para. 301.

<sup>4</sup>*Ibid.*, *Forty-ninth Session, Supplement No. 17 (A/49/17)*, para. 210.



9. In terms of contractual structure, the assignment element of a receivables financing transaction may be embodied, depending upon the type of case, as an integral term in the financing contract (e.g. in a factoring transaction), or it may be a distinct contract in a web of contracts (e.g. assignment of future revenues in project financing).

10. While it is assumed that work by the Commission would be limited to assignment in receivables financing, it may not be sufficient simply to define the scope in terms of receivables arising from transactions that are not for personal, family or household purposes (Sales Convention, article 2 (a); Factoring Convention, article 1.2 (a)). A more appropriate approach in the present context may be to look to the commercial purpose of the assignment itself, since most assignments in receivables financing transactions are for commercial purposes, even if the receivables themselves may derive from consumer transactions. Such an approach would cover, for example, refinancing or securitization of credit card consumer receivables, home equipment loans and home mortgages. Issues of consumer protection might be dealt with in conjunction with the question of protection of the debtor.

11. While it can be assumed that applicability of the uniform rules would hinge on internationality, several specific questions present themselves as to the extent of the internationality to be required. These include not only whether the assignor and debtor would need to have their places of business in different States, or whether one should look to the places of business of the assignor and the assignee, but also whether a bulk assignment would be covered only if all debtors, or merely if one debtor is located in a different country, and what the effect would be of the debtor moving to a different country after the assignment is effected.

12. Considerations that may weigh on such choices include, for example: whether the law governing the receivable should change simply because of a cross-border assignment; the potential for inconsistent results in assignments of domestic receivables as between a domestic assignee and a foreign assignee both of whom may in fact be part of a single loan syndicate; and desirability of consistency with the Factoring Convention, which covers both domestic and international assignments of international receivables.

13. As to the territorial scope of application, requiring that the assignee be located in a State that has enacted the rules could be questioned, since the demand for payment would normally be made at the place of business of the assignor or the debtor.

## **B. Various types of assignment and similar practices**

14. Assignment may be effected by way of sale, by way of security, or in payment of a pre-existing debt. Apart from legal systems that deal with assignment of trade receivables in terms of those three main categories, there are used in some legal systems functional equivalents of assignment of receivables, including techniques such as subrogation, pledge or novation (see paragraphs 22-29, be-

low). Consideration might be given to preparing a set of uniform rules that would cover all those ways in which receivables might be transferred, without necessarily, having to formulate precise definitions of the various forms.

15. Some legal systems impose specific conditions for effectiveness of assignment by way of security, which may not be applicable to assignment by way of sale, including, for example: written form and notification of the debtor, or registration, for effectiveness of the assignment as between the assignor and the assignee, or as against the debtor and other third parties; collection of the receivables by the assignee only in case of assignor's default under the receivables financing contract; return to the assignor of any surplus remaining after payment to the assignee.

16. Other ways in which the treatment of the two types of assignment may differ include the imposition of taxation on income generated from assignments by way of sale, but not on the credit obtained in the context of an assignment by way of security, though the latter may be subject to stamp duty. Furthermore it may be that receivables sold may be taken off the balance sheet of the assignor, which might improve the return-on-assets or capital-to-assets calculations of the assignor, and consequently the creditworthiness of the assignor.

17. Assignment in payment of a pre-existing debt is either an assignment by way of sale or an assignment by way of security, or a way of payment (e.g. if it is effected in repayment of an advance made in the context of a loan or an overdraft facility, where the consideration might be an advance and not a purchase price, and the assignment might be effected in order to repay the advance rather than to secure repayment of the advance).

18. In some legal systems, the pledge is the main legal technique by which receivables may be transferred by way of security, and the assignment must meet the requirements of pledge in order to obtain recognition (e.g. writing, delivery and registration). The pledgee of receivables normally acquires only the right to be paid out of the proceeds of the receivables in preference to other creditors of the pledgor in case the pledgor fails to pay under a receivables financing contract concluded with the pledgee.

19. Another functionally equivalent technique that is used is subrogation, which, like assignment, involves a triangular relationship between the creditor (subrogor), a third party paying and taking the place of the creditor (subrogee) and the debtor. Typically, it is required that the subrogation be express and that it take place at the same time as funds are provided in exchange for the receivables. In some countries, factoring is practised by way of subrogation, in order to avoid the formal requirements imposed on assignments (notarial document and notification of or consent by the debtor).

20. A further technique analogous to assignment that is used is novation, involving the change of the creditor. This requires, like assignment, an agreement between the original and the new creditor and is used in some countries where the assignment requires notarial notification or consent of the debtor. An important difference from

assignment is that novation does not result in the transfer of the old receivable but in the creation of a new one (as a result rights securing the old receivables are extinguished).

21. Notwithstanding the above types of differences among various ways of transferring receivables, in practice parties often negotiate among themselves a number of economic variations that may diminish the practical effect of such conceptual distinctions. For example, while by definition in sales of receivables the assignee is entitled to retain any surplus beyond the amount paid for the receivables, sales of receivables are frequently structured with "hold back" provisions providing for return to the assignor of any surplus collections. This may be an indication that it may be feasible to formulate a legal text that would foster cross-border recognition of assignment of receivables for financing purposes, and various functional equivalents of such assignment, despite certain conceptual and technical differences that exist among various legal systems.

### C. Commercial forms of receivables financing

#### 1. Factoring

22. In factoring, trade receivables are sold by the assignor ("supplier") to the assignee ("factor"), in return for advances or credit and the provision of services by the factor such as bookkeeping, collection of receivables and protection against default by the debtors. In "recourse factoring" the assignee has a right to turn to the assignor if the debtor is insolvent or unwilling to pay.

23. To avoid conflict or overlap with the Factoring Convention, work by the Commission could be aimed at factoring contracts not covered by the Factoring Convention: i.e. factoring contracts in the context of which only financing, or just one of the other services mentioned above is offered; non-notification factoring; factoring of receivables arising not only from sales and services contracts but also from leases and contracts on the basis of which equipment or facilities are made available (and possibly of other types of receivables). In addition, regarding factoring contracts subject to the Factoring Convention, such work might address issues not addressed in the Factoring Convention (e.g. conflicts of priority among several creditors laying a claim on the assigned receivables). In such a way, together with the Factoring Convention, a more comprehensive international legal regime on assignment in receivables financing could be established.

24. Apart from the Convention, which is not yet widely in force, factoring practice has attempted to address the problem of recognition and enforcement of cross-border assignments through the so called "two-factor" approach. This involves two consecutive assignments, one from the exporter to a factor in its own country, and another from the first factor to a second factor in the debtor's country. However, the problem of recognition and enforcement of cross-border bulk assignments of future receivables still may remain if the law of the debtor's country does not recognize the validity of such assignments. In addition, the operation of a "two-factor" system might be difficult, time

consuming and costly where multiple debtors are spread over several countries.

#### 2. Forfaiting

25. Similarly to factoring, forfaiting involves the discounting (purchase) of documentary or non-documentary receivables without recourse to the party from whom the receivables are purchased. It might not be advisable to cover the forfaiting of receivables in the form of negotiable instruments, such as bills of exchange or promissory notes, which are given in payment of a debt. Their transfer raises different problems and is, to some extent, regulated by other international legal instruments (for more details, see A/CN.9/397, para. 13).

#### 3. Refinancing and securitization

26. "Secondary financing", or "refinancing", involves a transaction between the first and a subsequent assignee (e.g. assignment from bank to bank), with the possibility also of yet further reassignments. Refinancing of receivables is faced with the same problem of the possible invalidity or ineffectiveness of cross-border assignments. The question may arise, however, whether to exclude more complicated refinancing transactions, in which, for example, parts of a pool of receivables are assigned to different parties, or in which the capital of a loan is assigned to one financing institution and the interest of the same loan is assigned to another financing institution.

27. In securitization, marketable assets (e.g. trade receivables) or non-marketable assets (e.g. consumer credit card receivables, healthcare receivables, home equipment loans, home mortgages) are packaged by the lender in pools of receivables and transferred to a company controlled by the lender, whose single purpose is to issue securities, sell them and use the proceeds to purchase the receivables. This removes the receivables from the lender's balance sheet and replaces them with cash, with possible resulting tax and accounting benefits. It also allows the lender to make a profit stemming from the difference between the interest paid to the securities-holders and that paid by the debtors of the assigned receivables.

28. Internationally, securitization is widely practised as sales of participations in syndicated loans, though problems may arise as a result of the disparity of laws in the differing ways in which assignments by way of sale are treated. Another potential difficulty in cross-border securitization is the invalidation of bulk assignments of all present and future receivables, as such assignments form the basis of securitization.

#### 4. Project finance

29. In project finance, finance is provided to a project contractor by way of a loan, and repayment of the loan is effected or secured through the future revenues of the project. Among the components of a typical project-finance contractual structure are sales agreements between the

project contractor or operator and the prospective purchasers of the resultant products of the project, and an assignment of revenues from such sales to the lenders that finance the construction. The typical characteristics of the assignment are that it is a bulk assignment of future receivables, typically by way of security, based on the presumed ability to repay the loan through revenues generated by the project.

### 30. "Draft article 1. *Scope of application*

(1) These rules apply to the assignment for [commercial] [financing] purposes of receivables between an assignor and one or more debtors whose places of business are in different States:

(a) when the States [are Contracting States] [have adopted the rules]; or

(b) when the rules of private international law lead to the application of the law of [a Contracting State] [this State].

(2) For the purposes of this [Convention] [law]:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the [contract giving rise to the receivables] [assignment] and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the time of the [conclusion of the contract] [assignment];

(b) if a party does not have a place of business, reference is to be made to its habitual residence.

### "Draft article 2. *Definitions*

(1) "Receivable" means any right of a creditor to receive or to claim the payment of a monetary sum, unless it is in the form of a bill of exchange or a promissory note.

(2) "Assignment of receivables" means the transfer, by way of sale, as security for performance of an obligation, or otherwise, from one party ("assignor") to another party who provides financing to the assignor ("assignee") of receivables arising from a contract ("the original contract") made between the assignor and a third party ("the debtor").

(3) "Financing contract" means the contract by which the assignee provides financing to the assignor."

## II. POSSIBLE ISSUES

### A. Bulk assignment

31. An important aim of the uniform rules would be to overcome uncertainty in various legal systems with regard to the validity of the assignment of more than one receivable, e.g. assignments in which receivables are not specified individually, sometimes referred to as "bulk assignment".

32. This goal might be achieved in a balanced way, without inadvertently fostering undue restrictions on the future economic activity of the assignor, if pools of receivables could be assigned, provided that, at the time of assignment or when they come into existence, they would be related to particular contracts from which they might arise (identification of receivables; draft article 3(1) and (2)). However, a requirement that receivables should be specified individually as to the identity of the debtor and their exact amount would render the bulk assignments of future receivables impracticable.

33. Related questions include whether receivables "come into existence" when they fall due or when the contract from which they might arise is concluded; whether, if some of the receivables in a pool cannot be identified to the contract from which they might arise, the assignment of the whole pool of receivables would be invalid; and how to establish the validity of such assignments as against the debtor and third parties without prejudicing their rights. As regards the debtor, this might be achieved by making the debtor's duty to pay the assignee contingent upon receipt of written notification of the assignment, and as regards the interests of third parties, by an adequate publicity system.

### B. Future receivables

34. Some uncertainty exists in various legal systems as to the validity of assignments of future receivables (including receivables yet to arise from contracts existing at the time of assignment and receivables which may arise under contracts non-existing at that time). Questions related to the recognition of assignments of future receivables include the following: whether a new act of transfer should be required when the receivables come into existence; whether the assignment of conditional receivables should also be expressly covered as future receivables; and whether receivables could be deemed to be acquired automatically by the assignee when they arise, which approach, if followed, might have implications as to whether the receivables could be considered ever to enter the estate of an insolvent assignor.

### 35. "Draft article 3. *Assignment of receivables*

(1) An assignment of one or more receivables is effective if, when the assignment is effected or when the receivables come into existence, they can be identified as receivables to which the assignment relates.

(2) The assignment of future [or conditional] receivables operates to transfer the receivables directly to the assignee when they come into existence [or when the condition is fulfilled] without the need for a new assignment."

### C. No-assignment clauses

36. Contracts routinely contain clauses prohibiting or restricting assignment. Such clauses may be intended in particular to protect the debtor from uncertainty as to whom to pay. However, the same end could be served by a rule

requiring the debtor to pay the assignee only upon proper notification (draft article 9).

37. A related question is whether the debtor should be allowed to setoff against the assignee a claim for damages due to the debtor by the assignor for breach of a no-assignment clause (draft article 10(2)). Such a rule could conceivably have the effect of recreating the problem caused in the first place by no-assignment clauses. In addition, the assignor might be held liable to the assignee for breach of warranty to the extent that the value of the assigned receivables was negated (see paragraph 46, below). Another question is whether there would be a need to distinguish the case of current accounts in which individual claims have not been deemed by applicable law to be independent, and thus only the current account balance has been subject to assignment.

#### 38. "Draft article 4. *No-assignment clauses*

(1) Subject to article 9, the assignment of receivables shall be effective notwithstanding any agreement between the assignor and the debtor prohibiting or restricting such assignment.

(2) Subject to article 10(2), nothing in paragraph (1) of this article shall affect any obligation or liability of the assignor to the debtor in respect of an assignment made in breach of the original contract."

### D. Transfer of security rights

39. The question may arise whether to include in the uniform rules a provision on whether an assignment automatically transfers the assignor's rights securing payment of a receivable depending on the nature of the security rights involved. In some legal systems, "accessory rights", i.e. those rights that cannot exist or be transferred independently from the receivable, the payment of which they are intended to secure, are considered to be transferred automatically; non-accessory security rights, i.e. rights that may exist or be transferred independently, require a separate act of transfer. It may be noted that the Factoring Convention addresses the issue by recognizing contractual autonomy on the matter of transfer of related rights.

40. It may be noted that the question of whether the transfer of related rights should be addressed in the draft uniform rules, or perhaps left to the applicable local law, may be raised in particular with respect to related rights of a proprietary nature (e.g. a non-accessory mortgage that has to be registered). Among other questions that may be raised is the relationship between a provision recognizing contractual autonomy and transfers of related rights by operation of law.

### E. Form of assignment

41. In considering whether the uniform rules should impose any requirements of form for the purpose of validity of an assignment, it may be noted that, in practice, assignments are effected by written or oral agreement, which may

be accompanied by an additional act, such as notification or consent of the debtor, or registration.

42. While written form is beneficial from the standpoint of certainty and evidence, and as a warning to the parties, in particular in case of bulk assignments of future receivables, introducing a mandatory form requirement could make assignment unnecessarily more difficult and costly. In addition, the protection of the debtor provided by a notification requirement might be achieved more simply by giving the debtor a right to refuse to pay the assignee without such notification.

43. Similarly, requiring consent of the debtor for the validity of assignment could be seen as burdening the use of receivables for credit, without adding significantly to the necessary protection of the debtor. Moreover, registration, though potentially useful in providing notice to third parties about the assignment, could, if required for the validity of assignment, hinder the significant commercial practice of "non-notification" assignment, i.e. assignment which is not notified to the debtor or any other third party.

#### 44. "Draft article 5. *Form*

An assignment need not be effected or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."

### F. Relationship between the assignor and the assignee

45. Consideration might be given to addressing certain contractual issues that might affect the transfer of receivables (such as breach of the receivables financing contract or breach of warranties undertaken by the assignor in the contract of assignment).

46. It is widely accepted that an assignor warrants that assigned receivables exist, that the assignor is the rightful creditor and its right in the receivables does not have any "hidden legal defects", e.g. a defence of the debtor or a third party's claim that could deprive the receivables of value (draft article 6).

47. A question that may be considered is whether it would be appropriate to include in the draft uniform rules a rule on the consequences of breach of the warranty, including whether such a breach would result in any rescission effects, whether any such effects should hinge on a notion of "fundamental breach", and whether, in the event that rescission took place, any receivables that did exist under the rescinded assignments would be considered to be transferred back without an additional act of "re-transfer". The latter question may be of particular importance in case of intervening insolvency of the assignee, since the assignee might not be considered to have the capacity to retransfer the receivables.

48. Another question, which would also have implications in case of the assignee's insolvency, concerns the point of time, in the context of assignments of future receivables, at which the receivables may be deemed to come into the

possession of the assignee, and at what time any attendant warranties would attach.

49. In case of breach of the receivables financing contract by the assignor (e.g. the assignor does not repay the loan received from the assignee), the assignee would normally have an interest in collecting from the debtors of the assigned receivables (draft article 7(2)). The exact nature of the options available to the assignee may depend on the nature of the assignment. In the case of an assignment by way of security, the assignee would typically have to return to the assignor any surplus, or claim compensation for any shortfall. In the case of a sale of the receivables, the assignee is normally able to collect the assigned receivables when they fall due and to retain any surplus, while bearing the risk of collecting less than it paid (draft article 7(3) and 7(4)).

50. Other matters arising between the assignor and the assignee as a result of the contract of assignment or the transfer of receivables could be left to be dealt with by other applicable law, for the determination of which a rule might be provided. One possibility would be that, in the absence of a choice by the parties, the contract of assignment could be governed by the law of the place of business of the assignor. A rule based on the assignor's place of business would have the advantage of simplicity and predictability.

51. An alternative would be a rule based on the notion of "closest relationship", along the lines adopted in the Rome Convention. Inherently more flexible, such an approach could result in the application of the law of the assignor's place of business (e.g. in an assignment by way of sale), or the law of the assignee's place of business (e.g. in recourse factoring in which the factor might perform book-keeping and collection functions). However, such a rule would have the disadvantage of reduced predictability (draft article 8(1)).

52. A question of importance, in particular in case of insolvency of the assignor or of the assignee, is which one of them is the rightful creditor. It might not be appropriate to subject this question, which is one of the transfer itself rather than of the underlying contract of assignment, to the law chosen by the assignor and the assignee since their choice could significantly affect the debtor and third parties. More appropriate, in particular for reasons of simplicity and predictability, may be the law of the country where the assignor has its place of business. By contrast, a rule providing for the application of the law governing the receivable could lead to the application of the law of the original contract, which may be the law chosen by the assignor and the debtor. Furthermore, in case the original contract does not yet exist at the time of assignment, which is often the case, the assignee would not be able to know which law will govern the question of when the assignee acquires the receivables (draft article 8(2); see also article 12.2 of the Rome Convention).

### 53. "Draft article 6. Warranties

(1) Unless otherwise agreed between the assignor and the assignee [in the contract of assignment], the

assignor warrants to the assignee that the assigned receivables exist.

(2) For the purposes of paragraph (1) of this article, the receivables shall be considered as existing if the assignor is the creditor, has a right to transfer the receivables and has no knowledge, at the time of assignment, of any fact that would deprive the receivables of value.

(3) Unless otherwise explicitly agreed between the assignor and the assignee [in the contract of assignment], the assignor does not warrant towards the assignee that the debtor will pay.

### "Draft article 7. Assignor's breach of financing contract

(1) When so agreed, and in any event if the assignor defaults on its obligation to pay in accordance with the financing contract, the assignee is entitled to notify the debtor pursuant to article 9 to pay the assignee.

(2) In an assignment by way of sale, unless otherwise agreed by the assignor and the assignee, the assignee may retain any surplus, and the assignor is not liable for any deficiency.

(3) In an assignment by way of security, unless otherwise agreed by the assignor and the assignee, the assignee must account to the assignor and return any surplus, and the assignor is liable for any deficiency."

### "Draft article 8. Law applicable to the relationship between assignor and assignee

(1) [With the exception of matters which are expressly settled in these rules,] the rights and obligations of the assignor and the assignee[, including the question of the point of time at which the assignee becomes the rightful creditor of the receivables,] are governed by the law the choice of which is:

(a) Stipulated in the assignment; or

(b) Agreed elsewhere by the assignor and the assignee.

(2)(a) In the absence of a choice by the parties, the rights and obligations of the assignor and the assignee[, including the question of the point of time at which the assignee becomes the rightful creditor of the receivables,] and with the exception of matters which are expressly settled in these rules, are governed by the law of the State in which the assignor has its place of business.

(b) For the purposes of subparagraph (a), in case the assignor has more than one place of business, the place of business is that which has the closest relationship to the assignment, having regard to the circumstances known to or contemplated by the assignor and the assignee at any time before or at the conclusion of the assignment.

## G. Effects of assignment towards the debtor

### 1. *Debtor's duty to pay*

54. The baseline question as to the debtor's duty to pay the assigned concerns the conditions that must be present for payment to the assignee to result in discharge of the debtor's payment obligation. If notification of the assignment is made the necessary condition, the debtor who pays the assignee before notification would not be entitled to discharge. Any other approach may be viewed as unjustifiably burdening the debtor with the impracticable task of searching for possible assignments prior to making payment.

55. Assuming that an approach based on notification would be adopted, a number of questions present themselves. With a view to certainty in the transaction, it would seem preferable to require that the notification be unconditional, since otherwise the assignee would bear the risk of the notification being ineffective. A requirement that the notification be in writing, which could be broadly formulated (see the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, articles 2(a) and 5 (A/CN.9/406, annex)) would also seem a necessary measure for the debtor's protection. An additional basic protection would require that the notification be issued by the assignor or, if issued by the assignee, with the assignor's authority. Such an approach would take account of various practices, for example, the assignee may obtain at the time of assignment blank notices signed by the assignor (and send them to the debtor when necessary), or an irrevocable power of attorney may be given by the assignor allowing the assignee to notify on its own.

56. Other questions relating to notification include: whether the debtor has to ignore the notification issued after the effective date of the insolvency of the assignor or of the assignee, particularly if the insolvency proceedings take place in the debtor's country; whether notification may be effective as to identified future receivables; as would be essential to affirm in line with the recognition of the validity of assignments of future receivables; whether the debtor, if in doubt as to some aspect of the assignment, may require information additional to that contained in the notification; whether a requirement of a written notification could be met, in cases in which the assignment was in writing, by providing the debtor with the assignment itself; and whom the debtor is to pay in case it receives more than one notification (e.g. from several assignees, or from the assignee and judgement creditors of the assignor, or from the assignee and the trustee in the insolvency of the assignor).

57. One way to address the question of multiple notifications is to require that the debtor may pay the first person to notify, taking into account, however, that it would not be intended to preclude subsequent notifications of "reassignment" by earlier assignees in the chain. Objections could be expected to making a "first to notify" approach subject to the debtor's not knowing of any other person's "superior right to payment", an approach found in article 8.1 of the Factoring Convention, as there might be seen as placing an

undue burden of investigation on the debtor and potentially undermining the practical utility of assignment of receivables in view of the reduced degree of clarity and simplicity.

58. A further point relating to a "first to notify" rule that may warrant attention is that in some legal systems an insolvency trustee need not notify the debtor, as the debtor is deemed to have constructive knowledge of the assignment to the insolvent entity as of the effective date of the insolvency. A related question is whether the effects of such a constructive knowledge rule should be limited to insolvency trustees in the country of the debtor where a "constructive knowledge" rule might exist.

59. An additional question that may be considered concerns the relationship between the uniform rules and the possibility of discharge of a debtor that pays the assignee pursuant to a notification meeting the requirements of domestic law but not necessarily those of the draft uniform rules. It may be argued that allowing such discharge would be consistent with the need to protect the debtor without necessarily running counter to the interests of the assignee or the assignor, in particular since the assignor would have transferred its receivables and received the corresponding benefit, and the assignee would have been paid.

### 60. "Draft article 9. *Debtor's duty to pay*

(1) The debtor is entitled, until the debtor receives notification in writing of the assignment in accordance with paragraph (2) of this article, to pay the assignor and be discharged from liability.

(2) The debtor is under a duty to pay the assignee if the debtor has not received notification in writing of a prior assignment, of a judgement attaching the assigned receivables [or of the insolvency of the assignor] and:

(a) the debtor receives [an unconditional] notification in writing of the assignment by the assignor or by the assignee with the assignor's authority; and

(b) the notification reasonably identifies the receivables assigned and the assignee to whom or for whose account the debtor is required to make payment.

(3) If requested by the debtor, the assignee must furnish within a reasonable period of time adequate proof that the assignment has been made, and unless the assignee does so, the debtor may pay the assignor and be discharged from liability.

(4) "Notification in writing" means a notification provided in a form that the information contained therein is accessible so as to be usable for subsequent reference, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Irrespective of whether the assignment is in writing or not, a summary statement in writing about the assignment in accordance with paragraph (2) of this article constitutes notification in writing under paragraph (4) of this article.



(6) Payment by the debtor to the assignee shall discharge the debtor from liability if made in accordance with this article or other applicable law.

## 2. Defences of the debtor and setoff

61. A basic question to be considered is the extent to which the draft uniform rules should permit the debtor to raise defences and to exercise a right of setoff in paying the assignee. The debtor is widely recognized as entitled to raise against the assignee the defences that the debtor could have raised against the assignor arising from the contract from which the assigned receivables derive, irrespective of whether they arose before or after assignment or notice thereof.

62. Many legal systems allow also setoff against the assignee of claims arising from a separate contract between the debtor and the assignee, provided that such claims are available to the debtor at the time proper notification of the assignment is given. Rights "available" to the debtor may be those due for payment or simply those in existence.<sup>5</sup>

63. "Draft article 10. *Defences of the debtor*

(1) In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may set up against the assignee all defences arising under the original contract of which the debtor could have availed itself if such claim had been made by the assignor.

(2) Notwithstanding paragraph (1), defences that the debtor could have exercised against the assignor for breach of a no-assignment clause are not available to the debtor against the assignee.

(3) The debtor may assert against the assignee any right of setoff in respect of claims existing against the assignor in whose favour the receivable arose and available to the debtor at the time notification of assignment conforming to article 9 was given to the debtor."

## 3. Waiver of defences

64. Defences of the debtor increase the uncertainty as to whether the assignee will be able to collect from the debtor and thus pose a potential obstacle to receivables financing. To address this uncertainty in practice, a waiver of certain of the debtor's defences is sometimes included in the original contract with the assignor, or is negotiated with the assignee at the time of notification or enforcement. Such waivers of certain defences are widely recognized, with some legal systems assuming a waiver of the debtor's defences if the debtor does not object or consents to an assignment when notified.

65. With a view to avoiding abuse of such waivers, consideration might be given to limiting recognition to waivers of those defences about the availability of which the debtor knew or ought to have known at the time of the waiver. A countervailing consideration would be that there may not be adequate justification for limiting contractual freedom in this way, and that the draft uniform rules might simply cede to limitations on such waivers found in mandatory rules of other applicable law.

66. "Draft article 11. *Waiver of defences*

A waiver by the debtor of the defences that the debtor could raise against the assignee under article 10 shall be valid [in respect of defences the availability of which the debtor knew or ought to have known at the time of waiver]."

## 4. Recovery of advances

67. It occurs in practice that the debtor pays the assignee before the assignor performs its obligations to the debtor under the original contract. This practice may raise uncertainty in some legal systems, in particular when there has been a default in performance or insolvency prior to performance on the part of the assignor, as to whether the debtor may setoff or recover its advance payment from the assignee. The draft uniform rules might remove some uncertainty by providing that the debtor should not be able to recover such advances from the assignee. Under such a rule, the debtor would be left to bear the risk of insolvency of its contractual partner (the assignor) and would not be given an additional right to turn against the assignee.

68. If such a rule were included, the question would arise whether an exception should be made for the case in which the assignee has not paid or loaned money to the assignor as required under the financing contract. However, such an exception may cast doubt on the independence of the assignment, as well as in effect creating a right of priority of the debtor in case of bankruptcy of the assignee. An exception for the case in which the assignee is aware of the assignor's non-performance also raises potential difficulties, such as the assignee having to determine whether the assignor performed properly its obligations to the debtor, or the debtor having to establish knowledge on the part of the assignee.

69. "Draft article 12. *Recovery of advances*

Without prejudice to the debtor's rights under article 10, non-performance or defective or late performance of the original contract by the assignor shall not by itself entitle the debtor to recover a sum paid by the debtor to the assignee, provided that the debtor has a right to recover that sum from the assignor.

## 5. Law applicable to the relationship between the assignee and the debtor

70. As to issues between the assignee and the debtor not addressed by the draft uniform rules, a private international law rule might be included. In this respect, there are two

<sup>5</sup>The Factoring Convention, in articles 9 and 10, lays down only some fundamental principles concerning the debtor's defences leaving matters such as the exact meaning of rights "available" to the debtor for setoff and waiver of defences to the domestic law; see UNIDROIT 1987, Study LVIII-Doc.33, para. 44.



basic possibilities: the law governing the receivable to which the assignment relates (the law of the original contract) or the law of the country where the debtor has its place of business. The first alternative might not provide an adequate degree of certainty, since in some cases the original contract might not yet exist at the time of assignment, or the rule or the choice that the law governing the contract should be the law might not be recognized where enforcement would be sought. Such a lack of recognition may stem from issues arising between the assignee and the debtor being characterized in various jurisdictions as procedural and thus falling under the law of the country in which enforcement is sought. However, a basic consideration in favour of the first alternative is that the receivable transferred should not change its legal character by virtue of the assignment.

71. As to the second approach, it may be argued that, in view of the drawbacks of the first approach, as well as of the fact that usually the assignee would seek enforcement in the debtor's country,<sup>6</sup> an approach providing more certainty might be to refer to the law of the place of business of the debtor. However, the application of such a rule would not be without some difficulties: the debtor's identity might not be known at the time of assignment; a bulk assignment would have to comply with the law of several countries where various debtors might be located; and the situation of enforcement in a country where the debtor has assets would not be covered. At any rate, the rule could reflect the generally accepted principle that the assignment should not alter the position of the debtor, except to the extent permitted by the law under which the debtor undertook an obligation towards the assignor in the first place (see article 12.2 of the Rome Convention).

72. "Draft article 13. *Law applicable to the relationship between the assignee and the debtor*

With the exception of matters which are expressly settled in these rules, any matter arising between the assignee and the debtor shall be governed by the law [governing the receivable to which the assignment relates.] [of the State where the debtor has its place of business. In case the debtor has more than one place of business, the place of business is that which has the closest relationship to the transfer of receivables, having regard to the circumstances known to or contemplated by the assignor and the assignee at any time before or at the conclusion of the contract.]"

## H. Effects of assignment towards third parties

73. Conflicts of priority among two or more claimants to the receivables may arise, for example, in the following situations: between several assignees, due to multiple assignments of the same receivables because of fraud or an unconscionable act of the assignor; between the assignee and the assignor's judgement creditors attaching the receiv-

ables; and between the assignee and the assignor's insolvency trustee. The key issue in such cases therefore is who among the several claimants will be able to satisfy its claim first in preference to the other creditors.

74. Various possible approaches may be contemplated for a rule on priorities. A rule giving priority to the first assignee (in actual time) would have the advantage of simplicity (draft article 14(1), variant A). Where such an approach is followed, third parties tend to be protected by the general knowledge that they possess about receivables financing contracts in the relevant market. Various jurisdictions follow a "first to notify the debtor" rule (draft article 14(1), variant B). A drawback of such an approach is that it, in effect, utilizes the debtor as a registry of notifications. In addition, the approach raises difficulties in the context of bulk assignments which might involve multiple debtors in several countries.

75. A rule based on registration would have the advantage that it would provide a system of notice to third parties, with the effect that the first assignee to register would have priority. Subject to the applicable insolvency law, the assignee would prevail over the assignor's creditors if the registration was effected before attachment, and over the insolvency trustee if registration was effected before the opening or effect of the insolvency proceedings (draft article 15(1), variant C). Registration could be effected in existing national registries, e.g. those for secured transactions or for registration of companies, with information being made available internationally. Alternatively, registration could be effected in an international registry.

76. Registration might be simplified if: a summary standard statement of the assignment were to be registered (not the assignment itself, which would raise the problem of authorization); statements would indicate the identity of the assignor and the assignee, and would contain some reasonable description of the receivables (e.g. assignment from A to B of all receivables A has against X, Y, Z); registration could relate to future receivables, and it could take place before the receivables financing contract is concluded, in order to address the situation in which a third party might register its claim as to the receivables during the time between the conclusion of the contract and the registration by the assignee and thus obtain priority; the assignee would be able to register the assignment without the consent of the assignor being necessary (again the problem of authorization and the time and cost involved would be avoided).

77. One possible disadvantage of a registration-based solution is that existing registries may not be suitable, a circumstance which might require the establishment of a new registry. Another possible disadvantage might be that with the growing importance of bulk assignments, which can only be described in general terms, and of non-notification assignments, the usefulness of registration might be reduced. It may be felt, however, that, despite these possible drawbacks, a registration system would still provide more certainty and predictability than any of the other approaches mentioned above.

78. Another alternative would be a private international law rule based on the assignor's place of business (draft

<sup>6</sup>Dalhuisen, The assignment of claims in Dutch private international law, in: *Comparability and Evaluation, Essays on Comparative Law, Private International Law and International Commercial Arbitration in honour of Dimitra Kokkini-Jatridou*, T.M.C. Asser Institute, The Hague, 1994, pp. 183 et seq.

article 14(1), variant D).<sup>7</sup> This rule would have the advantage that it could apply to the trustee in the assignor's insolvency proceedings opened at the place of business of the assignor. If the insolvency proceedings took place in another State, the rule would also apply, provided that that jurisdiction had adopted the draft uniform rules. In addition, such a rule would provide a single point of reference—one that could be ascertained at the time of even a bulk assignment of future receivables and that would be suitable to legal systems where registration was practised, since in such jurisdictions assignees would normally look to the place of business of the assignor to ascertain the status of receivables. However, priorities may be characterized variously, as issues of contract, tort, property, insolvency, or as procedural law, and thus may be subject to other applicable law. The problem of characterization may be overcome somewhat if the law of the country where the debtor has its place of business were applicable (see paragraph 73, above).

79. Whatever the priority rule might be, some exceptions may have to be made to address special cases such as the rights of the seller who retains title to the property sold until full payment of its price and who, at the same time, is the assignee of the future proceeds that might arise from the further sale of the property by the buyer in the course of its business (draft article 14(2)).

80. "Draft article 14. *Priorities*

(1) *Variant A*

The first assignee has priority over subsequent assignees, the assignor's creditors [and, subject to the applicable insolvency law, over the trustee in the insolvency of the assignor] with regard to the assigned receivables.

*Variant B*

The first assignee to notify the debtor in accordance with article 9 has priority over subsequent assignees, over earlier assignees who failed to notify or notified later, over the assignor's creditors [and, subject to the applicable insolvency law, over the trustee in the insolvency of the assignor] with regard to the assigned receivables.

*Variant C*

The first assignee to register a summary statement at a public register located in the place of business of the assignor, which reasonably identifies the assignor, the assignee and the assigned receivables, has priority over subsequent assignees and earlier assignees who failed to register or registered later, the assignor's creditors [and, subject to the applicable insolvency law, over the trustee in the insolvency of the assignor] with regard to the assigned receivables.

<sup>7</sup>Such a rule would not present the disadvantages of the rule proposed during the Diplomatic Conference in the context of which the Factoring Convention was adopted. There would not be a "superior right" provision; the issue whether the assignee is a factor would not be raised; and all the national systems under which priority might be determined would be covered (see CONF 7/6/Add.2, article Z. Priorities, and UNIDROIT 1988 CONF.7/C.1/S.R.19).

*Variant D*

The first assignee, or the first assignee to notify the assignment to the debtor, or the first to register a summary statement thereof in a public registry will have priority over subsequent assignees and the assignor's creditors, depending on the law of the State where the [assignor] [debtor] has its place of business.

(2) The rule of paragraph (1) does not apply in the following cases: . . ."

**I. Subsequent assignments**

81. Subsequent assignments are assignments of the same receivables effected by the assignor subsequent to the first assignment, or by the first or any subsequent assignee. A number of questions might be considered, including: whether any subsequent assignee is to be treated as the first assignee (e.g. whether a subsequent assignee could validly make a bulk assignment of future receivables despite a no-assignment clause); whether all subsequent assignments would be covered, provided they fall under the rules, or only those of which the initial assignment was covered (draft article 15(1)); see also article 11 of the Factoring Convention); whether the debtor could setoff against a subsequent or the final assignee, claims which it might have against an earlier assignee, irrespective of whether they arise from a contract, from tort or by operation of law (draft article 15(3)); whether the assignor or any of the assignees could prohibit or restrict subsequent assignments (in particular in case of assignments by way of security or assignment of single receivables; draft article 15(4)); and whether the invalidity of an intermediate assignment would render any subsequent assignment invalid (the remedies of the assignee against the assignor for breach of the warranty of existence of the receivables and the right of the debtor to pay the final assignee and be discharged presumably would be preserved; draft article 15(5)).

82. "Draft article 15. *Subsequent assignments*

(1) These rules apply to any assignment of the same receivables by the assignor to several assignees or by the first or any other assignee to subsequent assignees, provided that the [first] [such] assignment is governed by these rules.

(2) In case of subsequent assignments by the assignor, the debtor is discharged from liability by payment to the first assignee to notify under article 9 and has against the assignee the defences provided for under article 10.

(3) In case of subsequent assignments by the first or any subsequent assignee, the provisions of articles 9 to 12 apply as if the subsequent assignee were the first assignee. However, the debtor may not assert against a subsequent assignee rights of setoff in respect of claims existing against an earlier assignee.

(4) Any subsequent assignment by the first assignee or by any subsequent assignee shall be effective notwithstanding any agreement between the first assignor and

the first assignee or between any of the subsequent assignees prohibiting or restricting such assignment.

(5) Subject to the provisions of article 9, the invalidity of an intermediate assignment renders the final assignment invalid."

### III. CONCLUSION

83. The above survey of obstacles that arise from disparity of law to the use of assignment of receivables for financing purposes, along with a first attempt at draft uniform rules to address those obstacles, would seem to suggest not only the desirability of work by the Commission in this area, but also its potential feasibility. The Commission may wish at this stage to assign the topic and the draft uniform rules to a working group for further work and development.

84. As envisaged in the present report, in broad terms, the aim of work of the Commission would be to remove obstacles to receivables financing arising from the uncertainty

existing in various legal systems as to the validity of cross-border bulk assignments of future receivables between the assignor and the assignee and the effects of such assignments on the debtor and other third parties. This would involve addressing by a set of uniform rules issues including the right of the assignee to demand payment, the duty of the debtor to pay and the related protection of the debtor, as well as priorities among competing creditors.

85. As to the form that work by the Commission may take, an eventual question to be considered is whether, in order to better promote recognition and enforcement of cross-border assignments, the work by the Commission might take the form of a convention, which would provide a network of countries in which cross-border assignments could be enforced. A related question would be whether such an instrument should be predominantly of a mandatory nature, since it might not be appropriate to allow the assignor and the assignee to vary the legal regime under which receivables would be transferred as against the debtor and other third parties. At the same time, particularly in setting the scope of the work, the aim would also be to take account of the important role played by party autonomy in the development of receivables financing.

## V. STATUS OF UNCITRAL TEXTS

### Status of Conventions: note by the Secretariat

(A/CN.9/416) [Original: English]

1. At its thirteenth session the Commission decided that it would consider, at each of its sessions, the status of conventions that were the outcome of work carried out by it.<sup>1</sup>

2. The present note sets forth the status of the conventions and model laws emanating from the work of the Commission. It also shows the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), which was adopted prior to the establishment of the Commission, because the Convention is closely related to the work of the Commission in the area of international commercial arbitration.

3. The note indicates the changes since 25 May 1994, when the most recent report in this series (A/CN.9/401) was issued. The names of States in the annexed list that have adhered to a convention or enacted legislation based on a model law since the preparation of the last report are underlined.

4. The following texts are covered in the note: Convention on the Limitation Period in the International Sale of

Goods (New York, 1974) (new States parties: Cuba; number of States parties: 18); Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980) (new States parties: Cuba); United Nations Convention on the Carriage of Goods by Sea, 1978 ("Hamburg Rules") (number of States parties: 22); United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (new States parties: Cuba, Georgia, Lithuania, New Zealand, Republic of Moldova, Singapore; number of States parties: 44); United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) (the Convention has two States parties; it requires eight more adherences for entry into force); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991) (the Convention has been signed by five States; five adherences to the Convention are necessary for the Convention to enter into force); UNCITRAL Model Law on International Commercial Arbitration, 1985 (new jurisdictions that have enacted legislation based on the Model Law: Bahrain, Hungary, Singapore, Ukraine; total number of the jurisdictions with such legislation: 31); Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (new States parties: Bolivia, Georgia, Lithuania, Mali, Mongolia, Portugal, Senegal, Venezuela, Zimbabwe; total number of States parties: 105).

<sup>1</sup>Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17), para. 163.

## ANNEX

### 1. Convention on the Limitation Period in the International Sale of Goods (New York, 1974)\*

State <sup>a</sup>	Signature	Ratification Accession Approval Succession (*)	Entry into force
Argentina		9 October 1981	1 August 1988
Belarus	14 June 1974		
Brazil	14 June 1974		
Bulgaria	24 February 1975		
Bosnia and Herzegovina		12 January 1994*	6 March 1992
Costa Rica	30 August 1974		
Cuba		2 November 1994	1 June 1995
Czech Republic <sup>b</sup>		30 September 1993*	1 January 1993
Dominican Republic		23 December 1977	1 August 1988
Egypt		6 December 1982	1 August 1988
Ghana	5 December 1974	7 October 1975	1 August 1988
Guinea		23 January 1991	1 August 1991
Hungary	14 June 1974	16 June 1983	1 August 1988
Mexico		21 January 1988	1 August 1988
Mongolia	14 June 1974		
Nicaragua	13 May 1975		
Norway <sup>1</sup>	11 December 1975	20 March 1980	1 August 1988

State <sup>a</sup>	Signature	Ratification Accession Approval Succession (*)	Entry into force
Poland	14 June 1974		
Romania		23 April 1992	1 November 1992
Russian Federation <sup>c</sup>	14 June 1974		
Slovakia <sup>b</sup>		28 May 1993*	1 January 1993
Uganda		12 February 1992	1 September 1992
Ukraine	14 June 1974	13 September 1993	1 April 1994
United States of America		5 May 1994	1 December 1994
Yugoslavia		27 November 1978	1 August 1988
Zambia		6 June 1986	1 August 1988

Signatures only: 8; ratifications, accessions and successions: 18

<sup>a</sup>The Convention was concluded in authentic Chinese, English, French, Russian and Spanish texts. On 11 August 1992, the Secretary-General, in accordance with a request of the United Nations Commission on International Trade Law, circulated a proposal for the adoption of an authentic Arabic text of the Convention. No objections having been raised, the Arabic text was deemed adopted on 9 November 1992 with the same status as that of the other authentic texts referred to in the Convention.

<sup>b</sup>The Convention had been signed by the former German Democratic Republic on 14 June 1974, ratified by it on 31 August 1989, with entry into force on 1 March 1990.

<sup>c</sup>The Convention was signed by the former Czechoslovakia on 29 August 1975 and an instrument of ratification was deposited on 26 May 1977, with the Convention entering into force for the former Czechoslovakia on 1 August 1988. On 28 May 1993 Slovakia, and on 30 September 1993 the Czech Republic, deposited instruments of succession with effect from 1 January 1993, the date of succession of States.

<sup>d</sup>The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

#### *Declarations and reservations*

<sup>1</sup>Upon signature Norway declared, and upon ratification confirmed, that in accordance with article 34 the Convention would not govern contracts of sale where the seller and the buyer both had their relevant places of business within the territories of the Nordic States (i.e. Denmark, Finland, Iceland, Norway and Sweden).

## **2. Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980)**

State <sup>a</sup>	Accession Succession (*)	Entry into force
Argentina	19 July 1983	1 August 1988
Cuba	2 November 1994	1 June 1995
Czech Republic <sup>b</sup>	30 September 1993*	1 January 1993
Egypt	6 December 1982	1 August 1988
Guinea	23 January 1991	1 August 1991
Hungary	16 June 1983	1 August 1988
Mexico	21 January 1988	1 August 1988
Romania	23 April 1992	1 November 1992
Slovakia <sup>b</sup>	28 May 1993*	1 January 1993
Uganda	12 February 1992	1 September 1992
United States of America <sup>c</sup>	5 May 1994	1 December 1994
Zambia	6 June 1986	1 August 1988

In accordance with articles XI and XIV of the Protocol, the Contracting States to the Protocol are considered to be Contracting Parties to the Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol in relation to one another and Contracting Parties to the Convention, unamended, in relation to any Contracting Party to the Convention not yet a Contracting Party to this Protocol.

<sup>a</sup>The Protocol was acceded to by the former German Democratic Republic on 31 August 1989, with entry into force on 1 March 1990.

<sup>6</sup>The Protocol was acceded to by the former Czechoslovakia on 5 March 1990, with effect from 10 October 1990.<sup>1</sup> On 28 May 1993 the Slovak Republic, and on 30 September 1993 the Czech Republic, deposited instruments of succession, with effect from 1 January 1993, the date of succession of States.

*Declarations and reservations*

<sup>1</sup>Upon accession, Czechoslovakia and the United States of America declared that, pursuant to Article XII, they did not consider themselves bound by Article I.

**3. United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)**

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>	<i>Entry into force</i>
Austria	30 April 1979	29 July 1993	1 August 1994
Barbados		2 February 1981	1 November 1992
Botswana		16 February 1988	1 November 1992
Brazil	31 March 1978		
Burkina Faso		14 August 1989	1 November 1992
Cameroon		21 October 1993	1 November 1994
Chile	31 March 1978	9 July 1982	1 November 1992
Denmark	18 April 1979		
Ecuador	31 March 1978		
Egypt	31 March 1978	23 April 1979	1 November 1992
Finland	18 April 1979		
France	18 April 1979		
Germany	31 March 1978		
Ghana	31 March 1978		
Guinea		23 January 1991	1 November 1992
Holy See	31 March 1978		
Hungary	23 April 1979	5 July 1984	1 November 1992
Kenya		31 July 1989	1 November 1992
Lebanon		4 April 1983	1 November 1992
Lesotho		26 October 1989	1 November 1992
Madagascar	31 March 1978		
Malawi		18 March 1991	1 November 1992
Mexico	31 March 1978		
Morocco		12 June 1981	1 November 1992
Nigeria		7 November 1988	1 November 1992
Norway	18 April 1979		
Pakistan	8 March 1979		
Panama	31 March 1978		
Philippines	14 June 1978		
Portugal	31 March 1978		
Romania		7 January 1982	1 November 1992
Senegal	31 March 1978	17 March 1986	1 November 1992
Sierra Leone	15 August 1978	7 October 1988	1 November 1992
Singapore	31 March 1978		
Slovakia <sup>2</sup>	28 May 1993		
Sweden	18 April 1979		
Tunisia		15 September 1980	1 November 1992
Uganda		6 July 1979	1 November 1992
United Republic of Tanzania		24 July 1979	1 November 1992
United States of America	30 April 1979		
Venezuela	31 March 1978		
Zaire	19 April 1979		
Zambia		7 October 1991	1 November 1992

Signatures only: 21; ratifications and accessions: 22

<sup>2</sup>The Convention was signed by the former Czechoslovakia on 6 March 1979.<sup>1</sup> On 28 May 1993, the Slovak Republic deposited an instrument of succession to the signature.

*Declarations and reservations*

<sup>1</sup>Upon signature, the former Czechoslovakia declared in accordance with article 26 a formula for converting the amounts of liability referred to in paragraph 2 of that article into the Czechoslovak currency and the amount of the limits of liability to be applied in the territory of Czechoslovakia as expressed in the Czechoslovak currency.

#### 4. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

<i>State</i>	<i>Signature</i>	<i>Ratification Accession Approval Acceptance Succession (*)</i>	<i>Entry into force</i>
Argentina <sup>1</sup>		19 July 1983	1 January 1988
Australia		17 March 1988	1 April 1989
Austria	11 April 1980	29 December 1987	1 January 1989
Belarus <sup>1</sup>		9 October 1989	1 November 1990
Bosnia and Herzegovina		12 January 1994*	6 March 1992
Bulgaria		9 July 1990	1 August 1991
Canada <sup>2</sup>		23 April 1991	1 May 1992
Chile <sup>1</sup>	11 April 1980	7 February 1990	1 March 1991
China <sup>3</sup>	30 September 1981	11 December 1986	1 January 1988
Cuba		2 November 1994	1 December 1995
Czech Republic <sup>4</sup>		30 September 1993*	1 January 1993
Denmark <sup>1</sup>	26 May 1981	14 February 1989	1 March 1990
Ecuador		27 January 1992	1 February 1993
Egypt		6 December 1982	1 January 1988
Estonia <sup>1</sup>		20 September 1993	1 October 1994
Finland <sup>4</sup>	26 May 1981	15 December 1987	1 January 1989
France	27 August 1981	6 August 1982	1 January 1988
Georgia		16 August 1994	1 September 1995
Germany <sup>b, 5</sup>	26 May 1981	21 December 1989	1 January 1991
Ghana	11 April 1980		
Guinea		23 January 1991	1 February 1992
Hungary <sup>1, 6</sup>	11 April 1980	16 June 1983	1 January 1988
Iraq		5 March 1990	1 April 1991
Italy	30 September 1981	11 December 1986	1 January 1988
Lesotho	18 June 1981	18 June 1981	1 January 1988
Lithuania <sup>1</sup>		18 January 1995	1 February 1996
Mexico		29 December 1987	1 January 1989
Netherlands	29 May 1981	13 December 1990	1 January 1992
New Zealand <sup>8</sup>		22 September 1994	1 October 1995
Norway <sup>4</sup>	26 May 1981	20 July 1988	1 August 1989
Poland	28 September 1981		
Republic of Moldova		13 October 1994	1 November 1995
Romania		22 May 1991	1 June 1992
Russian Federation <sup>c, 1</sup>		16 August 1990	1 September 1991
Singapore <sup>7</sup>	11 April 1980	16 February 1995	1 March 1996
Slovakia <sup>9</sup>		28 May 1993*	1 January 1993
Slovenia		7 January 1994*	25 June 1991
Spain		24 July 1990	1 August 1991
Sweden <sup>4</sup>	26 May 1981	15 December 1987	1 January 1989
Switzerland		21 February 1990	1 March 1991
Syrian Arab Republic		19 October 1982	1 January 1988
Uganda		12 February 1992	1 March 1993
Ukraine <sup>1</sup>		3 January 1990	1 February 1991
United States of America <sup>7</sup>	31 August 1981	11 December 1986	1 January 1988
Venezuela	28 September 1981		
Yugoslavia	11 April 1980	27 March 1985	1 January 1988
Zambia		6 June 1986	1 January 1988

Signatures only: 3; ratifications, accessions, approval, acceptance and successions: 44

<sup>a</sup>The Convention was signed by the former Czechoslovakia on 1 September 1981 and an instrument of ratification was deposited on 5 March 1990, with the Convention entering into force for the former Czechoslovakia on 1 April 1991.<sup>7</sup> On 28 May 1993 Slovakia, and on 30 September 1993 the Czech Republic, deposited instruments of succession, with effect from 1 January 1993, the date of succession of States.

<sup>b</sup>The Convention was signed by the former German Democratic Republic on 13 August 1981, ratified on 23 February 1989 and entered into force on 1 March 1990.

<sup>c</sup>The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.



*Declarations and reservations*

<sup>1</sup>Upon adherence to the Convention, the Governments of Argentina, Belarus, Chile, Estonia, Hungary, Lithuania, Russian Federation and Ukraine, declared in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing, would not apply where any party had his place of business in their respective States.

<sup>2</sup>Upon accession, the Government of Canada declared that, in accordance with article 93 of the Convention, the Convention will extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories. Upon accession, the Government of Canada declared that, in accordance with article 95 of the Convention, with respect to British Columbia, it will not be bound by article 1(1)(b) of the Convention. In a notification received on 31 July, 1992, the Government of Canada withdrew that declaration. In a declaration received on 9 April 1992, the Government of Canada extended the application of the Convention to Quebec and Saskatchewan. In a notification received on 29 June 1992, Canada extended the application of the Convention to Yukon.

<sup>3</sup>Upon approval, the Government of China declared that it did not consider itself bound by sub-paragraph (b) of Paragraph 1 of article 1 and article 11 as well as the provisions in the Convention relating to the content of Article 11.

<sup>4</sup>Upon ratification, the Governments of Denmark, Finland, Norway and Sweden declared in accordance with article 92(1) that they would not be bound by part II of the Convention (Formation of the Contract). Upon ratifying the Convention, the Governments of Denmark, Finland, Norway and Sweden declared, pursuant to article 94(1) and 94(2), that the Convention would not apply to contracts of sale where the parties had their places of business in Denmark, Finland, Iceland, Sweden or Norway.

<sup>5</sup>Upon ratification, the Government of Germany declared that it would not apply article 1(1)(b) in respect of any State that had made a declaration that that State would not apply article 1(1)(b).

<sup>6</sup>Upon ratification, the Government of Hungary declared that it considered the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance to be subject to the provisions of article 90 of the Convention.

<sup>7</sup>Upon ratification, the Governments of Czechoslovakia, Singapore and the United States of America declared that they would not be bound by sub-paragraph (1)(b) of article 1.

<sup>8</sup>Upon accession, the Government of New Zealand declared that the accession did not extend to the Cook Islands, Niue or Tokelau.

### 5. United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)

State	Signature	Ratification Accession	Entry into force
Canada	7 December 1989		
Guinea		23 January 1991	
Mexico		11 September 1992	
Russian Federation <sup>a</sup>	30 June 1990		
United States of America	29 June 1990		

Signatures only: 3; ratifications and accessions: 2; ratifications and accessions necessary to bring the Convention into force: 10

<sup>a</sup>The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

### 6. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)

State	Signature	Ratification Accession	Entry into force
France	15 October 1991		
Mexico	19 April 1991		
Philippines	19 April 1991		
Spain	19 April 1991		
United States of America	30 April 1992		

Signatures only: 5; ratifications and accessions necessary to bring the Convention into force: 5

## 7. Model Law on International Commercial Arbitration (1985)

Legislation based on the Model Law on International Commercial Arbitration has been enacted in Australia, *Bahrain*, Bermuda, Bulgaria, Canada (by the Federal Parliament and by the Legislatures of all Provinces and Territories), Cyprus, Egypt, Finland, Hong Kong, *Hungary*, Mexico, Nigeria, Peru, Russian Federation, Scotland, *Singapore*, Tunisia, *Ukraine* and, within the United States of America, California, Connecticut, Oregon and Texas.

## 8. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

State	Signature	Ratification Accession Succession (*)
Algeria <sup>1, 2</sup>		7 February 1989
Antigua and Barbuda <sup>1, 2</sup>		2 February 1989
Argentina <sup>1, 2, 7</sup>	26 August 1958	14 March 1989
Australia		26 March 1975
Austria		2 May 1961
Bahrain <sup>1, 2</sup>		6 April 1988
Bangladesh		6 May 1992
Barbados <sup>2</sup>		16 March 1993
Belarus <sup>1, 3</sup>	29 December 1958	15 November 1960
Belgium <sup>1</sup>	10 June 1958	18 August 1975
Benin		16 May 1974
Bolivia		28 April 1995
Bosnia and Herzegovina <sup>1, 2, 6</sup>		6 March 1992*
Botswana <sup>1, 2</sup>		20 December 1971
Bulgaria <sup>1, 3</sup>	17 December 1958	10 October 1961
Burkina Faso		23 March 1987
Cambodia		5 January 1960
Cameroon		19 February 1988
Canada <sup>4</sup>		12 May 1986
Central African Republic <sup>1, 2</sup>		15 October 1962
Chile		4 September 1975
China <sup>1, 2</sup>		22 January 1987
Colombia		25 September 1979
Costa Rica	10 June 1958	26 October 1987
Côte d'Ivoire		1 February 1991
Croatia <sup>1, 2, 6</sup>		26 July 1993*
Cuba <sup>1, 2, 3</sup>		30 December 1974
Cyprus <sup>1, 2</sup>		29 December 1980
Czech Republic <sup>6</sup>		30 September 1993*
Denmark <sup>1, 2</sup>		22 December 1972
Djibouti		14 June 1983
Dominica		28 October 1988
Ecuador <sup>1, 2</sup>	17 December 1958	3 January 1962
Egypt		9 March 1959
El Salvador	10 June 1958	
Estonia		30 August 1993
Finland	29 December 1958	19 January 1962
France <sup>1</sup>	25 November 1958	26 June 1959
Georgia		2 June 1994
Germany <sup>6, 1</sup>	10 June 1958	30 June 1961
Ghana		9 April 1968
Greece <sup>1, 2</sup>		16 July 1962
Guatemala <sup>1, 2</sup>		21 March 1984
Guinea		23 January 1991
Haiti		5 December 1983
Holy See <sup>1, 2</sup>		14 May 1975
Hungary <sup>1, 2</sup>		5 March 1962
India <sup>1, 2</sup>	10 June 1958	13 July 1960
Indonesia <sup>1, 2</sup>		7 October 1981
Ireland <sup>1</sup>		12 May 1981
Israel	10 June 1958	5 January 1959
Italy		31 January 1969
Japan <sup>1</sup>		20 June 1961
Jordan	10 June 1958	15 November 1979
Kenya <sup>1</sup>		10 February 1989

<i>State</i>	<i>Signature</i>	<i>Ratification Accession Succession (*)</i>
Kuwait <sup>1</sup>		28 April 1978
Latvia		14 April 1992
Lesotho		13 June 1989
Lithuania <sup>3</sup>		15 March 1995
Luxembourg <sup>1</sup>	11 November 1958	9 September 1983
Madagascar <sup>1, 2</sup>		16 July 1962
Malaysia <sup>1, 2</sup>		5 November 1985
Mali		8 September 1994
Mexico		14 April 1971
Monaco <sup>1, 2</sup>	31 December 1958	2 June 1982
Mongolia <sup>1, 2</sup>		24 October 1994
Morocco <sup>1</sup>		12 February 1959
Netherlands <sup>1</sup>	10 June 1958	24 April 1964
New Zealand <sup>1</sup>		6 January 1983
Niger		14 October 1964
Nigeria <sup>1, 2</sup>		17 March 1970
Norway <sup>1, 3</sup>		14 March 1961
Pakistan	30 December 1958	
Panama		10 October 1984
Peru		7 July 1988
Philippines <sup>1, 2</sup>	10 June 1958	6 July 1967
Poland <sup>1, 2</sup>	10 June 1958	3 October 1961
Portugal <sup>1</sup>		18 October 1994
Republic of Korea <sup>1, 2</sup>		8 February 1973
Romania <sup>1, 2, 3</sup>		13 September 1961
Russian Federation <sup>1, 3</sup>	29 December 1958	24 August 1960
San Marino		17 May 1979
Saudi Arabia		19 April 1994
Senegal		17 October 1994
Singapore <sup>1</sup>		21 August 1986
Slovakia <sup>4</sup>		28 May 1993*
Slovenia <sup>1, 2, 6</sup>		25 June 1991*
South Africa		3 May 1976
Spain		12 May 1977
Sri Lanka	30 December 1958	9 April 1962
Sweden	23 December 1958	28 January 1972
Switzerland <sup>1, 8</sup>	29 December 1958	1 June 1965
Syrian Arab Republic		9 March 1959
Thailand		21 December 1959
The former Yugoslav Republic of Macedonia <sup>1, 2, 6</sup>		10 March 1994*
Trinidad and Tobago <sup>1, 2</sup>		14 February 1966
Tunisia <sup>1, 2</sup>		17 July 1967
Turkey <sup>1, 2</sup>		2 July 1992
Uganda <sup>1</sup>		12 February 1992
Ukraine <sup>1, 3</sup>	29 December 1958	10 October 1960
United Kingdom of Great Britain and Northern Ireland <sup>1</sup>		24 September 1975
United Republic of Tanzania <sup>1</sup>		13 October 1964
United States of America <sup>1, 2</sup>		30 September 1970
Uruguay		30 March 1983
Venezuela <sup>1, 2</sup>		8 February 1995
Yugoslavia <sup>1, 2, 6</sup>		26 February 1982
Zimbabwe		29 September 1994

Signatures only: 2; ratifications, accessions and successions: 105

<sup>4</sup>The Convention was signed by the former Czechoslovakia on 3 October 1958 and an instrument of ratification was deposited on 10 July 1959.<sup>1, 3</sup> On 28 May 1993, Slovakia, and on 30 September 1993, the Czech Republic, deposited instruments of succession.

<sup>8</sup>The Convention was acceded to by the former German Democratic Republic on 20 February 1975 with reservations referred to in notes<sup>1, 2</sup> and <sup>3</sup> below.

<sup>6</sup>The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

*Declarations and reservations*

(Excludes territorial declarations and certain other reservations  
and declarations of a political nature)

<sup>1</sup>State will apply the Convention only to recognition and enforcement of awards made in the territory of another Contracting State.

<sup>2</sup>State will apply the Convention only to differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law.

<sup>3</sup>With regard to awards made in the territory of non-contracting States, State will apply the Convention only to the extent to which these States grant reciprocal treatment.

<sup>4</sup>The Government of Canada has declared that Canada will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Canada, except in the case of the Province of Quebec, where the law does not provide for such limitation.

<sup>5</sup>State will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in the State, or a right in or to such property.

<sup>6</sup>State will apply the Convention only to those arbitral awards which were adopted after the coming of the Convention into effect.

<sup>7</sup>The present Convention should be construed in accordance with the principles and rules of the National Constitution in force or with those resulting from reforms mandated by the Constitution.

<sup>8</sup>On 23 April 1993, the Government of Switzerland notified the Secretary-General its decision to withdraw the declaration it had made upon ratification.

## VI. TRAINING AND ASSISTANCE

### Training and technical assistance: note by the Secretariat

(A/CN.9/415) [Original: English]

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#### INTRODUCTION

1. The purpose of the training and technical assistance activities of the Commission is to disseminate information on international commercial law conventions, model laws and other legal texts, particularly in developing countries and in countries whose economic systems are in transition. Those activities are aimed at government officials from interested ministries such as trade, foreign affairs, justice and transport, at law reform commissions, judges, arbitrators, practising lawyers, the commercial and trading community, and scholars.

2. UNCITRAL seminars and briefing missions for government officials, which are important components of the training and assistance programme, are designed to explain the salient features and utility of international trade law instruments of UNCITRAL such as: in the area of sales, the United Nations Convention on Contracts for the International Sale of Goods; in the area of arbitration, the UNCITRAL Arbitration Rules and the Model Law on International Commercial Arbitration; in the area of procurement, the UNCITRAL Model Law on Procurement of Goods, Construction and Services; in the area of banking and payments, the Model Law on International Credit Transfers, and the United Nations Convention on International Bills of Exchange and International Promissory

Notes; in the area of transport, the United Nations Convention on the Carriage of Goods by Sea and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade. In addition, information is provided on certain important legal texts of other organizations (e.g. Uniform Customs and Practice for Documentary Credits, INCOTERMS (International Chamber of Commerce) and the Convention on International Factoring (International Institute for the Unification of Private Law (UNIDROIT)).

3. In addition, technical assistance is provided to States preparing legislation based on UNCITRAL models in the areas of international commercial arbitration, procurement and international credit transfers. Such assistance is requested in various forms, including, for example, reviews of preparatory drafts of legislation from the viewpoint of UNCITRAL model laws, assistance in the preparation of drafts of legislation, comments on reports of law reform commissions, and briefings for legislators, judges, arbitrators and other end users of UNCITRAL legal texts embodied in national legislation (e.g. procurement managers).

4. This note sets out activities of the Secretariat subsequent to the twenty-seventh session of the Commission (31 May-17 June 1994) and discusses possible future training and assistance activities. In that period there has been

a continuation of the increase in the demand for training and technical assistance from the UNCITRAL secretariat, particularly from developing countries, newly independent States, and States whose economies are in transition. This increasing demand reflects an upsurge in those States in law reform relating to international trade, as well as a degree of increasing attention by bilateral and multilateral development agencies, including other parts of the United Nations system, to the importance of commercial law in the trade and investment profile of a State.

## I. UNCITRAL SEMINARS AND BRIEFING MISSIONS

5. Lectures at UNCITRAL seminars are generally given by one or two members of the Secretariat, by experts from the host countries and occasionally by external consultants. After the seminars, the UNCITRAL secretariat remains in close contact with seminar participants in order to provide the host countries with the maximum possible support during the contemplation and legislative process relating to the adoption and use of UNCITRAL legal texts.

6. The following is a list of the seminars and briefing missions that have taken place since the previous session:

(a) *Shanghai, China* (27-28 June 1994), held in cooperation with the China International Economic and Trade Commission (CIETAC), and attended by approximately 90 participants.

(b) *Harare, Zimbabwe* (1-3 August 1994), held in cooperation with the Office of the Attorney-General, and attended by approximately 70 participants.

(c) *Gaborone, Botswana* (8-10 August 1994), held in cooperation with the Office of the Attorney-General, and attended by approximately 50 participants.

(d) *Windhoek, Namibia* (12-16 August 1994), held in cooperation with the Office of the Attorney-General, and attended by approximately 30 participants.

(e) *Nairobi, Kenya* (12-15 September 1994), held in cooperation with the Office of the Attorney-General, and attended by approximately 60 participants.

(f) *Tbilisi, Georgia* (7-9 November 1994), briefing mission held in cooperation with the Ministry of Foreign Affairs.

(g) *Baku, Azerbaijan* (11-15 November 1994), briefing mission held in cooperation with the Ministry of Foreign Affairs.

(h) *Yerevan, Armenia* (16-18 November 1994), briefing mission held in cooperation with the Ministry of Foreign Affairs.

(i) *Panama City, Panama* (17-18 November 1994), held in cooperation with the Chamber of Commerce and the Boutin Law Firm, and attended by approximately 150 participants.

(j) *Cali, Colombia* (21-22 November 1994), held in cooperation with the Chamber of Commerce and the Inter-American Commission of Commercial Arbitration, and attended by approximately 150 participants.

(k) *Tashkent, Uzbekistan* (21-23 November 1994), held in cooperation with the Ministry of Foreign Economic Relations.

(l) *Prague, Czech Republic* (4-5 April 1995), held in cooperation with the Ministry of Industry and Trade, and attended by approximately 70 participants.

## II. OTHER SEMINARS, CONFERENCES, COURSES AND WORKSHOPS

7. Members of the UNCITRAL secretariat have participated as speakers in the following seminars, conferences and courses where UNCITRAL legal texts were presented for examination and discussion, or for the purpose of co-ordination of activities:

Annual Session of the Governing Council of the International Institute for Unification of Private Law (UNIDROIT) (Rome, 8-14 May 1994 and 29 March-1 April 1995);

Arbitration Conference sponsored by the International Council for Commercial Arbitration (ICCA) and the China International Economic and Trade Arbitration Commission (CIETAC) (Beijing, 22-23 June 1994);

UN/UNITAR Fellowship Programme in International Law (The Hague, 8-12 August 1994);

Conference entitled "Egyptian New Law of Commercial Arbitration: Different Experiences of Adopting the Model Law", sponsored by the Cairo Regional Centre for International Commercial Arbitration (Cairo, 12-13 September 1994);

Conference entitled "New Trends in Maritime Arbitration in the Afro-Asian Region", sponsored by the Cairo Regional Centre for International Commercial Arbitration (Alexandria, 14-15 September);

Forum on Ukrainian Law and Public Procurement, sponsored by ITC/UNCTAD/GATT (Kiev, 18-22 September 1994);

UN/ECE Working Party on Facilitation of International Trade Procedures (WP.4) (Geneva, 19-23 September 1994);

Thirteenth Course—International Commercial Arbitration and Law Libraries, sponsored by the International Association of Law Libraries and Martinus Nijhoff Publishers (The Hague, 26-29 September 1994);

European Insolvency Practitioners Association—Annual Conference (Telfs, 29 September-2 October 1994);

Arbitration Symposium of the London Court of International Arbitration, Asia/Pacific Users Council (Sydney, 5-7 October 1994);

International Bar Association twenty-fifth Biennial Conference (Sydney, 8-15 October 1994);

Regional Trade Law Seminar of the Attorney-General's Department of Australia (Melbourne, 18-19 October 1994);

International Entry Course on Arbitration, sponsored by the Chartered Institute of Arbitrators (Bahrain, 25-27 October 1994);

International Entry Course on Arbitration, sponsored by the Chartered Institute of Arbitrators (Harare, 28-30 November 1994);

WIPO Arbitration Conference (Geneva, 19-20 January 1995);

UN/ECE Working Party on Facilitation of International Trade Procedures (WP.4) (Geneva, 20-24 March 1995);

Regional Conference of the Americas, sponsored by the International Association of Insolvency Practitioners (INSOL) (Toronto, 22-24 March 1995);

Willem C. Vis International Commercial Arbitration Moot, organized by the Institute of International Commercial Law of Pace University School of Law, New York (Vienna, 22-26 March 1995);

Dynamic Asia Conference, sponsored by the International Chamber of Commerce (ICC) (New Delhi, 27-28 March 1995);

International Seminar on Globalization and Harmonization of Commercial/Arbitration Laws (New Delhi, 31 March-1 April 1995);

International Trade Law Post-Graduate Course, sponsored by the International Training Centre of the International Labour Organization (ILO) and the University Institute of European Studies (Turin, 11-12 April 1995);

34th Session of the Asian-African Legal Consultative Committee (AALCC) (Doha, 17-22 April 1995).

### III. TECHNICAL ASSISTANCE TO STATES IN PREPARATION OF LEGISLATION

8. The Secretariat has continued to provide technical consultations and assistance to States in the preparation of national legislation based on UNCITRAL model laws, in particular the Model Law on International Commercial Arbitration and the UNCITRAL Model Law on Procurement of Goods, Construction and Services. Such assistance is beneficial from the standpoint of recipient States in view of the Secretariat's accumulated experience in the preparation of the UNCITRAL model laws, and in providing technical assistance to Governments in the preparation of legislation. Furthermore, when such UNCITRAL technical assistance forms part of coordinated technical assistance efforts, aid agencies and Governments are able to rechannel funds that would otherwise be used for the payment of consultant's fees to meet other needs and purposes.

9. In order to facilitate further the provision of technical assistance by the Secretariat, the Commission may wish to consider authorizing the Secretariat to request States to provide it with legislation currently in effect in the areas of activity of the Commission.

### IV. SIXTH UNCITRAL SYMPOSIUM ON INTERNATIONAL TRADE LAW

(Vienna, 22-26 May 1995)

10. The Secretariat is organizing the Sixth UNCITRAL Symposium on International Trade Law to be held on the occasion of the twenty-eighth session of the Commission. The Symposium is designed to acquaint young lawyers with UNCITRAL as an institution and with the legal texts that have emanated from its work.

11. As was the case at the previous Symposia, lecturers have been invited primarily from representatives to the Commission session taking place at the time of the Symposium and from members of the Secretariat. In order to save on the costs of interpretation and to be able to increase the communication between participants themselves, the Symposium will be held in English and French only.

12. The travel costs of 22 participants from Africa, Latin America, Asia and Eastern Europe will be paid from UNCITRAL Trust Fund for Symposia. In addition, it is expected that approximately 75 individuals will attend at their own cost.

## V. FUTURE ACTIVITIES

### A. Training and technical assistance

13. For the remainder of 1995, seminars and legal-assistance briefing missions are being planned in Africa, Asia, Eastern Europe and Latin America. It should be emphasized that the ability of the Secretariat to implement these plans is contingent upon the receipt of sufficient funds in the form of contributions to the UNCITRAL Trust Fund for Symposia.

14. As it has done in recent years, the Secretariat has agreed to co-sponsor the next three-month International Trade Law Post-Graduate Course to be organized by the University of Turin Institute of European Studies and the International Training Centre of the International Labour Organization at Turin. Typically, approximately half of the participants are drawn from Italy, with many of the remainder being from developing countries. Issues of harmonization of international trade law and various items on the Commission's work programme are covered in the Course.

### B. Coordination of training and technical assistance with other organizations

15. The General Assembly at recent sessions has appealed to the United Nations Development Programme (UNDP) and other United Nations bodies responsible for development assistance to support the training and technical assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission. The Secretariat has taken steps towards increasing such cooperation and coordination, which can include provision of legal technical assistance, seminars and briefing missions by UNCITRAL and which could involve the mounting of joint programmes with entities such as the International Trade Centre UNCTAD/GATT. In some cases, costs of UNCITRAL participation may be covered by facilities such as institution-building loans of international development banks or umbrella development assistance facilities of UNDP.

16. Cooperation and coordination among entities providing legal technical assistance has the desirable effect of ensuring that, when United Nations system entities, or outside entities, are involved in providing legal technical assistance, the legal texts formulated by the Commission



and recommended by the General Assembly to be considered are in fact so considered and used. Furthermore, from the standpoint of States that are the recipients of legal technical assistance, such cooperation and coordination is particularly desirable. Coordination and cooperation among agencies increases the extent to which the guidance and assistance will help to establish legal systems that not only are internally consistent, but also utilize internationally developed trade law conventions, model laws, and other legal texts, and will thus maximize the ability of business parties from different States to successfully plan and implement commercial transactions.

## VI. INTERNSHIP PROGRAMME

17. The internship programme is designed to enable persons who have obtained a law degree to serve as interns in the International Trade Law Branch of the Office of Legal Affairs, which functions as the secretariat of the Commission. Interns are assigned specific tasks in connection with projects being worked on by the Secretariat. Persons participating in the programme are able to become familiar with the work of UNCITRAL and to increase their knowledge of specific areas in the field of international trade law. In addition, the Secretariat occasionally accommodates research in the Branch and in the UNCITRAL Law Library by scholars and legal practitioners for a limited period of time. Unfortunately, no funds are available to the Secretariat to assist interns to cover their travel or other expenses. Interns are often sponsored by an organization, university or a Government agency, or they meet their expenses from their own means. During the past year the Secretariat has received two interns, originating from Denmark and Germany.

## VII. FINANCIAL AND ADMINISTRATIVE CONSIDERATIONS

18. The Secretariat continues in its efforts to devise a more extensive training and technical assistance programme, to meet the considerably greater demand from States for training and assistance, and in response to the call of the Commission at its twentieth session (1987) for an increased emphasis both on training and assistance and on the promotion of the legal texts prepared by the

Commission.<sup>1</sup> However, unless the Secretariat is provided with the necessary financial and human resources, which presently it is not, the demand for training and technical assistance with respect to UNCITRAL legal texts, and the need to promote the use of those texts, remains to a significant extent unfulfilled.

19. Because no funds for the travel expenses of lecturers or participants are provided for in the regular budget, expenses for UNCITRAL training and technical assistance activities have to be met by voluntary contributions to the UNCITRAL Trust Fund for Symposia. Of particular value are contributions made to that Trust Fund on a multi-year basis, because they permit the Secretariat to plan and finance the programme without the need to solicit funds from potential donors for each individual activity. Such a contribution has been received from Canada. In addition, contributions from Austria, Denmark, France, Pakistan and Switzerland have been used for the seminar programme. The Commission may wish to express its appreciation to those States and organizations that have contributed to the Commission's programme of training and assistance by providing funds or staff or by hosting seminars.

20. Particular attention may be drawn to the fact that the funds needed for efficient training and technical assistance in the area of international trade law and the dissemination of information concerning the legal texts prepared by the Commission are comparatively small amounts, but that without those funds the relatively large expenditures of the Organization and its Member States on the preparation of the legal texts in question may fail to achieve the intended result of unification and harmonization of international trade law.

21. In view of the above, the Commission may again wish to appeal to all States to consider making contributions to the UNCITRAL Trust Fund for Symposia so as to enable the Secretariat to meet the increasing demands in developing countries and newly independent States for training and assistance. In order to facilitate contributions from States, the Commission may wish to apply to have the Trust Fund for Symposia included in the programme of United Nations pledging conferences. The Commission may further wish to appeal to aid agencies, particularly those in the United Nations system, for increased support, cooperation and coordination.

<sup>1</sup>Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17), para. 335.

# I. DRAFT UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

## CHAPTER I. SCOPE OF APPLICATION

### Article 1. *Scope of application*

(1) This Convention applies to an international undertaking referred to in article 2:

(a) If the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State, or

(b) If the rules of private international law lead to the application of the law of a Contracting State,

unless the undertaking excludes the application of the Convention.

(2) This Convention applies also to an international letter of credit not falling within article 2 if it expressly states that it is subject to this Convention.

(3) The provisions of articles 21 and 22 apply to international undertakings referred to in article 2 independently of paragraph (1) of this article.

### Article 2. *Undertaking*

(1) For the purposes of this Convention, an undertaking is an independent commitment, known in international practice as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person.

(2) The undertaking may be given:

(a) At the request or on the instruction of the customer ("principal/applicant") of the guarantor/issuer;

(b) On the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal/applicant") of that instructing party; or

(c) On behalf of the guarantor/issuer itself.

(3) Payment may be stipulated in the undertaking to be made in any form, including:

(a) Payment in a specified currency or unit of account;

(b) Acceptance of a bill of exchange (draft);

(c) Payment on a deferred basis;

(d) Supply of a specified item of value.

(4) The undertaking may stipulate that the guarantor/issuer itself is the beneficiary when acting in favour of another person.

### Article 3. *Independence of undertaking*

For the purposes of this Convention, an undertaking is independent where the guarantor/issuer's obligation to the beneficiary is not:

(a) Dependent upon the existence or validity of any underlying transaction, or upon any other undertaking (including stand-by letters of credit or independent guarantees to which confirmations or counter-guarantees relate); or

(b) Subject to any term or condition not appearing in the undertaking, or to any future, uncertain act or event except presentation of documents or another such act or event within a guarantor/issuer's sphere of operations.

### Article 4. *Internationality of undertaking*

(1) An undertaking is international if the places of business, as specified in the undertaking, of any two of the following persons are in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer.

(2) For the purposes of the preceding paragraph:

(a) If the undertaking lists more than one place of business for a given person, the relevant place of business is that which has the closest relationship to the undertaking;

(b) If the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant for determining the international character of the undertaking.

## CHAPTER II. INTERPRETATION

### Article 5. *Principles of interpretation*

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 the international practice of independent guarantees and stand-by letters of credit.

### Article 6. *Definitions*

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "Undertaking" includes "counter-guarantee" and "confirmation of an undertaking";

(b) "Guarantor/issuer" includes "counter-guarantor" and "confirmer";

(c) "Counter-guarantee" means an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment under that other undertaking has been demanded from, or made by, the person issuing that other undertaking;

(d) "Counter-guarantor" means the person issuing a counter-guarantee;

(e) "Confirmation" of an undertaking means an undertaking added to that of the guarantor/issuer, and authorized by the guarantor/issuer, providing the beneficiary with the option of demanding payment from the confirmer instead of from the guarantor/issuer, upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the confirmed undertaking, without prejudice to the beneficiary's right to demand payment from the guarantor/issuer;

(f) "Confirmer" means the person adding a confirmation to an undertaking;

(g) "Document" means a communication made in a form that provides a complete record thereof.

### CHAPTER III. FORM AND CONTENT OF UNDERTAKING

#### Article 7. *Issuance, form and irrevocability of undertaking*

(1) Issuance of an undertaking occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer concerned.

(2) An undertaking may be issued in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary.

(3) From the time of issuance of an undertaking, a demand for payment may be made in accordance with the terms and conditions of the undertaking, unless the undertaking stipulates a different time.

(4) An undertaking is irrevocable upon issuance, unless it stipulates that it is revocable.

#### Article 8. *Amendment*

(1) An undertaking may not be amended except in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph (2) of article 7.

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, an undertaking is amended upon issuance of the amendment if the amendment has previously been authorized by the beneficiary.

(3) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, where any amendment has not previously been authorized by the beneficiary, the undertaking is amended only when the guarantor/issuer receives a notice of acceptance of the amendment by the beneficiary in a form referred to in paragraph (2) of article 7.

(4) An amendment of an undertaking has no effect on the rights and obligations of the principal/applicant (or an instructing party) or of a confirmer of the undertaking unless such person consents to the amendment.

#### Article 9. *Transfer of beneficiary's right to demand payment*

(1) The beneficiary's right to demand payment may be transferred only if authorized in the undertaking, and only to the extent and in the manner authorized in the undertaking.

(2) If an undertaking is designated as transferable without specifying whether or not the consent of the guarantor/issuer or another authorized person is required for the actual transfer, neither the guarantor/issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it.

#### Article 10. *Assignment of proceeds*

(1) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the undertaking.

(2) If the guarantor/issuer or another person obliged to effect payment has received a notice originating from the beneficiary, in a form referred to in paragraph (2) of article 7, of the beneficiary's irrevocable assignment, payment to the assignee discharges the obligor, to the extent of its payment, from its liability under the undertaking.

#### Article 11. *Cessation of right to demand payment*

(1) The right of the beneficiary to demand payment under the undertaking ceases when:

(a) The guarantor/issuer has received a statement by the beneficiary of release from liability in a form referred to in paragraph (2) of article 7;

(b) The beneficiary and the guarantor/issuer have agreed on the termination of the undertaking in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph (2) of article 7;

(c) The amount available under the undertaking has been paid, unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking;

(d) The validity period of the undertaking expires in accordance with the provisions of article 12.

(2) The undertaking may stipulate, or the guarantor/issuer and the beneficiary may agree elsewhere, that return of the document embodying the undertaking to the guarantor/issuer, or a procedure functionally equivalent to the return of the document in the case of the issuance of the undertaking in non-paper form, is required for the cessation of the right to demand payment, either alone or in conjunction with one of the events referred to in subparagraphs (a) and (b) of paragraph (1) of this article. However, in no case shall retention of any such document by the beneficiary after the right to demand payment ceases in accordance with subparagraph (c) or (d) of paragraph (1) of this article preserve any rights of the beneficiary under the undertaking.

#### Article 12. *Expiry*

The validity period of the undertaking expires:

(a) At the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the undertaking, provided that, if the expiry date is not a business day at the place of business of the guarantor/issuer at which the undertaking is issued, or of another person or at another place stipulated in the undertaking for presentation of the demand for payment, expiry occurs on the first business day which follows;

(b) If expiry depends according to the undertaking on the occurrence of an act or event not within the guarantor/issuer's sphere of operations, when the guarantor/issuer is advised that the act or event has occurred by presentation of the document specified for that purpose in the undertaking or, if no such document

is specified, of a certification by the beneficiary of the occurrence of the act or event;

(c) If the undertaking does not state an expiry date, or if the act or event on which expiry is stated to depend has not yet been established by presentation of the required document and an expiry date has not been stated in addition, when six years have elapsed from the date of issuance of the undertaking.

#### CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

##### Article 13. *Determination of rights and obligations*

(1) The rights and obligations of the guarantor/issuer and the beneficiary arising from the undertaking are determined by the terms and conditions set forth in the undertaking, including any rules, general conditions or usages specifically referred to therein, and by the provisions of this Convention.

(2) In interpreting terms and conditions of the undertaking and in settling questions that are not addressed by the terms and conditions of the undertaking or by the provisions of this Convention, regard shall be had to generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice.

##### Article 14. *Standard of conduct and liability of guarantor/issuer*

(1) In discharging its obligations under the undertaking and this Convention, the guarantor/issuer shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit.

(2) A guarantor/issuer may not be exempted from liability for its failure to act in good faith or for any grossly negligent conduct.

##### Article 15. *Demand*

(1) Any demand for payment under the undertaking shall be made in a form referred to in paragraph (2) of article 7 and in conformity with the terms and conditions of the undertaking.

(2) Unless otherwise stipulated in the undertaking, the demand and any certification or other document required by the undertaking shall be presented, within the time that a demand for payment may be made, to the guarantor/issuer at the place where the undertaking was issued.

(3) The beneficiary, when demanding payment, is deemed to certify that the demand is not in bad faith and that none of the elements referred to in subparagraphs (a), (b) and (c) of paragraph (1) of article 19 are present.

##### Article 16. *Examination of demand and accompanying documents*

(1) The guarantor/issuer shall examine the demand and any accompanying documents in accordance with the standard of conduct referred to in paragraph (1) of article 14. In determining whether documents are in facial conformity with the terms and conditions of the undertaking, and are consistent with one another, the guarantor/issuer shall have due regard to the applicable international standard of independent guarantee or stand-by letter of credit practice.

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/

issuer shall have reasonable time, but not more than seven business days following the day of receipt of the demand and any accompanying documents, in which to:

(a) Examine the demand and any accompanying documents;

(b) Decide whether or not to pay;

(c) If the decision is not to pay, issue notice thereof to the beneficiary.

The notice referred to in subparagraph (c) above shall, unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, be made by teletransmission or, if that is not possible, by other expeditious means and indicate the reason for the decision not to pay.

##### Article 17. *Payment*

(1) Subject to article 19, the guarantor/issuer shall pay against a demand made in accordance with the provisions of article 15. Following a determination that a demand for payment so conforms, payment shall be made promptly, unless the undertaking stipulates payment on a deferred basis, in which case payment shall be made at the stipulated time.

(2) Any payment against a demand that is not in accordance with the provisions of article 15 does not prejudice the rights of the principal/applicant.

##### Article 18. *Set-off*

Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer may discharge the payment obligation under the undertaking by availing itself of a right of set-off, except with any claim assigned to it by the principal/applicant or the instructing party.

##### Article 19. *Exception to payment obligation*

(1) If it is manifest and clear that:

(a) Any document is not genuine or has been falsified;

(b) No payment is due on the basis asserted in the demand and the supporting documents; or

(c) Judging by the type and purpose of the undertaking, the demand has no conceivable basis, the guarantor/issuer, acting in good faith, has a right, as against the beneficiary, to withhold payment.

(2) For the purposes of subparagraph (c) of paragraph (1) of this article, the following are types of situations in which a demand has no conceivable basis:

(a) The contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;

(b) The underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;

(c) The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) Fulfilment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary;

(e) In the case of a demand under a counter-guarantee, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter-guarantee relates.

(3) In the circumstances set out in subparagraphs (a), (b) and (c) of paragraph (1) of this article, the principal/applicant is entitled to provisional court measures in accordance with article 20.

## CHAPTER V. PROVISIONAL COURT MEASURES

### Article 20. *Provisional court measures*

(1) Where, on an application by the principal/applicant or the instructing party, it is shown that there is a high probability that, with regard to a demand made, or expected to be made, by the beneficiary, one of the circumstances referred to in subparagraphs (a), (b) and (c) of paragraph (1) of article 19 is present, the court, on the basis of immediately available strong evidence, may:

(a) Issue a provisional order to the effect that the beneficiary does not receive payment, including an order that the guarantor/issuer hold the amount of the undertaking, or

(b) Issue a provisional order to the effect that the proceeds of the undertaking paid to the beneficiary are blocked, taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious harm.

(2) The court, when issuing a provisional order referred to in paragraph (1) of this article, may require the person applying therefor to furnish such form of security as the court deems appropriate.

(3) The court may not issue a provisional order of the kind referred to in paragraph (1) of this article based on any objection to payment other than those referred to in subparagraphs (a), (b) and (c) of paragraph (1) of article 19, or use of the undertaking for a criminal purpose.

## CHAPTER VI. CONFLICT OF LAWS

### Article 21. *Choice of applicable law*

The undertaking is governed by the law the choice of which is:

(a) Stipulated in the undertaking or demonstrated by the terms and conditions of the undertaking; or

(b) Agreed elsewhere by the guarantor/issuer and the beneficiary.

### Article 22. *Determination of applicable law*

Failing a choice of law in accordance with article 21, the undertaking is governed by the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued.

## CHAPTER VII. FINAL CLAUSES

### Article 23. *Depositary*

The Secretary-General of the United Nations is the depositary of this Convention.

### Article 24. *Signature, ratification, acceptance, approval, accession*

(1) This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until . . . [the date two years from the date of adoption].

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

(3) This Convention is open to 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 25. *Application to territorial units*

(1) If a 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 one or more of them, and may at any time substitute another declaration for its earlier declaration.

(2) These declarations are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the place of business of the guarantor/issuer or of the beneficiary is located in a territorial unit to which the Convention does not extend, this place of business is considered not to be in a Contracting State.

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

### Article 26. *Effect of declaration*

(1) Declarations made under article 25 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations 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 which makes a declaration under article 25 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary.

### Article 27. *Reservations*

No reservations may be made to this Convention.

### Article 28. *Entry into force*

(1) This Convention enters into force on the first day of the month following the expiration of one year from the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession.

(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention

enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.

(3) This Convention applies only to undertakings issued on or after the date when the Convention enters into force in respect of the Contracting State referred to in subparagraph (a) or the Contracting State referred to in subparagraph (b) of paragraph (1) of article 1.

#### Article 29. *Denunciation*

(1) A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period 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 . . . one thousand nine hundred and ninety-. . . , 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 the present Convention.

## II. DRAFT UNCITRAL MODEL LAW ON LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF COMMUNICATION

### Part I. Text of articles 1 and 3 to 11 as they result from the work of the Commission at its twenty-eighth session

#### CHAPTER I. GENERAL PROVISIONS\*

##### Article 1. *Sphere of application\*\**

This Law applies to any kind of information in the form of a data message used in the context of commercial\*\*\* activities.\*\*\*\*

##### Article 3. *Interpretation*

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

#### CHAPTER II. APPLICATION OF LEGAL REQUIREMENTS TO DATA MESSAGES

##### Article 4. *Legal recognition of data messages*

Information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message.

##### Article 5. *Writing*

(1) Where a rule of law requires information to be in writing or to be presented in writing, or provides for certain consequences if

\*This Law does not override any rule of law intended for the protection of consumers.

\*\*The Commission suggests the following text for States that might wish to limit the applicability of this Law to international data messages:

This Law applies to a data message as defined in paragraph (1) of article 2 where the data message relates to international commerce.

\*\*\*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 cooperation; carriage of goods or passengers by air, sea, rail or road.

\*\*\*\*The Commission suggests the following text for States that might wish to extend the applicability of this Law:

This Law applies to any kind of information in the form of a data message [used in the context of . . . ], except in the following situations: . . . ]

it is not, a data message satisfies that rule if the information contained therein is accessible so as to be usable for subsequent reference.

(2) The provisions of this article do not apply to the following: [ . . . ].

##### Article 6. *Signature*

(1) Where a rule of law requires a signature, or provides for certain consequences in the absence of a signature, that rule shall be satisfied in relation to a data message if:

(a) a method is used to identify the originator of the data message and to indicate the originator's approval of the information contained therein; 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 agreement between the originator and the addressee of the data message.

(2) The provisions of this article do not apply to the following: [ . . . ].

##### Article 7. *Original*

(1) Where a rule of law requires information to be presented or retained in its original form, or provides for certain consequences if it is not, a data message satisfies that rule if:

(a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and

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

(2) Where any question is raised as to whether subparagraph (a) of paragraph (1) of this article is satisfied:

(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.

(3) The provisions of this article do not apply to the following: [ . . . ].



*Article 8.**Admissibility and evidential weight of data messages*

(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence:

- (a) on the sole ground that it is a data message; or,
- (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.

*Article 9.**Retention of data messages*

(1) Where a rule of law requires that certain documents, records or information be retained, that rule is satisfied by retaining data messages, provided that the following conditions are met:

- (a) the information contained therein is accessible so as to be usable for subsequent reference; and
- (b) the data message is retained in the format in which it was generated, transmitted or received, or in a format which can be demonstrated to represent accurately the information generated, transmitted 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 of its transmission or reception.

(2) An obligation to retain documents, records or information in accordance with paragraph (1) does not extend to any information the sole purpose of which is to enable the message to be transmitted or received.

(3) A person may satisfy the requirement referred to in paragraph (1) by using the services of any other person, provided that the conditions set forth in subparagraphs (a), (b) and (c) of paragraph (1) are met.

## CHAPTER III. COMMUNICATION OF DATA MESSAGES

*Article 10.**Variation by agreement*

(1) As between parties involved in generating, storing, communicating, receiving or otherwise processing data messages, and except as otherwise provided, the provisions of this chapter may be varied by agreement.

(2) Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law referred to in chapter II.

*Article 11.**Attribution of data messages*

(1) A data message is that of the originator if it was communicated by the originator itself.

(2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was communicated by a person who had the authority to act on behalf of the originator in respect of that data message.

(3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if:

(a) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure for that purpose which was:

- (i) previously agreed by the originator; or
- (ii) reasonable in the circumstances; or

(b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.

(4) Paragraph (3) shall not apply:

(a) after the addressee has received notice within a reasonable time from the originator that the data message is not that of the originator; or

(b) in a case within paragraph (3)(a)(ii) or (3)(b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.

(5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the content of the data message as received as being what the originator intended to transmit, and to act on that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the content of the data message as received.

[(6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption unless it repeats the content of another data message, and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the repetition was a duplication and not the transmission of a separate data message.]

## Part II. Text of articles 2 and 12 to 14 as they resulted from the work of the Working Group on Electronic Data Interchange at its twenty-eighth session

(The text of those articles was not considered by the Commission at its twenty-eighth session.)

### Article 2. Definitions

For the purposes of this Law:

(a) "Data message" means information generated, stored or communicated by electronic, optical or analogous means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

(b) "Electronic data interchange (EDI)" means the electronic transfer from computer to computer of information using an agreed standard to structure the information;

(c) "Originator" of a data message means a person by whom, or on whose behalf, the data message purports to have been generated, stored or communicated, but it does not include a person acting as an intermediary with respect to that data message;

(d) "Addressee" of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;

(e) "Intermediary", with respect to a particular data message, means a person who, on behalf of another person, receives, transmits or stores that data message or provides other services with respect to that data message;

(f) "Information system" means a system for generating, transmitting, receiving or storing information in a data message.

### Article 12. Acknowledgement of receipt

(1) This article applies where, on or before sending a data message, or by means of that data message, the originator has requested an acknowledgement of receipt.

(2) Where the originator has not requested that the acknowledgement be in a particular form, the request for an acknowledgement may be satisfied by any communication or conduct of the addressee sufficient to indicate to the originator that the data message has been received.

(3) Where the originator has stated that the data message is conditional on receipt of that acknowledgement, the data message has no legal effect until the acknowledgement is received.

(4) Where the originator has not stated that the data message is conditional on receipt of the acknowledgement and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time:

(a) the originator may give notice to the addressee stating that no acknowledgement has been received and specifying a time, which must be reasonable, by which the acknowledgement must be received; and

(b) if the acknowledgement is not received within the time specified in subparagraph (a), the originator may, upon notice to the addressee, treat the data message as though it had never been transmitted, or exercise any other rights it may have.

(5) Where the originator receives an acknowledgement of receipt, it is presumed that the related data message was received by

the addressee. Where the received acknowledgement states that the related data message met technical requirements, either agreed upon or set forth in applicable standards, it is presumed that those requirements have been met.

### Article 13. Formation and validity of contracts

(1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. 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.

(2) The provisions of this article do not apply to the following:  
[...]

### Article 14. Time and place of dispatch and receipt of data messages

(1) Unless otherwise agreed between the originator and the addressee of a data message, the dispatch of a data message occurs when it enters an information system outside the control of the originator.

(2) Unless otherwise agreed between the originator and the addressee of a data message, the time of receipt of a data message is determined as follows:

(a) if the addressee has designated an information system for the purpose of receiving such data messages, receipt occurs at the time when the data message enters the designated information system, but if the data message is sent to an information system of the addressee that is not the designated information system, receipt occurs when the data message is retrieved by the addressee;

(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

(3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is received under paragraph (4).

(4) Unless otherwise agreed between the originator and the addressee of a computerized transmission of a data message, a data message is deemed to be received at the place where the addressee has its place of business, and is deemed to be dispatched at the place where the originator has its place of business. For the purposes of this paragraph:

(a) if the addressee or the originator has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;

(b) if the addressee or the originator does not have a place of business, reference is to be made to its habitual residence.

(5) Paragraph (4) shall not apply to the determination of place of receipt or dispatch for the purpose of any administrative, criminal or data-protection law.

### III. SUMMARY RECORDS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW FOR MEETINGS DEVOTED TO THE PREPARATION OF THE DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT, THE DRAFT UNCITRAL MODEL LAW ON ELECTRONIC DATA INTERCHANGE AND RELATED MEANS OF COMMUNICATION AND THE DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS

#### Summary record (partial)\* of the 547th meeting

Tuesday, 2 May 1995, at 10 a.m.

[A/CN.9/SR.547]

*Temporary Chairman:* Mr. CORELL (Under-Secretary-General, Legal Counsel)

*Chairman:* Mr. GOH (Singapore)

*Chairman of the Committee of the Whole entrusted with studying the draft Convention on Independent Guarantees and Stand-by Letters of Credit:* Mr. GAUTHIER (Canada)

*The discussion covered in the summary record began at 10.50 a.m.*

#### ELECTION OF OFFICERS

1. The TEMPORARY CHAIRMAN invited nominations for the office of Chairman of the Commission.
2. Mr. SHISHIDO (Japan) nominated Mr. Goh Phai Cheng (Singapore).
3. *Mr. Goh (Singapore) was elected Chairman.*
4. *Mr. Goh (Singapore) took the Chair.*
5. The CHAIRMAN suggested that Mr. Jacques Gauthier (Canada), Chairman of the Working Group on International Contract Practices, should be elected, in his personal capacity, Chairman of the Committee of the Whole entrusted with studying the draft Convention on Independent Guarantees and Stand-by Letters of Credit.

6. *It was so decided.*

DRAFT CONVENTION ON INDEPENDENT GUARANTEES  
AND STAND-BY LETTERS OF CREDIT (A/CN.9/405,  
A/CN.9/408, A/CN.9/411)

#### *Organization of work*

7. The CHAIRMAN suggested that, in view of the highly technical nature of the discussion on the draft Convention on Independent Guarantees and Stand-by Letters of Credit, the meeting should be chaired by the Chairman of the Committee of the Whole.

\*No summary record was prepared for the first part of the meeting.

8. *It was so decided.*

9. *Mr. Gauthier (Chairman of the Committee of the Whole entrusted with studying the draft Convention on Independent Guarantees and Stand-by Letters of Credit) took the Chair.*

10. Mr. GAUTHIER (Chairman of the Committee of the Whole) invited the Commission to consider the articles of the Draft Convention on Independent Guarantees and Stand-by Letters of Credit as revised at the twenty-third session of the Working Group on International Contract Practices (A/CN.9/408, annex). After a long discussion the Working Group had confirmed the working assumption that the final text would take the form of a convention and not a model law. Draft final clauses had therefore been formulated (A/CN.9/411). He would give a brief general introduction to each article for the benefit of delegations that had not attended the meetings of the Working Group. A drafting group would be set up by the Secretariat to deal with any suggestions for improving the text. An understanding had been reached in the Working Group that time did not allow for the submission of written comments. Since some States had none the less sent in written comments to the Secretariat, he suggested that the representatives of those States should present them orally. Papers would not usually be distributed unless the Commission decided that it wished to see a long proposal in writing.

#### *Article 1*

11. Mr. GAUTHIER (Chairman of the Committee of the Whole), introducing article 1, pointed out that according to paragraph (1) the Convention applied to an international undertaking. "Undertaking" was defined in article 2, "international" in article 4. Subparagraphs (a) and (b) of paragraph (1) specified the

conditions to be met for the Convention to be applicable. The last part of the paragraph provided for the possibility of opting out.

12. Paragraph (2), applying to the commercial letter of credit, was an opting-in provision, which the Working Group had discussed and chosen to retain.

13. Paragraph (3), referring to the conflict of laws rules, was a reminder that those rules would apply even if the international undertaking was not covered by paragraph (1).

14. He invited comments on the article paragraph by paragraph.

#### *Paragraph (1)*

15. Mr. LAMBERTZ (Observer for Sweden) proposed that the *chapeau* of paragraph (1) be amended to refer to "international undertakings" in the plural rather than "an international undertaking" in the singular. That would be a more elegant wording and was also more usual in legal parlance.

16. Mr. GAUTHIER (Chairman of the Committee of the Whole) suggested that the question should be referred to the drafting group.

17. *It was so decided.*

18. Mr. MARKUS (Observer for Switzerland) introduced a joint amendment to paragraph (1)(a) by Sweden and Switzerland, which was intended to cover cases where an instrument was issued at a place other than the place of business of the guarantor. Paragraph (1)(a) should be amended to read: "If the place of business of the guarantor/issuer is in a Contracting State or, if the guarantor/issuer has more than one place of business, the place of business from which the issuance of the undertaking is directed is in a Contracting State, or".

19. Mr. GAUTHIER (Chairman of the Committee of the Whole) thought that the point raised by Sweden and Switzerland might be covered by the words "at which the undertaking is issued". In the absence of support for the proposal, he would take it that the Commission was happy with the existing wording.

20. Ms. CZERWENKA (Germany) was in favour of making the text a model law, which would be more flexible than a convention and make the scope of application easier to define. The Swedish-Swiss proposal showed that the definition of the scope of application gave rise to problems. Moreover, now that the Working Group had decided not to include rules on jurisdiction in the text, it was unnecessary to give it the form of a convention.

21. Mr. VASSEUR (Observer for Monaco) endorsed that view, pointing out that the title "Convention" had been agreed upon by the Working Group at a very late stage of its deliberations, when many of its members had left.

22. Mr. GAUTHIER (Chairman of the Committee of the Whole) observed that, as shown in paragraph 93 of the report of the Working Group on its twentieth session (A/CN.9/388), the Working Group had later confirmed the assumption that the final text would take the form of a convention. However, it was up to the Commission to decide the matter.

23. Mr. CHOUKRI SBAI (Observer for Morocco) noted that the Working Group had introduced the element of the observance of good faith into the text of the draft Convention (article 5). He considered that the purpose of the independent guarantees in question should be specified. Their duration, if not otherwise stipulated, should be for a maximum of three rather than six years.

He was opposed to the text being adopted in the form of a model law, since that would detract from its binding force, an advantage possessed by other UNCITRAL conventions already existing in the field of commerce. With regard to paragraph (1)(a) of article 1, he felt that the existing wording did not satisfactorily cover situations where the place of business of the guarantor/issuer was in more than one Contracting State. In such cases, would the location of the head office of the guarantor/issuer determine the applicable place of business? As far as paragraph (2) was concerned, the Convention should only apply to stand-by letters of credit, since otherwise a party which was in a stronger economic position might be able to oblige a weaker partner to waive national or international private law.

24. Mr. SHISHIDO (Japan), endorsing the remarks made by the representative of Germany, said that his delegation supported the adoption of the text in the form of a model law.

25. Mr. GAUTHIER (Chairman of the Committee of the Whole) suggested that the Commission should revert to the question of the final form of the text later.

26. Mr. EDWARDS (Australia) wondered whether the connection between paragraphs (1) and (3) of article 1 was expressed as felicitously as it might be. However, that matter could possibly be referred to the drafting group.

27. Mr. SHISHIDO (Japan), noting that the right of the parties to exclude the Convention as a whole was provided for in the last line of paragraph (1), said that they should, in his view, be permitted to opt out of individual provisions. If the final form of the text adopted were to be that of a convention, his delegation would prefer to see the inclusion of a provision allowing party autonomy, on the lines of article 6 of the United Nations Convention on Contracts for the International Sale of Goods (the 1980 Vienna Sales Convention).

28. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that while it would be possible to include a general provision on party autonomy, the possibility of "opting out" of individual provisions was often dealt with in the provision itself. Expressions such as "unless otherwise stipulated" were to be found throughout the text.

29. Mr. FAYERS (United Kingdom of Great Britain and Northern Ireland) agreed with the representative of Japan. Since there was an opting-out provision in the Vienna Sales Convention, it might be thought odd if the draft Convention did not include similar wording.

30. Mr. HERRMANN (Secretary of the Commission) pointed out that the structure of the two texts was different. The conditions under which the Sales Convention would apply were set forth in article 1. Article 6 then stated, as an exception: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." That text combined two different kinds of rules in a single article, one relating to exclusion of the Convention as a whole, the effect of which was that another law was applicable, and the other to derogation from certain of its provisions. The present draft Convention could follow the same approach, in which case it would be necessary to specify which provisions were to be mandatory and thus not subject to derogation. The place to do that, however, was not in the article on scope of application, which was concerned with whether the Convention applied as such. It would not make sense to say, before it had been established that the Convention applied, that the parties had derogated from or varied certain of its provisions. The two issues were separate and should be dealt with separately.

31. Mr. LAMBERTZ (Observer for Sweden) said that he would have supported a proposal to delete the clause "unless the undertaking excludes the application of the Convention". What would happen if the Convention had already been incorporated into national legislation as an internationally binding obligation and was then excluded by the parties? Would they also have excluded the national law, or not? According to the Secretary, that would depend on whether the implementation of the Convention was based on a binding obligation for the State, in which case the parties that excluded its application would also have excluded the national law implementing the Convention. Other delegations had another interpretation, namely, that excluding the application of the Convention never meant at the same time excluding the application of the national law which implemented it. If so, he did not see the reason for that wording. That was a logical problem, which should be clarified.

32. Ms. CZERWENKA (Germany) said the Commission should concentrate on the substance of the Convention, as it was not assumed to know about national law. The provision in question simply stated the conditions under which the Convention would not apply, but said nothing regarding what would apply if the Convention were excluded, which was up to national legislators.

33. As to the proposal by Japan, Germany had always favoured a set of non-mandatory rules which would stipulate where deviation was possible. The Convention should not follow the approach taken in article 6 of the Vienna Sales Convention; it was sufficient to say that the parties could exclude the application of the Convention as a whole.

*The meeting rose at 12.30 p.m.*

### Summary record of the 548th meeting

Tuesday, 2 May 1995, at 2 p.m.

[A/CN.9/SR.548]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

*The meeting was called to order at 2.05 p.m.*

#### DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (*continued*) (A/CN.9/405, A/CN.9/408 and A/CN.9/411)

Article 1 (*continued*) (A/CN.9/408, annex)

##### Paragraph 1 (*continued*)

1. The CHAIRMAN, speaking as representative of Singapore, associated himself with the remarks made by the German delegation at the previous meeting. The Convention could only state what it applied to and what it did not apply to, but could not dictate to the legislature of a Contracting State. However, it was to be assumed that, if a Contracting State introduced legislation to implement the Convention (or model law), it would probably comply with the requirements of the Convention.

2. Ms. ZHANG Yuejiao (China) shared the view of the German delegation. A convention was preferable to a model law.

3. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, if there were no comments on the question raised by Sweden regarding the effect of the clause "unless the undertaking excludes the application of the Convention", he would assume that the Commission accepted the draft of article 1(1)(a) as it stood.

4. *It was so agreed.*

5. Mr. GAUTHIER (Chairman of the Committee of the Whole) drew the Commission's attention to the Japanese suggestion that the Convention might include a provision similar to that in article 6 of the Vienna Sales Convention. In view of the Secretary's earlier remarks on the matter and bearing in mind that the text mentioned possible choices other than those provided for in the

Convention, he thought that the Commission might not wish to accept the Japanese proposal.

6. *It was so agreed.*

7. Mr. GAUTHIER (Chairman of the Committee of the Whole) invited the Commission to discuss whether the product of its deliberations should be a convention or a model law.

8. The CHAIRMAN, speaking as representative of Singapore, asked whether the United Nations would have to convene a diplomatic conference if the text adopted took the form of a draft convention.

9. Mr. HERRMANN (Secretary of the Commission) said that a diplomatic conference would not necessarily have to be convened. He reminded the Commission that the General Assembly had constituted itself as a diplomatic conference to adopt the United Nations Convention on International Bills of Exchange and International Promissory Notes in 1988.

10. Informal talks had been held with those in charge of the programme of work for the Sixth Committee at the fiftieth session of the General Assembly, from which it appeared that, as consideration of one major agenda item had been postponed, there was a possibility that the draft Convention might be considered at that session.

11. Mr. BYRNE (United States of America) said that the Working Group had assumed that the text would take the form of a convention and not of a model law, in view of the need to harmonize international practice. The very flexibility of a model law would militate against international harmony, and a recognized legal regime was needed with regard to international instruments. The difficult and dangerous area of fraud could not be covered by

means of private rules. It would be preferable to permit individual reservations rather than adopt a model law.

12. Ms. BAZAROVA (Russian Federation) agreed with the representative of the United States of America. When work had been begun on the text six years previously, her country had not had any legislation on independent guarantees. Since then it had been making use of the material produced by the Commission, for which it was very grateful. Internally, therefore, it no longer had any need of a model law. An international document, on the other hand, would be of assistance in dealing with international obligations. She therefore supported the adoption of a convention, particularly since the text left countries a good deal of freedom.

13. Mr. GRANDINO RODAS (Brazil) supported the adoption of a model law.

14. Mr. RADWAN (Observer for the Arab Association for International Arbitration) said that an international convention could be interpreted as the imposition of the law of the strong on the weak, especially in international trade. The history of international conventions showed that they were highly subject to amendment. It would be better to opt for a model law.

15. Mr. STOUFFLET (France) said that he was not completely convinced by the arguments advanced in favour of a model law. It had been said that a model law would have flexibility, but the draft was itself flexible enough. It offered the possibility of opting out on a number of points.

16. Tried and tested legal mechanisms for stand-by letters of credit and guarantees already existed. He agreed with the representative of the United States of America that what was needed was to reduce the differences between existing systems, for which purpose a convention would be preferable to a model law.

17. If understanding could not be achieved, a model law would be better than nothing, but the Commission should abide by its mandate and strive for a convention.

18. Mr. ILLESCAS (Spain) said the product of the Commission's work should be a convention because it would have a more unifying effect than a model law. The issue of independent guarantees and stand-by letters of credit had very serious consequences for all parties involved. At present, however, those instruments had different effects, especially for issuers, according to the country of issue. It was desirable that everyone involved in such transactions should know just where they stood, and that could not be provided for under a model law, from which countries would be free to depart. The Working Group had allowed for a reasonable degree of flexibility within the text; however, an excess of flexibility could permit mutually contradictory practices in different countries thus disappointing the expectations with regard to assurance of receipt of payment that the adoption of an international legal instrument would generate. He accordingly supported the option of a convention.

19. Ms. ZHANG Yuejiao (China) said that she inclined to share the opinion of the German delegation. At the same time, her delegation felt that a model law would also be acceptable. She would have difficulty supporting a convention containing final clauses which provided that there should be no reservations.

20. Mr. GAUTHIER (Chairman of the Committee of the Whole) explained that the Commission had before it a draft of final clauses (A/CN.9/411) prepared by the Secretariat, which still had to be discussed. The provision referred to by the Chinese representative was an interpretation of an existing principle of international treaty law that reservations were not allowed unless they were specifically provided for. It remained to be seen whether the Commission would adopt it or not.

21. Mr. ADENSAMER (Austria) considered that the rules should take the form of a convention.

22. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that the text as it stood would provide sufficient flexibility for those countries that would prefer a model law if it were adopted as a convention.

23. Mr. VASSEUR (Observer for Monaco), referring to the draft final clause ruling out the possibility of making reservations, said that, though that clause had not yet been adopted, he understood that there was not much chance of its being modified. Other recent UNCITRAL texts had had similar clauses. It was therefore not possible to proceed on the assumption that if the text took the form of a convention, States preferring the model law form would be able to make reservations.

24. Ms. ASTOLA (Finland) said that Finland had always been in favour of a convention. Despite the danger that it might not be ratified, a convention was still preferable to a model law.

25. Ms. JASZCZYNSKA (Poland) said that Poland was in favour of a convention.

26. Mr. EDWARDS (Australia) said he was in favour of the Working Group's recommendation for a convention. A model law would result in a large number of differences between national laws and would not contribute to harmonization. The most important thing was to achieve real certainty on key issues, a certainty that did not at present exist.

27. Mr. FAYERS (United Kingdom) said that the United Kingdom would have preferred a model law, but had been persuaded by the argument that a convention would promote the harmonization of international banking practices. Though the freedom allowed by a model law might enable it to win greater acceptance, the text as it stood offered a great deal of flexibility.

28. Mr. OGARRIO (Mexico) and Mr. LAMBERTZ (Observer for Sweden) expressed their support for a convention.

29. Mr. GAUTHIER (Chairman of the Committee of the Whole) took it that the Commission agreed that the text should take the form of a convention.

30. Mr. MARKUS (Observer for Switzerland) said that paragraph (1)(b) should be deleted since it added nothing to the text and might lead to difficulties in practice. The purpose of paragraph (1)(b) was to extend the international field of application of the Convention, but it did not in fact do so, because it had exactly the same connecting factor as paragraph (1)(a). In his view, it would make no difference whether paragraph (1)(b) were deleted or not, except in the case of a choice of law, but in that case it would be more appropriate and simple to add an opt-in clause to the already existing opt-out clause.

31. Mr. CHOUKRI SBAI (Observer for Morocco) said that paragraph (1)(b) was an important provision as it dealt with the scope of the Convention, the aim of which was to harmonize international trade law. As the phrase "unless the undertaking excludes the application of the Convention" appeared to make it possible for parties to circumvent the terms of the Convention, he proposed its deletion.

32. Ms. CZERWENKA (Germany) supported the suggestion made by the observer for Switzerland. When the issue of reservations to the Convention came to be discussed, it might be necessary to refer to paragraph (1)(b) if that article were left as it stood. What seemed a perfectly straightforward matter might become much more complicated if the Commission later decided to allow

reservations. For the sake of simplicity, it would therefore be preferable to delete paragraph (1)(b).

33. Mr. FAYERS (United Kingdom) said that in his view, paragraph (1)(b) was intended to and did in fact add something to paragraph (1)(a). Indeed those who had drafted the Vienna Sales Convention had come to the conclusion that a similar provision was necessary. However, it might nevertheless be preferable to delete paragraph (1)(b), because it merely stated what the judge would do in any case. If it were retained, it would be necessary to consider carefully the wording in paragraph (3).

34. Mr. HERRMANN (Secretary of the Commission) said that the main reason given for deleting paragraph (1)(b) was that it simply stated what happened in any case. But the fact that a provision was redundant had not in the past prevented the Commission from including it. What might be self-evident for some people was not necessarily self-evident for everybody. Moreover, leaving something out because it was self-evident might lead people to draw the wrong conclusions. In contrast to the Vienna Sales Convention, the present draft Convention contained a rule on conflict of laws. The provision in question did not state what rule of private international law led to the application of the law of a Contracting State. The Convention might apply as a result of a positive choice of law. He observed that the application of paragraph (1)(b) had a much narrower scope in practice than the corresponding provision in the Sales Convention owing to the conflict of laws rule in article 21. But despite its more limited practical application, it would be wrong to conclude that it had no effect at all.

35. Mr. GAUTHIER (Chairman of the Committee of the Whole), seeing no further support for the suggestion made by the observer for Switzerland, took it that the Commission wished to retain the text as it stood.

*The meeting was suspended at 3.25 p.m.  
and resumed at 3.50 p.m.*

#### Paragraph 2

36. Mr. GAUTHIER (Chairman of the Committee of the Whole), introducing article 1(2), said that the Working Group had explored several approaches concerning what might be called an opting-in type of provision for commercial letters of credit, but had eventually focused on a way of bridging the differences between independent guarantees and stand-by letters of credit and developed a set of uniform rules that would cover both fields. Basically, the present text stipulated that if those using letters of credit other than stand-by letters of credit wanted the Convention to apply, they must say so.

37. Mr. VELEZ-RODRIGUEZ (Observer for the International Chamber of Commerce) said that, in the view of his organization, articles 1(2) and 20 constituted a threat to the stability of well-established international practices. Bank guarantees and stand-by letters of credit were contracts between issuers and beneficiaries that were linked to, but independent of, contracts between applicants and beneficiaries. Such instruments functioned relatively uniformly and smoothly throughout the world, despite the absence of comparable statutory rules in many countries. International practice was reflected in existing ICC rules such as the Uniform Customs and Practice for Documentary Credits (UCP) and the Uniform Rules for Demand Guarantees (URDG). By adopting minimally acceptable rules, the draft Convention failed to add anything to URDG or UCP practices except in the case of fraud and provisional court measures. Indeed, by interfering with well-established international practice through the opting-in provision for documentary letters of credit (article 1, paragraph (2)), the text gave rise to serious concern for various reasons. Firstly, under

article 2, paragraph (1), only undertakings payable either upon simple demand or upon presentation of other documents were subject to the draft Convention, whereas in practice many undertakings were payable upon presentation of a demand together with other specific documents. Secondly, article 8, paragraph (2), could affect revocable as well as irrevocable undertakings, whereas international practice allowed a revocable undertaking to be amended up to the moment at which the beneficiary made a demand. Thirdly, references in the draft Convention to the "principal/applicant" implied that undertakings were in certain respects ancillary to acts or omissions of the applicant, while international practice was founded on complete independence, subject only to the principle *fraus omnia corrumpit*. Fourthly, according to international practice, all terms and conditions of an undertaking had to be embodied in the instrument itself or in any formal amendments thereof, but the draft Convention stated at several points that "the guarantor/issuer and beneficiary may agree elsewhere". Fifthly, the ban on "eternal" undertakings in article 12, paragraph (c), did not conform with international practice, which in some cases allowed the absence of a termination date. Lastly, under certain circumstances specified in article 19, paragraph (1), the issuer was obliged not to honour a demand made despite the fact that international practice allowed the bank discretion to honour its commitment for its own reasons. Moreover, in the case of alleged fraud in the underlying transaction, an issuer having contractual relations with both the applicant and the beneficiary must, in international practice, remain neutral, in contrast to article 19 (1)(b)(ii) of the draft Convention. He concluded by asking the Commission to draw the consequences from his comments and delete article 1(2).

38. Ms. CZERWENKA (Germany) said that her delegation would also favour deleting article 1, paragraph (2). It dealt with a situation where the Convention usually did not apply but parties to an undertaking decided it should. That was outside the scope of application of the Convention and therefore should not be dealt with in the text. Furthermore, the paragraph gave the false impression that the Convention dealt with something other than the undertakings defined in article 2.

39. If the Commission wished to retain the text, it should be redrafted. Either paragraph (1) should state that the Convention applied to stand-by letters of credit, but that other instruments could be opted in as well, or it should state that the Convention applied also to international letters of credit other than those undertakings referred to in article 2.

40. Mr. KOZOLCHYK (United States of America) said that there was no real inconsistency between the Uniform Customs and Practice for Documentary Credits (UCP) and paragraph (2). The rules were not meant to contradict anything in UCP, but rather to supplement it with provisions not covered by it because of its nature. Being customary rules, UCP could not tell a bank as of which moment its own law required it to be bound by its promise. In many countries where UCP had been adopted, that could be any one of several different moments in time under local law, and UCP could do nothing about it because UCP could not change local law. The Convention could, however, and it did so in a manner consistent with the spirit of the institution.

41. If the basic premise was that the Convention set forth rules of traffic and remedial rules which were not found in UCP, what was wrong with combining them? There might be transactions that had both a UCP letter of credit and a bank guarantee or stand-by letter of credit covered by the Convention and which stated that the Convention applied. In such cases, two different laws would have to be applied for each part of the transaction, and none of the remedies in the Convention, consistent though they were with UCP part of the transaction, would be applicable.



42. Mr. MARKUS (Observer for Switzerland) said that he also favoured deleting paragraph (2), for three reasons. First of all, in drafting the Convention, the Working Group had concentrated on stand-by letters of credit and bank guarantees, and he doubted that commercial letters of credit had been sufficiently considered. Secondly, the opting-in clause was of a somewhat uncertain legal nature. Thirdly, the notion of "letter of credit" itself was quite unclear, as it was never defined in the Convention. It could be understood very differently in different countries, raising uncertainty as to the entire scope of application of the Convention.

43. Mr. SHISHIDO (Japan) also felt that the paragraph should be deleted, not because Japan would find it difficult to include commercial letters of credit in the Convention, but because of the problem of drafting. Since there was no definition of letters of credit, it was not clear which letters of credit could be opted in. In any case, there was no need for the paragraph to include commercial letters of credit, as article 2 did not exclude such letters from the definition of "undertaking" and, under the rule of party autonomy, any of the Convention's provisions could be applied to them.

44. Mr. FAYERS (United Kingdom) said that the banks in his country apparently saw no objection to having a provision such as paragraph (2), which would provide their customers with that option if that was what they wanted. The Convention and UCP were complementary, although some of the provisions of the former were inconsistent with the latter. If the parties were to apply the Convention to their letters of credit, that would entail considerable expense in consulting lawyers on a number of difficult questions. However, he saw no reason in principle why the facility should not be offered to people wishing to contract into the Convention, and he had no objection to retaining the provision. Just because it was not necessary to state something in law did not mean it should not be stated.

45. If the provision were deleted, however, under his country's law it would be possible for the parties to so construct their commercial letters of credit that the provisions of the Convention, in whole or in part, would apply to them. That option—"in whole or in part"—should be available to the parties, and was even more important if some of the provisions were not consistent with UCP.

46. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that paragraph (2) broadened the scope of application of the Convention and was misleading. It should be deleted.

47. Mr. VASSEUR (Observer for Monaco) said that the Banking Federation of the European Union had been greatly surprised by paragraph (2), and had not seen it as complementing UCP. He asked how anyone could think that banks throughout the world which had adopted UCP either through banking associations or individually would also want to apply the rules of the Convention. The paragraph was causing some consternation for almost all banks, and none of the associations within the Federation had been in favour of it.

48. Mr. KOZOLCHYK (United States of America) said it was difficult to imagine how anyone could oppose the idea of allowing a bank to issue a commercial letter of credit subject to the Convention or why anyone should be afraid to allow the parties to choose to do so. The difficulties which had been raised with respect to paragraph (2) concerned, rather, its formulation, meaning and clarity. The text represented a necessary compromise, because it had proved impossible to define a stand-by letter of credit. Another solution would be to take the opposite approach and expand the scope of the Convention to include commercial letters of credit, allowing the parties to opt out. For commercial letters of credit in the international sphere, there were many advantages to allowing the optional application of the Convention.

It provided certainty of a legal sort, which could not be provided in rules, about when the undertaking was effective and the meaning of definitions. It provided definitive rules for the first time of an enlightened and progressive nature on the assignment of proceeds—an issue which UCP did not and could not cover, because it was a matter for law and not for practice—and on fraud and injunctions.

49. Fraud increasingly dominated the field of commercial and stand-by letters of credit. That would have an impact on applications for extraordinary relief, as to which there was neither an international regime nor international harmony, with respect either to the rules to be applied or to the standard to be used. In that regard, the Convention offered a useful safe harbour for issuers of international letters of credit as well as beneficiaries and applicants, enabling them to know what the regime or standard would be with respect to fraud and extraordinary or injunctive relief.

50. The Convention further provided clear rules on the legal effect of transfer and on set-off and choice of law, which could not be provided by any system of private rules. There was no competition between the Convention and any private regime of rules: the provisions themselves were not in conflict, and they allowed enough flexibility so that the parties could choose to opt out; if there were a conflict, a UCP rule would take precedence over the rule of the Convention. There was nothing in the Convention which contradicted sound banking practice, and the United States banking community, which favoured the inclusion of the provision as at present drafted, felt that it would actually help to promote sound banking practice.

51. As to whether the existence of an international legal regime supplementing private rules of practice would defeat the aim of facilitating trade, his country's experience was that, where there was an express provision in positive law on letters of credit, which supplemented rules of practice such as UCP, that had an enormous positive effect on the willingness of lawyers and courts to encourage the use of commercial as well as stand-by letters of credit and had provided additional certainty. Many of the arguments put forward against specific provisions of the Convention in relation to commercial letters of credit would be equally valid in relation to guarantees and stand-by letters of credit and would imply that the Convention should not be adopted at all for any instrument. That would be true as well under the Uniform Rules for Demand Guarantees (URDG), with respect to guarantees, and under UCP, with respect to stand-by letters of credit.

52. His delegation could agree to a provision which dropped any reference to stand-by letters of credit and indicated that the parties could adopt the Convention with regard to any independent international undertaking, which might avoid some of the problems of definition. But if felt that the Convention should be available for parties in an international commercial transaction and that the text should say so. He asked whether the Secretariat felt the provision was unnecessary.

53. Mr. ILLESCAS (Spain) said he saw a great deal of merit in the comments by the representative of the United States of America. Situations did indeed arise in which a letter of credit was backed up by a counter letter of credit, or by a guarantee of due performance for a commercial letter of credit. In such situations, submitting a commercial letter of credit to a different rule from that governing a letter of credit or guarantee on first demand would be a complicated process, which would be at variance with the Convention's objective of achieving uniformity. As drafted, paragraph (2), rather than helping to resolve the conflict, contributed to the confusion through its specific reference to international letters of credit, which were governed by the UCP. The solution might be to find another term which would have the same

scope. It must be clear that parties could submit letters of credit other than stand-by letters of credit to the rule if they wished.

54. Mr. AL-NASSER (Saudi Arabia) said that his country's banks and chambers of commerce, had discussed paragraph (2) and had concluded that it was ambiguous; some had even thought that it provided a choice between applying the rules of the International Chamber of Commerce and applying those of the Convention. Like the representative of Spain, he believed the paragraph should be reworded in order to dispel its ambiguity. Its effect should be to refer only to documentary credits. In the absence of satisfactory new wording, the paragraph should be deleted.

55. Mr. LAMBERTZ (Observer for Sweden) said it seemed the general view that a bank should be able to issue a guarantee or a stand-by letter of credit governed by the Convention, and that the Convention should say so expressly—not because that was necessary, but because it would be useful. If the present wording was misleading, an acceptable solution might be to adopt the suggestion made by Germany to replace the reference to an international letter of credit other than a stand-by letter of credit by a reference to all undertakings not covered by article 2. Paragraph (2) would then read along the following lines: "This Convention applies also to undertakings other than those referred to in article 2 if they expressly state that they are subject to the Convention".

56. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the expression "international letter of credit other than a stand-by letter of credit" had been adopted by the Working Group as being the only alternative to the term "undertaking" itself. If the German suggestion was adopted, the text would become meaningless, since an "undertaking" was something defined in article 2, and therefore the "undertaking" in article 1(2)—in effect an undertaking "other than an undertaking"—would not be an undertaking within the meaning of the Convention.

57. Ms. ZHANG Yuejiao (China) was in favour of keeping paragraph (2), which had the virtue of flexibility.

58. Ms. BAZAROVA (Russian Federation) said that paragraph (2) aimed at permitting issuers of commercial letters of credit to apply the Convention to those instruments. She therefore favoured its inclusion, although the text could be worded more clearly. She endorsed the observations of Spain and Saudi Arabia on that point.

59. Ms. ASTOLA (Finland) said that her delegation could accept the article with or without paragraph (2). If it was retained it might usefully be redrafted. She found merit in the German suggestion, which as she understood it, was that the paragraph would refer to an international letter of credit other than that defined in article 2, not that it would refer to undertakings other than those defined in the Convention. A simple alternative would be to say that the Convention applied also to a commercial letter of credit if the document so stated. That would avoid the problems raised by linking paragraph (2) to article 2.

60. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted the general agreement that paragraph (2) was acceptable in its principle—namely, that the Convention could be applied to commercial letters of credit by means of a stipulation in the instrument to that effect—as well as the idea that its text should be clarified. As to the exact wording, the approach suggested by the representative of Germany was to speak of an international letter of credit other than an undertaking as defined in article 2. Unless he heard any objection, he would take it that the Commission referred the paragraph to the drafting group on that understanding.

61. *It was so agreed.*

*The meeting rose at 5.05 p.m.*

### Summary record of the 549th meeting

Wednesday, 3 May 1995, at 9.30 a.m.

[A/CN.9/SR.549]

*Chairman:* Mr. GOH (Singapore)

*Chairman of the Committee of the Whole:* Mr. GAUTHIER (Canada)

*The meeting was called to order at 9.35 a.m.*

#### DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (*continued*) (A/CN.9/405, A/CN.9/408, A/CN.9/411)

##### *Article 1 (continued) (A/CN.9/408, annex)*

1. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that paragraph (3) of article 1 was intended to indicate that the two provisions on conflict of laws would apply even if the international undertaking was not covered by paragraph (1).

2. Mr. EDWARDS (Australia) said his delegation would prefer the reader of article 1 to have his attention immediately drawn to the fact that exclusion of the application of the Convention could not apply to the choice of law regime referred to in articles 21 and 22. That should be made clear in paragraph (1).

3. Mr. SHISHIDO (Japan) asked whether the internationality of the undertakings referred to in paragraph (3) was the same as that defined by article 4. He also wondered whether an international letter of credit other than a stand-by letter of credit, as referred to in paragraph (2), was also included in the undertakings referred to in paragraph (3).

4. Mr. HERRMANN (Secretary of the Commission) said that the term "international" would have to be understood as defined in article 4. But whether that was the correct definition with respect to the scope of application of articles 21 and 22 was another matter. The question of choosing between the laws of different States arose in a general international context, for which the definition in article 4 might be too narrow. If so, the remedy would be to include an appropriate definition in articles 21 and 22. Paragraph (3) as at present drafted was a negative rule; the language

could alternatively be drafted in positive terms by stating that the rule of article 1, paragraph (1), defining the scope of application applied only to articles 2 to 20.

5. As to the second question raised by Japan, the undertakings to which article 1, paragraph (3), and all other provisions of the Convention applied were those defined in article 2. It had been specifically decided that article 2 should not include commercial letters of credit. The term "undertaking" as used anywhere in the Convention, therefore, did not as such apply to them. The provisions were, however, drafted in such a way that they could be applied to commercial letters of credit if the parties so desired. It was then up to them to opt in, under article 1, paragraph (2). If it was wished to have a Convention that applied specifically to such instruments from the outset, the text would have to be redrafted.

6. Mr. SHIMIZU (Japan) said he could not understand the logical basis for the application of the Convention. It was designed to apply to the undertakings defined in article 2, but could be extended to other instruments not covered by that article. For the undertakings defined in article 2 to be governed by the Convention, it would not suffice for the parties to state that they wanted it to apply, because the conditions set forth in paragraph (1)(a) and (b) would also have to be met. With commercial or other letters of credit, on the other hand, it would suffice for the parties to state expressly that they wished for the application of the Convention; the conditions in paragraph (1)(a) and (b) would not have to be met.

7. Mr. HERRMANN (Secretary of the Commission) said that it would be impossible to specify all types of instruments that could possibly be brought under the umbrella of the Convention by choice of the parties, as the Commission did not even know all the types in existence. Whatever types of instruments might be mentioned, that would not mean that other types could not be opted in. When the parties chose to opt in, that was a matter for them. There was no reason why the conditions in paragraph (1)(a) and (b) should be met if the parties did not think it necessary. That was only necessary if the Convention was to apply automatically under article 1, paragraph (1).

8. Ms. CZERWENKA (Germany) said she was in favour of redrafting the article, as paragraph (3) sounded adversarial in its present wording. It would be preferable to have a positive wording regarding the scope of application of articles 21 and 22. Thus paragraph (1) might begin "This Convention applies to an international undertaking referred to in article 2; articles 5 to 20, however, only:". Subparagraphs (a) and (b) would follow, and paragraph (3) would then be deleted. As to the term "international", it would cause problems to have two definitions. The only definition should be the one in article 4, which should also apply with regard to the application of articles 21 and 22.

9. Mr. FAYERS (United Kingdom) said that article 1, paragraph (3), was intended to let the judge know which private international law principles he should apply when paragraph (1)(b) was at issue. Paragraph (3) could be redrafted to state that for the purposes of paragraph (1)(b), the rules of private international law would be those set out in articles 21 and 22; it was not necessary to continue with the phrase "irrespective of whether or not in any given case the Convention applies pursuant to paragraph (1) of this article".

10. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that paragraph (3) was in fact intended to be broader than the representative of the United Kingdom had indicated. The text was not just a further explanation of how to understand paragraph (1)(b).

11. Mr. HERRMANN (Secretary of the Commission) said that articles 21 and 22 were like a second Convention; they constituted an independent set of rules for a court in a Contracting State if the question of conflict of laws arose. Where the place of business of the guarantor/issuer was not in a Contracting State, but there was an international context, it was necessary to know which law to apply. In article 22, there was a positive and binding rule of private international law which must be applied by the court in a Contracting State and was also binding if it led to the law of a non-Contracting State.

12. Mr. CHOUKRI SBAI (Observer for Morocco) proposed the following wording for the text: "Notwithstanding the rules of the Convention, the provisions of articles 21 and 22 apply to international undertakings as defined in article 2."

13. Mr. GAUTHIER (Chairman of the Committee of the Whole) said the Commission did not seem to be opposed to the objective of paragraph (3) but to feel that it could be stated more clearly. It might be that the text could not be significantly altered without modifying the principle behind it. However, he took it that the Commission wished to record its agreement as to the substance and to ask the drafting group to explore ways of improving the text.

14. *It was so decided.*

*Article 2 (A/CN.9/408, annex)*

15. Mr. GAUTHIER (Chairman of the Committee of the Whole) called for comments on paragraph (1).

16. Mr. HERRMANN (Secretary of the Commission) drew attention to the fact that the phrase "or upon presentation of other documents" in the fourth line had been added fairly recently in order to make it clear that the demand must itself take the form of a document. The Working Group had not wanted an instrument that would allow an oral demand to suffice. The question of oral demands had been discussed at an early stage in the work, and it had been suggested that the text should include an explicit rule declaring an oral demand alone to be invalid. According to the current draft, an instrument allowing an oral demand would not fall within the Convention's scope of application. Referring them to a query raised by the ICC, he said that the common case of a demand accompanied by some documents could be clearly covered, if there was a need for more clarity, by replacing the word "other" by the word "additional".

17. Mr. CHOUKRI SBAI (Observer for Morocco) suggested, firstly, that in view of its length and range of content, article 2 should be split into two separate articles, the first containing the definition of an undertaking, as in the present paragraph (1), and the second dealing with questions of substance and payment. It would then be possible to expand the definition of an undertaking. Secondly, he proposed that the word "immediately" be added after the words "to pay" in the third line of paragraph (1). Moreover, since the phrase "upon simple demand" might be ambiguous, the demand should be considered valid only if submitted within the period laid down in article 12(c), that is to say, six years. In other words, payment should be immediate if the demand was submitted in time. Thirdly, he suggested adding an extra paragraph to the effect that the objective of the undertaking must be defined; the beneficiary could have several objectives and aims, whereas a letter of credit was issued for a single objective, which should therefore be stated in the guarantee, in order to avoid disputes or conflicts.

18. Mr. FAYERS (United Kingdom) said that although it seemed that the United Kingdom and the ICC were alone in interpreting the phrase "upon simple demand or upon presentation

of other documents" as not including demands needing to be accompanied by other documents, he would like the drafting group to be authorized to add words that would make it clear that such documents were in fact included.

19. Mr. STOUFFLET (France) said that article 2, paragraph (1), listed certain categories of institutions or persons able to issue an independent commitment. Although the Secretary had assured the Commission that the listing did not carry any implication in regard to capacity or authority to give such an independent commitment, he felt that it would be preferable to insert the words "authorized to do so according to the law to which it or he is subject" after the words "other institution or person ('guarantor/issuer')".

20. Mr. AL-NASSER (Saudi Arabia) said that representatives of Saudi Arabian banks had misgivings concerning the institutions authorized to issue independent commitments. He therefore supported the amendment proposed by the representative of France.

21. Ms. FENG Aimin (China) expressed her agreement with the explanation offered by the Secretary, but asked for clarification with reference to article 19.

22. Mr. SHISHIDO (Japan) asked whether or not article 2 excluded commercial letters of credit. Secondly, he wondered whether it would be possible to delete the words "usually referred to as an independent guarantee or as a stand-by letter of credit", since that terminology did not exist in Japanese law and would cause problems.

23. Mr. CHOUKRI SBAI (Observer for Morocco) said that a proper definition was very important for the independence of the commitment. It had to be independent of the link between the principal and the bank or guarantor as well as of that between the principal and the beneficiary. To ensure that the guarantee led to immediate payment of a certain sum to satisfy the objective in question, there must be no sign of any linkage.

24. Mr. KOZOLCHYK (United States of America), referring to the question of an oral demand, said that two possible situations could arise. Firstly, an oral demand might be expressly required, but that happened so rarely that there was no need for the Convention to prohibit such an undertaking. Secondly, the wording of an undertaking might be ambiguous, calling only for a "demand" without specifying that it needed to be in writing. In his view, however, that possibility was covered by article 15 and therefore did not need to be addressed. He expressed his support for the request made by the representative of the United Kingdom that the drafting group should be asked to find a form of words to cover the apparent gap created when a demand was accompanied by additional documents. As for the proposal put forward by the representatives of France and Saudi Arabia, he agreed in principle with their position, but considered that the question should be approached in such a way that it did not give rise to a possible defence based on *ultra vires* or lack of authority by the issuer. The wording proposed by the representative of France might allow room for such a defence. Should the Commission decide to deal with the question, it might be preferable to include an affirmative statement to the effect that the Convention itself did not give the authority to issue such an undertaking.

*The meeting was suspended at 10.50 a.m.  
and resumed at 11.20 a.m.*

25. Mr. GAUTHIER (Chairman of the Committee of the Whole), referring to the question of whether to include wording regarding capacity to enter into the commitments covered by the text, noted that some considered such wording would be acceptable as long as it did not give rise to a defence of *ultra vires*. In his view, the defence that someone was incapable at law always

existed and the text did not grant or deny capacity. However, if wording on capacity was to be included, the question would have to be discussed in greater detail. He asked members to give careful thought to that matter before amending the text.

26. A suggestion had been made to include a description of the purpose for which the instrument was issued. That possibility had been examined by the Working Group, but had been considered divisive and unlikely to receive support.

27. Turning to the proposed amendments, he said that on the question of "simple demand" it was not the Working Group's intention to exclude demands accompanied by documents. It seemed, however, that it was possible to construe the present drafting, in English at least, as meaning that such a demand would not be an undertaking within the terms of the Convention. He suggested that the matter be referred to the drafting group to ensure that that risk was eliminated.

28. *It was so agreed.*

29. Mr. GAUTHIER (Chairman of the Committee of the Whole) drew attention to the point raised concerning oral demands. His understanding was that they were not covered by the Convention. After inviting comment, he noted that there did not seem to be any support for including a provision in the Convention to regulate such demands.

30. After inviting comment, he noted that there did not seem to be any support for the proposal to include the word "immediately" before "pay to the beneficiary".

31. After inviting comment, he noted that there did not seem to be any support for the proposal to include, after the word "person", the words "having the legal capacity in accordance with the law of the country applicable to that person".

32. After inviting comment, he noted that there did not seem to be any support for the proposal to introduce a term describing the purpose for which the instrument was issued.

33. On the question of whether commercial letters of credit were covered by article 2, he understood that, given the context of the whole Convention—including article 1(2)—and the words "usually referred to as an independent guarantee or as a stand-by letter of credit", commercial letters of credit were not automatically covered. For them to be covered, the parties would have to make the fact explicit in the undertaking.

34. As to the suggestion that the terms "independent guarantee" or "stand-by letter of credit" might not be clear because they were not widely used in certain market-places, he pointed out that was why the word "usually" had been included.

35. He asked whether there was support for the deletion of the words "usually referred to as an independent guarantee or as a stand-by letter of credit".

36. Mr. CHOUKRI SBAI (Observer for Morocco) said that since the independence of the undertaking was defined in article 3, there should be no problem with the wording of article 2(1).

37. Mr. SHISHIDO (Japan) said that his delegation's problem was not with the terms "independent guarantee" or "stand-by letter of credit", but with the words "usually referred to as". However, Japanese legal requirements would be met if the issuer were required to use the words "independent guarantee" or "stand-by letter of credit".

38. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that his country too would have problems with the word "usually",

which was not a legal term. Perhaps the wording "an undertaking is an independent commitment referring to an independent guarantee or stand-by letter of credit" might meet the case.

39. Mr. GAUTHIER (Chairman of the Committee of the Whole) observed that the reason for the inclusion by the Working Group of the words "usually referred to as" was that at one time the words "in the form of a bank guarantee or stand-by letter of credit" had been considered and rejected, because it had been realized that there was no agreed form used in banking circles. The Working Group had then looked at the concept known as the "safe haven", which meant that to be covered by the Convention the instrument would have to be formally entitled "independent guarantee" or "stand-by letter of credit". That solution has been considered unsatisfactory by the Working Group because again there was no formula in widespread use. The word "usually" had therefore been included to take account of market practice.

40. Mr. FAYERS (United Kingdom) proposed that in article 2, paragraph (1), the words "usually referred to as" be replaced by "commonly known as".

41. Mr. CHOUKRI SBAI (Observer for Morocco) pointed out that the use of the terms "independent guarantee" and "stand-by letter of credit" appeared in the title of the draft Convention. The way those terms were used, moreover, varied from country to country. Hence, the specific reference to them in paragraph (1) of article 2 was both superfluous and open to ambiguous interpretation. He therefore suggested that the words "usually referred to as an independent guarantee or as a stand-by letter of credit" be omitted.

42. Ms. BAZAROVA (Russian Federation) said that the word "usually" had a clear meaning in the Russian language. She felt that its deletion from article 2, paragraph (1), would avoid the problem of different usages of the terms in some countries. It was standard practice in the Russian Federation to refer to letters of credit.

43. Mr. GAUTHIER (Chairman of the Committee of the Whole) warned that, if the adverb "usually" were deleted, the verb "referred to" could imply that the undertaking necessarily bore a specific heading. He suggested that the Commission might consider adopting the expression "commonly known as", as proposed by the United Kingdom representative.

44. Mr. EDWARDS (Australia) said that, while he could go along with the expression "commonly known as", it implied wide acceptance, which was not the case in some civil-law countries. He therefore suggested that "known in some legal systems as" might be a suitable alternative.

45. Ms. ZHANG Yuejiao (China) considered that, because the expression "commonly known as" was capable of different interpretations, it would be difficult to make a judgement on the matter.

46. Mr. FAYERS (United Kingdom), referring to the remarks made by the representative of Australia, said that, since an under-

taking was commonly known in the market as an independent guarantee or a stand-by letter of credit, perhaps the phrase "in the ordinary course of business known as" might be a more appropriate formulation.

47. Mr. ILLESCAS (Spain) said that, in the Spanish version of article 2, paragraph (1), the phrase "*conocida en la práctica como*" ("known in practice as"), was used to render the English words "usually referred to". It had the dual merit of avoiding the problematic adverb "usually" and of referring to the context of business dealings in a general sense. The English phrasing could possibly be brought into line with the Spanish text at that point.

48. Mr. CHOUKRI SBAI (Observer for Morocco) wondered whether the problem presented by the word "usually" might be overcome by its inclusion in a footnote or square brackets.

49. Mr. LAMBERTZ (Observer for Sweden) said that he favoured the wording "in the ordinary course of business", suggested by the United Kingdom representative, since it made a reference to market practice while avoiding the definition of an absolute rule. He felt that the matter might be left to the drafting group.

50. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, on the basis of past experience, he would prefer the Commission to find an acceptable solution itself rather than refer the matter to the drafting group.

51. Mr. AL-ZEID (Observer for Kuwait) said that the proposed replacement of "usually referred to as" by "commonly known as" was not fully satisfactory as far as the Arabic version was concerned. He agreed with the representative of Japan and the observer for Morocco that the phrase "usually referred to as ... credit" was both superfluous and potentially confusing. If that phrase were deleted, the definition of undertaking in article 2, paragraph (1), would remain sufficiently clear and encompass other commercial letters of credit.

52. Mr. SHISHIDO (Japan), while expressing a preference for the expression "in the ordinary course of business", said that the addition of a phrase that defined the area of jurisdiction applicable would render the formulation more acceptable in Japanese law.

53. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the Commission was concerned rather with the concept of a widely-shared practice in the international marketplace. Attempts to narrow the definition to the practice of a particular group, such as lawyers or other specialists, should be avoided.

54. Mr. STOUFFLET (France) said that reference to international practice in a text for application at the level of States was inadvisable. The term "demand guarantee", which was employed in uniform rules drawn up by the ICC, a body recognized as a qualified interpreter of practice, could perhaps be added to the terms "independent guarantee" and "stand-by letter of credit".

*The meeting rose at 12.30 p.m.*

## Summary record of the 550th meeting

Wednesday, 3 May 1995, at 2 p.m.

[A/CN.9/SR.550]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

The meeting was called to order at 2.05 p.m.

### DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT *(continued)* (A/CN.9/405, A/CN.9/408 and A/CN.9/411)

#### Article 2 *(continued)* (A/CN.9/408, annex)

1. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted that there was support for the replacement of the phrase "usually referred to as an independent guarantee or as a stand-by letter of credit" in paragraph (1) by the phrase "known in international practice as an independent guarantee or stand-by letter of credit" and for the retention of paragraphs (2), (3) and (4) as drafted.

2. *It was so agreed.*

#### Article 3 (A/CN.9/408, annex)

3. Mr. GAUTHIER (Chairman of the Committee of the Whole) invited the Commission to consider article 3, which described the circumstances under which an undertaking could be considered as independent.

4. Mr. VASSEUR (Observer for Monaco) said he thought that there was an inconsistency between the provision in article 3 that "an undertaking is independent where the guarantor/issuer's obligation to the beneficiary is not subject to the existence or validity of an underlying transaction" and the provision in paragraph (2) of article 19, which mentioned "types of situations in which a demand has no conceivable basis" and quoted as an example in its subparagraph (b) a situation in which "the underlying obligation of the principal/applicant has been declared invalid by a court".

5. Mr. FAYERS (United Kingdom) shared that misgiving and suggested that the difficulty might be solved by adding the words "and subject to article 19" before the words "an undertaking is independent" in the first sentence of the article. That would indicate that articles 3 and 19 were related.

6. Mr. BYRNE (United States of America) said that he appreciated the issue raised by the observer for Monaco but thought that the purpose of article 3 was to define the notion of independence in order to determine the scope of the Convention. For that purpose, even though an independent undertaking within the Convention existed, it might conceivably be declared pursuant to article 19 to be an independent obligation entailing no obligation to pay because of the presence of fraud. The suggestion made by the United Kingdom would mean that an independent guarantee tainted by fraud would be outside the scope of the Convention, which would be inadvisable, since the purpose of article 19 was to provide a system of regulation where fraud was alleged.

7. Mr. SHISHIDO (Japan) supported the proposal made by the United Kingdom.

8. Mr. HERRMANN (Secretary of the Commission) said that the purpose of article 3 was to distinguish between those instruments in respect of which a payment obligation under a guarantee depended directly on the validity of an underlying obligation and those in which it did not. However, that should not be construed as implying that an underlying obligation was irrelevant. For instance, a positive statement of non-performance by the principal/applicant would clearly be relevant.

9. However, inclusion of the words "subject to" would not clarify the meaning, but might lead to confusion. The text as drafted introduced important progress by severing a direct link and making it indirect and documentary.

10. Mr. FAYERS (United Kingdom) withdrew his proposal to add the words "subject to" in the first line of the article. He thanked the Secretary for his explanations and suggested that the phrase "is not subject to" in the second line be replaced by the words "is not dependent upon" and that the words "is not subject" be added before the words "to any term or condition" in the fourth line of the article.

11. Mr. CHOUKRI SBAI (Observer for Morocco) said that the term "subject to" would lead to confusion in Arabic. He would therefore prefer the expression "linked to" or "dependent on". In both French and Arabic, the use of the term "dependent upon", as proposed by the United Kingdom, would be correct.

12. The CHAIRMAN, speaking in his capacity as the representative of Singapore, supported the United Kingdom proposal.

13. Mr. OGARRIO (Mexico) supported the United Kingdom proposal, the Spanish version of which expressed much more clearly the idea explained by the Secretary.

14. Mr. GAUTHIER (Chairman of the Committee of the Whole) asked the Commission whether it wished to accept the amendment proposed by the United Kingdom.

15. *It was so decided.*

#### Article 4 (A/CN.9/408, annex)

16. Mr. MARKUS (Observer for Switzerland) mentioned some concerns that he shared with the Observer for Sweden.

17. Firstly, there was no rule to cover the rare but possible case that the undertaking did not expressly indicate one or more of the places of business involved.

18. Secondly, there was no clarity regarding the case where the undertaking specified an objectively wrong place of business. The question was whether the decisive place of business would be the real place of business or the place of business indicated in the



undertaking, i.e. objectively, the wrong one. If the latter were the case, the parties would be given the possibility of opting-in by indicating an objectively wrong place of business, which was not satisfactory. Opting-in should be allowed exclusively by means of the mechanism mentioned in article 1.

19. Thirdly, since the concept of habitual residence had not been mentioned elsewhere in the draft, it should not be introduced in the context of internationality.

20. He therefore proposed that paragraph (1) be amended to read:

"(1) An undertaking is international if the places of business of any two of the following persons are in different States and if these places are specified in the undertaking: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer."

21. Paragraph (2)(b) should be deleted and the entire paragraph (2) should read:

"(2) If the undertaking lists more than one place of business for a given person, the relevant place of business is that which has the closest relationship to the undertaking."

22. Mr. KOZOLCHYK (United States of America) asked if the term "beneficiary" in paragraph (1) included the transferee. If it did not, it would be necessary to include the transferee as one of the persons whose presence might be relevant to the internationality of an undertaking. He also suggested including the assignee of proceeds because as long as the presence of either one of the parties could lead to a dispute, there would be every reason to apply the Convention.

23. Mr. FAYERS (United Kingdom) asked why the word "confirmer" had been added at the end of paragraph (1). He pointed out that according to article (6)(b), the term "guarantor/issuer" included "counter-guarantor" and "confirmer". Therefore either "counter-guarantor" should be inserted or "confirmer" should be deleted.

24. Mr. GAUTHIER (Chairman of the Committee of the Whole) pointed out that the Working Group on International Contract Practices had referred in paragraphs 92 and 93 of the report on the work of its twenty-second session (A/CN.9/405) to its decision not to mention the place of business of the counter-guarantor but to retain a reference to the confirmer, and referred to the reasons for that decision.

25. Ms. ASTOLA (Finland) said that the amendment proposed by the observer for Switzerland seemed to say more clearly the same as the existing text. It might be the intention of the amendment to state that parties could not invent places of business, which would be a good point, but the existing English text might allow that interpretation. In general, she supported the proposed amendment.

26. Ms. CZERWENKA (Germany) said she was not sure what change was introduced by the proposal. Paragraph (2) of the article provided that the criterion of internationality would be that the undertaking had listed different places of business, but there was no other objective criterion. She asked whether it was the concern of the drafters of the amendment to take into account what would happen if the place of business did not exist in reality, though the proposal did not explicitly address that question.

27. What was needed was a definition of internationality based on very simple criteria to make it possible to know when an

instrument was international and would be covered by the Convention.

28. She thought that an amendment was not justified and preferred retention of the existing wording.

29. Mr. MARKUS (Observer for Switzerland) explained that the very slight change in the order of the wording of paragraph 1 was intended merely to clarify that the text referred to the objectively existing "places of business" of the persons concerned, which might not be obvious from the phrase "as specified in the undertaking".

30. To some extent, he agreed with the remarks made by the representative of Finland but was not sure that "as specified in the undertaking" could be construed in the way the Finnish delegation had suggested.

31. Mr. CHOUKRI SBAI (Observer for Morocco) asked whether it was obligatory to state the place of business or residence in the undertaking and whether there would be a penalty for failing to do so. If it was conceivable that neither place was specified, he suggested that the beginning of the paragraph be amended to read: "An undertaking is international if the places of business of two of the following persons are in different States . . .". It would then be necessary to ascertain the real place of business.

32. Mr. HERRMANN (Secretary of the Commission) said that the wording of paragraph (1) proposed by the representatives for Sweden and Switzerland somewhat resembled that used in the United Nations Sales Convention (1980), which referred to the real place of business. In contrast, a more formalistic approach had been taken in the United Nations Convention on International Bills of Exchange and International Promissory Notes (1988), which referred to the place as specified in the instrument. The proposed amendment lay somewhere between the two and was therefore, in his opinion, inoperable. The scope of application would be determined in two steps, first by inquiring about the real places of business and then by ascertaining whether they corresponded to the places specified in the undertaking. He therefore felt that it would be preferable to leave the paragraph as it stood.

33. Mr. BYRNE (United States of America) said that the Working Group had decided, in the interest of commercial certainty, that it ought to be possible to rely on the face of the instrument. The original wording of the paragraph reflected that requirement.

34. Mr. GAUTHIER (Chairman of the Committee of the Whole) took it that the prevailing view was that the existing structure of the paragraph be maintained.

35. Mr. BYRNE (United States of America) said that the word "confirmer" had been inserted in the list referring to "any two of the following persons" because some delegations thought that otherwise, if the guarantor/issuer was also the confirmer and the two were in different countries, the Convention would not apply. Since there must be more than one category, it would be necessary to insert a reference to such persons as the transferee/second beneficiary, the confirmer and also, in his view, the counter-guarantor.

36. Mr. HERRMANN (Secretary of the Commission) said that two separate issues had been raised. One concerned the time of determination of internationality and the other, raised earlier by the representative of the United Kingdom, concerned the interplay between articles 4 and 6. The former raised a difficult policy issue, namely, whether account should be taken of changes in individual categories, for example, where one person moved outside a given jurisdiction. Should a legal regime apply for some



time prior to a change in the beneficiary or before assignment of proceeds? The important question of the new beneficiary or transferee should be discussed separately.

37. On the second issue, an undertaking was considered to be international if the confirmer alone were in a different State from the other parties, but that did not apply in the case of a counter-guarantor. There was possibly a slight problem in that connection in the interplay between the definitions in articles 4 and 6. The statement in article 6 that "guarantor/issuer" included "counter-guarantor" and "confirmer", could not be interpreted as meaning, for the purposes of article 4, that each term subsumed the other two. It was therefore necessary to insert the term "confirmer" in article 4.

38. Mr. FAYERS (United Kingdom) suggested that article 6(b) should be reworded to read: "guarantor/issuer, otherwise than in paragraph (1) of article 4, includes 'counter-guarantor' and 'confirmer'".

39. Mr. GAUTHIER (Chairman of the Committee of the Whole) took it that there was insufficient support for the inclusion of "transferee" in the list of persons in paragraph 1 of article 4. He asked whether there was any support for including the "assignee of proceeds".

40. Ms. FENG Aimin (China) said that rule 49 of the Uniform Customs and Practice for Documentary Credits (UCP) clearly stated that the assignee's role related to the transfer of proceeds and not to the transfer of rights. The assignee of proceeds should therefore not be included in the list.

41. Mr. KOZOLCHYK (United States of America) said that, although the assignee was not entitled to draw, the UCP rules stated that the rights of the assignee of proceeds were a matter for the law of individual countries. As the purpose of the Convention was to provide a measure of international uniformity and as the assignee of proceeds was mentioned in article 10, it was felt that it should also be included in article 4.

42. The Convention was likely to be particularly useful in dealing with both the transferee and assignee categories in order to ensure greater uniformity where there was a conflict between the laws of different countries. It would not make sense to omit categories because of a misunderstanding of the application of the rules and assignments.

43. Ms. FENG Aimin (China) said that if the transferee, as second beneficiary, were to be omitted, the assignee should also be omitted.

44. Mr. EDWARDS (Australia) said that it would be entirely unacceptable if the contractual basis of a transaction that was not initially international were changed *ex post facto*, merely because the assignee provided an international character.

45. Mr. FAYERS (United Kingdom) said that he shared the doubts of the representatives of China and Australia. He had great difficulty in understanding the practical implications of a provision that allowed an instrument to start life in one category and suddenly change to another.

46. He agreed that the assignee of proceeds should be omitted from the list.

47. Ms. CZERWENKA (Germany) did not seriously object to the inclusion of the transferee in the list of persons in paragraph (1) of article 4. Where an undertaking was transferable, it would probably be necessary to state in the undertaking itself that an

international element might arise, as a result of, say, the nomination of a transferee in a different State.

48. Mr. KOZOLCHYK (United States of America) said that if the internationality of a beneficiary in a transferable stand-by letter of credit were accepted, there was every reason to accept the internationality of the transferee or second beneficiary.

49. The potential of the type of stand-by letter of credit known as "direct pay" for generating an enormous number of assignments had been one of the reasons for including provisions on the assignment of proceeds in the Convention. It was a type of financial obligation payable directly by the principal obligor on presentation of documents and was likely to be used extensively in the international money market. The resultant stream of payment might become effective anywhere in the world within seconds. People therefore needed to be assured that payment of the assignee was guaranteed by a legal regime. It was furthermore implicit in any stand-by letter of credit that the instrument was assignable from the moment of issue.

50. Ms. ASTOLA (Finland) asked whether the place of business of the assignees in question would in that case be mentioned in the undertaking.

51. Mr. BYRNE (United States of America) said that in the course of the transfer of a letter of credit, it was typical banking practice that a new letter of credit was issued to a second beneficiary, constituting in effect a virtually new undertaking. His delegation was not proposing that the first undertaking should retroactively be made international. But, if the second letter of credit, which might either supersede the original or become part of it, were on its face international, it would fall within the scope of the Convention. Similarly, if the document consummating an assignment were on its face international, the assignment and associated rights would also be international and come within the scope of the Convention.

52. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted that there was insufficient support for the inclusion of "assignee" in the list of persons in paragraph (1) of article 4 and for the inclusion of "counter-guarantor" in the list. Lastly, he noted that there was insufficient support for the deletion of "confirmer" from the list.

*The meeting was suspended at 3.35 p.m.  
and resumed at 4 p.m.*

Article 5 (A/CN.9/408, annex)

53. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted that there were no comments on article 5.

Article 6 (A/CN.9/408, annex)

54. Ms. CZERWENKA (Germany) said that the phrase "upon simple demand or upon presentation of other documents" in subparagraph (c) might have to be revised in the light of whatever decision was taken on the same phrase in article 2(1).

55. In subparagraph (f), she suggested that the definition should read "'confirmer' means the person issuing a confirmation", in order to link it more clearly to the definition of "confirmation" in subparagraph (e).

56. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that those two points would be referred to the drafting group.

## Article 7 (A/CN.9/408, annex)

57. Mr. GAUTHIER (Chairman of the Committee of the Whole), introducing the article, said that paragraph (1) was concerned with when and where an undertaking was issued, paragraph (2) with the form in which it should be issued, paragraph (3) with the point of time at which a demand for payment could be made and paragraph (4) with the question of revocability.

58. Mr. AL-NASSER (Saudi Arabia) proposed that the closing phrase of paragraph (1) should be amended to read "leaves the sphere of control of the guarantor/issuer to be transferred to the beneficiary". Without such clarification, the undertaking might be regarded as having been issued even if it had left the sphere of control of the guarantor through theft.

59. Mr. SHISHIDO (Japan) asked whether paragraphs (1) and (2) were mandatory provisions, with the result that the parties could not agree on a different time of issuance and could not issue purely oral undertakings.

60. Mr. HERRMANN (Secretary of the Commission) said that, although both paragraphs (1) and (2) were strictly speaking mandatory, that was not really the point. Paragraph (1) was a definition of the term "issuance"; it was not concerned with the time of effectiveness, which was dealt with in paragraph (3). Paragraph (2) was intended to exclude purely oral undertakings, as had been agreed. It was left to the parties to stipulate a stricter form of undertaking if they wished.

61. Mr. KOZOLCHYK (United States of America) said that, when read in conjunction with paragraph (4), paragraph (1) amounted to more than just a definition. It established a rule as to the time when the undertaking became effective. It was not enough for two of the parties to reach agreement on the matter; all parties involved in the international network of correspondent banking relationships needed to know exactly when liability was incurred, particularly in view of the growing use of electronic communications.

62. Mr. LAMBERTZ (Observer for Sweden), noting that there had been some uncertainty about the precise meaning of "leaves the sphere of control of the guarantor/issuer", gave a hypothetical example. Belgium and Germany were assumed to be Contracting States. A Belgian bank having its only office in Brussels issued a demand guarantee through a German bank in Frankfurt, which was not a branch of the Belgian bank. The Belgian bank sent the documents to the German bank on 1 February, telling it to issue the guarantee on 1 March unless the mandate was withdrawn before that date. The mandate was not withdrawn, and the guarantee was issued in Frankfurt on 1 March, leaving the Belgian bank's sphere of control at that time. As he understood it, that case would not be covered by the Convention, because under article 1 the Convention applied if the place of business of the bank at which the undertaking was issued was in a Contracting State. In his hypothetical example, the Belgian bank had no place of business at which the undertaking was issued.

63. Mr. FAYERS (United Kingdom) said that he did not understand where, in the Swedish representative's hypothetical example, there was a gap in the coverage of the Convention. It seemed to him that the guarantee would have been issued by the German bank on 1 March. What was the relationship between the Belgian bank and the German bank?

64. Mr. LAMBERTZ (Observer for Sweden) said that the German bank was only the advising bank or agent, not the issuing bank.

65. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that if the German bank was merely an agent, and hence merely an extension of the Belgian bank, the answer to the question regarding the time of issuance might be that the undertaking was not issued until such time as the agent released it. The place of issuance might, however, be Brussels, not Frankfurt.

66. Referring to the problem of theft, he noted that the Saudi Arabian representative's concern was that the undertaking should leave the sphere of control of the issuer as a result of a voluntary act on the issuer's part. That concern was not, however, to be met by saying that it left the issuer's sphere of control for transfer to the beneficiary, because it might, before it reached the beneficiary, pass through the hands of an advising bank, a confirming bank, an agent etc. The choice that had been made was that it would then for the purposes of the Convention be regarded as having been issued.

67. Mr. AL-NASSER (Saudi Arabia) suggested that the point might be covered if the text read "issuance of an undertaking occurs when and where the guarantor/issuer sends the undertaking".

68. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the word "send" was not clear, either. In the Swedish representative's example, was the instrument sent when it went from Brussels to Frankfurt, or only when it left Frankfurt? The term "sphere of control" had been preferred by the Working Group to "sphere of operation" on the understanding that an undertaking would leave the issuer's sphere of control only as the result of a voluntary act. If it were removed through an illicit act, it would not be regarded as having left its sphere of control.

69. Mr. ILLESCAS (Spain) said that a problem would arise only if the undertaking were presented for payment. According to article 2, the undertaking was a commitment to pay to the beneficiary. Hence the situation raised by the Saudi Arabian representative could come about only if the instrument were stolen by or on behalf of the beneficiary. If the issuer had not authorized the circulation of the instrument, the beneficiary would be acting fraudulently in presenting it for payment, and the situation would be covered by article 19, no payment being due in the circumstances. The wording used in article 7 thus seemed to him to offer adequate safeguards.

70. Ms. FENG Aimin (China) agreed with the Spanish representative. Under article 4, moreover, the issuer and the beneficiary would probably not be in the same place, so that the likelihood of theft would be small. In any case, under article 7, the bank could simply revoke a stolen guarantee and issue a new one.

71. On the question of the hypothetical example given by the Swedish representative, she agreed with the United Kingdom representative that it was necessary to establish the relationship between the banks. It seemed to her that, after the issuer issued the guarantee, the other party was simply in an advising position, so that no problem could arise.

72. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that it was not being suggested that issuance could occur involuntarily. Rather, there was concern about the wording and its possible interpretation. However, he took it that the Commission agreed as to what was meant by "issuance" and that the current draft of article 7 was acceptable.

## Article 8 (A/CN.9/408, annex)

73. Mr. GAUTHIER (Chairman of the Committee of the Whole) pointed out that in the current and subsequent articles,

references to paragraph (1) of article 7 should be read as references to paragraph (2) of article 7. He invited the Commission to comment on article 8.

74. Ms. CZERWENKA (Germany) said that, for the sake of consistency, the authorization of an amendment by the beneficiary referred to in paragraph (2)(a) should be in the form stipulated in article 7(2) in the same way as the notice of acceptance of an amendment by the beneficiary.

75. The question had been raised by the banking community in her country whether paragraph (2) related to both revocable and irrevocable undertakings. However, it seemed clear that the provisions covered only irrevocable undertakings.

76. Ms. FENG Aimin (China) said that oral amendments should not be permitted, though the article made no provision on that point. On the other hand, the Chinese version made it clear that issuance must be made in tangible form. She asked for clarification of the English version with regard to oral amendments.

77. Mr. KOZOLCHYK (United States of America) said that, under paragraph (2)(b) of article 8, the beneficiary's consent was not required if an amendment consisted "solely of an extension of the validity period of the undertaking", on the assumption that such an extension would invariably be in the interest of the beneficiary. However, that might not always be the case.

78. In stand-by letter of credit practice, a confirming bank might not have agreed to an extension, but the provision as worded did not make it clear whether or not a confirming bank would be bound by the extension. Also, a beneficiary might not want to have an extended credit or an extended bank guarantee.

79. Mr. EDWARDS (Australia) said that the passage at the end of paragraph (2), beginning with the words, "if any amendment does not fall . . .", should perhaps be made into a separate paragraph.

80. Although issuance had been appropriately defined in paragraph (1) of article 7 with regard to an undertaking, it did not seem to have been defined in the context of amendments.

81. He agreed with the representative of the United States on the question of the beneficiary's agreement under paragraph (2)(b).

82. Mr. ILLESCAS (Spain) said that subparagraph (a) as drafted raised many questions. The condition that an amendment should be effective if previously authorized by the beneficiary should be changed to stipulate a previous proposal, suggestion or request by the beneficiary. The mechanism for authorization by the interested parties should also cover conditions for extension of validity.

*The meeting rose at 5.05 p.m.*

## Summary record of the 551st meeting

Thursday, 4 May 1995, at 9.30 a.m.

[A/CN.9/SR.551]

*Chairman:* Mr. GOH (Singapore)

*Chairman of the Committee of the Whole:* Mr. GAUTHIER (Canada)

*The meeting was called to order at 9.30 a.m.*

### DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (*continued*) (A/CN.9/405, A/CN.9/408, A/CN.9/411)

#### *Article 8 (continued)* (A/CN.9/408, annex)

1. Mr. EDWARDS (Australia) wondered whether the "validity period" (article 8), mentioned in paragraph (2)(b), ought not to be defined, in view of the wording of article 7 and the fact that the term also appeared in articles 11 and 12.

2. Mr. CHOUKRI SBAI (Observer for Morocco), supporting the opinion expressed by the representative of Australia, suggested the addition, in article 8, of wording along the lines of "issuance of an amendment shall be in conformity with the terms of paragraph (1) of article 7".

3. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, if it was feared that there might be confusion between the ideas of revocation and amendment, a phrase such as "unless stipulated to be revocable" could be inserted in paragraph (2).

4. Mr. HERRMANN (Secretary of the Commission) thought that there was a wider issue and referred to the paper submitted by the International Chamber of Commerce, which mentioned the

rule set out in article 8 of the Uniform Customs and Practice for Documentary Credits (UCP). The position was clear if a stand-by letter of credit incorporated reference to UCP. He wondered whether the Commission wished to include a similar rule, in the interest of consistency.

5. Ms. FENG Aimin (China) pointed out that, pursuant to UCP and the Uniform Rules for Demand Guarantees (URDG), revocability was determined at the time of issuance.

6. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, since instruments were basically irrevocable, revocability had to be stipulated. He asked whether the Commission really wished to insert specific reference to revocability in an article on amendment, in respect of instruments not subject to UCP or URDG. In the absence of any comment, he would assume that the current text was acceptable.

7. With regard to paragraph (2)(a), he asked whether the Commission wished to establish a required form for previous authorization by the beneficiary.

8. Mr. CHOUKRI SBAI (Observer for Morocco) supported the current wording and stressed the advisability of avoiding too many formal requirements.

9. Mr. BYRNE (United States of America) said that his delegation did not want to insert a formality requirement in paragraph (2)(a). The provision was unnecessary because paragraph (1) of article 8 made appropriate reference to paragraph (1) of article 7.

10. Ms. FENG Aimin (China) supported the view expressed by the United States representative. Paragraph (1) of article 7 was binding and there was therefore no need to make any stipulation about previous authorization in article 8.

11. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he understood the representatives of China and the United States to have said that there was no need for subparagraph (a) and that there should not be two regimes, one in which the amendment became effective upon issuance and one in which it became effective when a notice of acceptance was given. He asked whether the Commission wished to maintain the two rules. Paragraph (2)(b) might simply be deleted, which would mean that the undertaking could be amended only when the guarantor/issuer received a notice of acceptance.

12. Mr. ILLESCAS (Spain) said it would be clearer to delete paragraph (2)(b), as that would harmonize the different regimes for amendments and dispel any doubts as to when notification of an amendment was needed.

13. Mr. SHISHIDO (Japan) said he would accept either option, but it would be simpler and better to follow the proposals made by the representatives of China and the United States.

14. Mr. ADENSAMER (Austria) said that rules should not be made simply from an academic point of view. It was not rare in practice to have extensions of the validity period of an undertaking. The present text should be retained, as it had been dictated by the needs of practice.

15. Mr. VASSEUR (Observer for Monaco) said that no amendment could be extended without its being accepted by the beneficiary, but that if it was the beneficiary who had requested the amendment, then his acceptance was not necessary. He would prefer to delete subparagraph (b) and retain subparagraph (a).

16. Mr. STOUFFLET (France) said that he could accept the article as drafted but thought that subparagraph (a) should be clarified. He wondered whether the difficulty was due to the use of the word "authorized" and whether the word "requested" might not be clearer.

17. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said he supported the deletion of subparagraph (b).

18. Ms. BAZAROVA (Russian Federation) said she would like to keep the text as it was, since it was based on practice. She shared the misgivings of the representative of France and felt that it would be better to replace the word "authorized" by "requested".

19. Mr. OGARRIO (Mexico) agreed with the proposals to replace "authorized" by "requested" and to delete subparagraph (b).

20. Mr. MAHASARANOND (Thailand) said he supported the present text.

21. Mr. KOZOLCHYK (United States of America) said that to eliminate subparagraph (b) would not be merely to express an academic point of view, but to conform with practice. If it were kept, it would not only be in contradiction with practice, but also contrary to UCP.

22. Mr. CHOUKRI SBAI (Observer for Morocco) said the phrase "unless otherwise stipulated" opened the door to freedom

of contracting. That was in the interest of the beneficiary, and accordingly, it would be useful to retain the text.

23. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he took it that the Commission wished to maintain the dual approach reflected in the two subparagraphs, but that the word "authorized" could be replaced by the phrase "previously requested or otherwise consented to". It appeared that work was needed by the drafting group to clarify the idea that "unless otherwise stipulated" referred to the whole of paragraph (2).

24. Mr. KOZOLCHYK (United States of America) said that with regard to practice in stand-by letters of credit, paragraph (2)(a) meant that by formal means in the text of a letter of credit or amendment, the amount available could be increased or decreased on an automatic basis. A difficulty was raised by the word "requested", which would present the banks with a different issue, from an operational viewpoint. The form of request could vary substantially, depending on whether it came from the beneficiary or the issuer, which would invite confusion or litigation. The word "authorized" had a more serious connotation than the word "requested", and the two should not be used together.

25. Ms. FENG Aimin (China) agreed with the representative of the United States that the article had worrisome aspects. One such aspect was the way it differed from the terms of article 2, paragraph (2)(b): "at the request or on the instruction of the customer ('principal/applicant') of the guarantor/issuer". That might cause some confusion.

26. Mr. EDWARDS (Australia) said he shared the concern raised by the representative of the United States. A dispute could arise as to the terms of consent.

27. Mr. BOSSA (Uganda) said the use of the word "authorized" or "requested" would depend on where the amendment originated. If it was initiated by the applicant, it would be authorized or consented to by the beneficiary. If, however, it was initiated by the beneficiary, then he would have requested it. To cover the two situations, the text could read "The amendment had been previously authorized or requested by the beneficiary".

28. Mr. KOZOLCHYK (United States of America) said his delegation could not accept subparagraph (b) as it applied to stand-by letters of credit practice. The United States banking industry had felt that if there was a rule that the beneficiary need not be consulted, it would have to oppose the adoption of the Convention. The only alternative would be to reserve a rule for the stand-by practice, but the procedure of having such special rules had so far been avoided.

29. Mr. FAYERS (United Kingdom) said that while the issue was not important in guarantee practice, it evidently was in regard to stand-by letters of credit. The provision introduced a new operational rule, replete with difficulties, and he therefore agreed with the representative of the United States.

30. Mr. LAMBERTZ (Observer for Sweden) said in fact the question was a minor one. The only issue was when an amendment became effective. If the amendment were of the kind referred to in subparagraph (b), consisting solely of an extension of the validity period of the undertaking, both parties would normally consider that it had been made and there would be no need for acceptance by the beneficiary. According to the rule, however, it would not have been made. It would therefore cause problems to eliminate subparagraph (b). However, he wondered whether the drafting had to be so precise as to the time when the amendment became effective. A compromise might be to state "unless otherwise stipulated in the undertaking or elsewhere agreed by the

guarantor/issuer and beneficiary, an undertaking is amended when consented to by the beneficiary”.

31. Mr. OGARRIO (Mexico) said that paragraph (2)(b) had been introduced as an exception to the general principle whereby the consent of the beneficiary was necessary for an amendment, on the assumption that the extension of the validity period of the undertaking would always be to the advantage of the beneficiary. It had, however, been pointed out that in some cases an extension would not be to his advantage, particularly in the case of commercial letters of credit. He therefore supported the deletion of paragraph (2)(b).

*The meeting was suspended at 11 a.m.  
and resumed at 11.20 a.m.*

32. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that as his suggested use of the word “requested” did not appear to solve the problem, it would perhaps be better to stick to “authorized”, as being closer to what had been intended. On the more substantive point of whether to keep or to delete subparagraph (b), there appeared to be two schools of thought. It was, in his view, necessary to consider whether there did indeed exist cases that would make the rule a bad one and, conversely, whether there existed other cases that made it essential. The wording “unless otherwise stipulated in the undertaking” implied the possibility of supplementing or replacing the present rule by some other provision such as a rule based on UCP or URDG. On reflection, however, and taking into account the practical point of view, he had come to the conclusion that it might be preferable to delete paragraph (2)(b). The exercise of drafting a new convention that applied a unified system of rules for instruments that were seen by some as being different or that did indeed reflect different practices had led the Working Group to seek uniform rules that respected such differences in practices while attempting to bridge them. However, it had emerged that for a significant segment of practices in relation to stand-by letters of credit, paragraph (2)(b) would raise problems. Though others considered that paragraph to be useful, he felt that its deletion would have a lesser impact on practices than its retention. In his view, a text without paragraph (2)(b) was more likely to achieve consensus.

33. Ms. FENG Aimin (China) said that she was not opposed to the deletion of paragraph (2)(b), but felt that a number of issues needed to be considered. One of them concerned the position of the confirmer, who was often involved in the amendment of an undertaking. The majority of banks followed ICC rules, and too much emphasis on amendment of the relationship between the issuer and the beneficiary would create problems. Indeed, consideration should be given to deleting the entire paragraph (2) of article 8. There also appeared to be a contradiction between article 8 and article 2(2), which concerned the relationship between the principal/applicant and the guarantor/issuer. In banking practice, banks followed the instructions of the applicant. If the applicant wanted an amendment to be issued, whether or not the beneficiary's consent had been obtained beforehand, the bank must respect that request. There was also a conflict with UCP and URDG, which was likely to raise many problems of a practical nature. As the article appeared to contradict actual practice in the banking world, she did not think it advisable to add extra rules. In her view, article 8(2) went too far and would merely complicate current banking practices. On the other hand, its deletion would not give rise to any problems. In short, paragraphs (1) and (3) were sufficient on their own. There was no need for paragraph (2).

34. Ms. ASTOLA (Finland) said she was not entirely against the deletion of paragraph (2)(b) in its present form. In most cases it was the beneficiary who asked for an extension, a case covered by subparagraph (a). But sometimes the extension was initiated

by the guarantor or principal. There again there was no problem if the beneficiary had previously accepted the extension or if such an extension had been provided for in the guarantee. But there might be a problem if nothing had been said about such an extension which might then, in some cases, be unfair to the beneficiary. She therefore suggested adding the words “and consented to by the beneficiary” in paragraph (2)(b). Such consent would not necessarily have to be given beforehand.

35. Mr. LAMBERTZ (Observer for Sweden) said he agreed in substance with what the representative of Finland had said. If paragraph (2)(b) were to be deleted, it would be necessary to meet the concerns of those who saw such a deletion as creating a problem. It might be possible to add in subparagraph (a), after the word “authorized” the words “or is otherwise consented to by the beneficiary”. That would open the possibility, in the event of an argument about whether an amendment was effective or not when the validity period had been extended, to regard it as the kind of amendment for which the non-objection of a beneficiary implied his consent.

36. Ms. CZERWENKA (Germany) said that, having heard the arguments, especially those of the representative of Mexico, her delegation could now agree to delete paragraph (2)(b). In practice most cases would be covered by paragraph (2)(a).

37. Mr. GAUTHIER (Chairman of the Committee of the Whole), after inviting comment, noted that there was no support for the Chinese suggestion to delete paragraph (2) altogether.

38. After inviting comment, he noted that there was some support for the Finnish suggestion to retain paragraph (2)(b) and incorporate into it the notion of consent by the beneficiary.

39. After inviting comment, he noted that there was support for the Swedish proposal to delete paragraph (2)(b) and reword paragraph (2)(a) to speak of the amendment having previously been authorized or otherwise consented to by the beneficiary. He asked whether the intent was that the consent “otherwise given” would be given after the issuance but be retroactive to it.

40. Mr. LAMBERTZ (Observer for Sweden) said that his intention was that the amendment should be effective on issuance unless opposed. He was not asking for the consent to be active. It would be non-opposition that was retroactive to the time of issuance.

41. Mr. GAUTHIER (Chairman of the Committee of the Whole) wondered whether the proposal would not create more difficulties than it would solve. In his view, it did not make it clear when an amendment was effective and in what circumstances.

42. Mr. HERRMANN (Secretary of the Commission) considered that it would be a contradiction to state in the first rule that the time of receipt of the notice of acceptance was the effective one, and then in the second rule to include a possibly later consent. If that possibility was ruled out, in his view the only remaining question was whether, when the original validity period had expired and the validity had been extended, an amendment should be effective at the time of the consent or retroactively at the time of issuance of the amendment. That question might almost be academic, but the latter alternative might create legal uncertainty with respect to the time between issuance and consent. Once the Commission had dealt with that question, it would be easy to draft the rule. He suggested that a single rule be drafted without discussing where to put it, which was merely a matter of editing.

43. Ms. CZERWENKA (Germany) said that she was against any change that would give acceptance a retroactive effect.

44. Ms. BAZAROVA (Russian Federation) said her delegation would prefer a provision covering not subsequent consent to an amendment but the absence of an objection. If that was too difficult to achieve, she would endorse the Chinese proposal to delete the provision altogether, so that no misunderstanding would be possible.

45. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted that the Working Group had discussed a "no objection" rule, to the effect that if there was no reaction from the beneficiary for 10 days the instrument was automatically amended. He therefore wondered if the Commission was not going over old ground. He cautioned it not to lose sight of the interests both of the issuer, who wished to know whether and how far he was bound, and of the beneficiary, who wished to know the nature of his rights and whether those rights were at the mercy of the issuer.

46. Ms. FENG Aimin (China) said that her delegation might consider the Swedish proposal, but had a problem in connection with the relationship between issuer and beneficiary. The Commission should take account of article 9(c)(i) of the UCP rules, which stated that if another bank was authorized or requested by the issuing bank to add its confirmation to a credit, but was not prepared to do so, it must so inform the issuing bank without delay. That article showed that the rights of the guarantor in the operations took precedence over those of the beneficiary, whereas the Commission's approach was the contrary one.

47. Mr. EDWARDS (Australia) suggested that delegations should be given an opportunity to take another look at the whole range of options.

48. Mr. SHISHIDO (Japan) suggested that the Commission should revert to the French proposal to use the word "requested"

instead of "authorized", since there was no need to take account of cases where an amendment was initiated by the issuer, but only of those where it was initiated by the beneficiary.

49. Mr. KOZOLCHYK (United States of America) supported the suggestion of the Australian representative.

50. He had been involved in writing the UCP provisions and knew that the question of amendments was a very complicated one. Following a long discussion on amendment practices, it had been found that the commercial letter of credit practice was that the consent of the beneficiary was needed, implying that until that consent was given, the credit should remain valid as originally issued. That principle was needed because otherwise there would be great uncertainty for the beneficiary as well as for the confirming and intermediary banks.

51. Once the principle of the need for consent by the beneficiary was established, the question was how the beneficiary should express that consent. The UCP had started by saying that if within seven days nothing was heard, consent should be deemed to have been given. It had then encountered arguments to the effect that there were very few national laws in which the silence of a party was deemed to be binding as an expression of positive consent.

52. He suggested that the Commission should confine itself to laying down principles and not try to prescribe methods in great detail, in view of the widely differing practices in the banking industry. There did seem to be a consensus that the consent of the beneficiary was needed for an amendment, and the Commission should now establish whether that consent had to be express or implied.

*The meeting rose at 12.30 p.m.*

## Summary record of the 552nd meeting

Thursday, 4 May 1995, at 2 p.m.

[A/CN.9/SR.552]

*Chairman:* Mr. GOH (Singapore)

*Chairman of the Committee of the Whole:* Mr. GAUTHIER (Canada)

*The meeting was called to order at 2.10 p.m.*

### DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (*continued*) (A/CN.9/405, A/CN.9/408 and A/CN.9/411)

#### *Article 8 (continued) (A/CN.9/408, annex)*

1. Mr. GAUTHIER (Chairman of the Committee of the Whole) restated the question under discussion and asked the Commission to consider an approach whereby the article would state that an amendment had to be in a form stipulated, that the consent of the beneficiary was required and that the amendment would have no effect on the rights and obligations of the principal/applicant or of a confirmer unless they had given their consent. The article should also leave open the possibility of providing otherwise.

2. Mr. CHOUKRI SBAI (Observer for Morocco) said that a similar proposal had been before the Committee, namely, to retain the existing text and leave the initiative to the guarantor but to add

a passage to state that the amendment would not be considered final unless the beneficiary consented. In that way, the guarantor would have the initiative but that initiative would not be accepted or final without the consent of the beneficiary.

3. Ms. CZERWENKA (Germany) believed that a mere statement that consent was required would be a backward step. If the question of when the amendment became effective were not regulated in the Convention, it would be subject to national law, so that there would be no uniformity. She believed that the Committee had been very close to agreement on the question of the time of effectiveness and would regret it if the question were left open.

4. Mr. LAMBERTZ (Observer for Sweden) supported the proposal made by the Chairman of the Committee of the Whole. He was not convinced that uniformity was necessary, a point that had been made earlier by a number of delegations.



5. The question of the time of effectiveness had been discussed at length and it was difficult to find a better solution than that proposed. States might wish to adopt more precise rules in their national laws, though he was not convinced that his country would wish to do so.

6. Mr. FAYERS (United Kingdom) said that he shared the Swedish view though he rather agreed with the representative of Germany that the statement was merely one of principle and that it would not achieve much progress towards uniformity, though uniformity might not be necessary in practice. The Secretary had cogently put the question whether retroactive provisions were necessary. The Commission had been close to accepting article 8(2) with the deletion of subparagraph (b). He would be prepared to support that proposal or even the inclusion of both subparagraphs (a) and (b) if it could be shown to be necessary that the matter should be dealt with in the Convention rather than left to the market.

7. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted that no delegation seemed to favour a reference to retroactive effect in the article. It would therefore seem that on balance a text on the lines of paragraph (2), without subparagraph (b), would suffice. That would leave the provision in line with UCP rules.

8. *It was so agreed.*

#### Article 9 (A/CN.9/408, annex)

9. Mr. EDWARDS (Australia) proposed that the words "if so, and" in paragraph (1) be deleted. That would make the wording simpler and more consistent with the reference to the same concept at the end of paragraph (2).

10. Mr. FAYERS (United Kingdom) said he thought it had been agreed that the passage in paragraph (1) should read "if authorized in the undertaking and only to the extent and in the manner set out therein". Perhaps the Secretary could clarify the question.

11. Mr. HERRMANN (Secretary of the Commission) explained that paragraph (1) was intended as a provision limiting the possibility of a transfer, to cover those cases in which a transfer was authorized and those in which it was not, while paragraph (2) covered cases in which there was an authorization of transfer—a transferable instrument—so that "only if" would be illogical there. The form of words suggested by the United Kingdom seemed to be preferable.

12. Ms. CZERWENKA (Germany) said that the question was not the extent to which the beneficiary's right to demand payment could be transferred but whether that right could be transferred at all. She would support the text as it stood, subject to possible drafting improvements.

13. Mr. GAUTHIER (Chairman of the Committee of the Whole) asked if he could take it that there was agreement in principle that transferability must be authorized in the undertaking and that the extent and manner of transfer were secondary matters. On that assumption, the text could be passed to the drafting group.

14. Mr. VASSEUR (Observer for Monaco) said he could understand that the transferability of an undertaking required to be authorized. However, partial transfers existed and he asked for an explanation of the phrase "in the manner authorized".

15. Mr. GAUTHIER (Chairman of the Committee of the Whole) explained that the basis was article 49(c) of the ICC Uniform Customs and Practice for Documentary Credits.

16. Mr. KOZOLCHYK (United States of America) noted that, in his summing up, the Chairman had mentioned the principle of the transferability of an undertaking and the question of its manner and extent. However, there seemed to have been no reference in the Chairman's remarks to the consent of the issuer.

17. In reply to the question raised by the observer for Monaco, he explained that the term "extent" referred to whether transferability was partial or not, and the term "manner" referred to the mechanism used, such as the issuance of another credit.

18. Mr. GAUTHIER (Chairman of the Committee of the Whole) explained that he had been referring only to paragraph (1). He had not suggested deletion of paragraph (2), which referred to the question of consent.

19. Mr. LAMBERTZ (Observer for Sweden) said he had been asked by Professor Håstad, of Sweden, who had studied the draft, to raise the question whether, in the event of insolvency of the beneficiary, the undertaking as an asset could be divided up among the creditors of the beneficiary if it were not transferable.

20. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted that the principle embodied in paragraph 9(1) had been agreed upon and that the text would be passed to the drafting group. The question raised by Monaco had been answered. He appreciated the point made by the observer for Sweden regarding insolvency but was not convinced that the law on insolvency was uniform world-wide and doubted whether that question could be handled in the context of the Convention. In any case, the Commission would be discussing insolvency later in the current session. Since there were no comments on the question of insolvency he assumed that the Commission wished to approve article 9 as it stood.

21. *It was so agreed.*

#### Article 10 (A/CN.9/408, annex)

22. Mr. GAUTHIER (Chairman of the Committee of the Whole) emphasized that the article referred to the assignment of proceeds and not to the assignment of an undertaking. As before, references in the text to paragraph 7(1) should read 7(2).

23. Mr. FAYERS (United Kingdom), referring to paragraph (1), asked what was the background of the provision that the agreement not to assign the proceeds of a guarantee need not be in the form stipulated in paragraph 7(2), which presumably meant that an oral agreement would be possible. He doubted whether that would be the correct procedure.

24. The wording "if the guarantor/issuer or another person obliged to effect payment has received a notice of the beneficiary", in paragraph (2) confined the giving of notice to the beneficiary, who was the assignor. Under English law notice could also be given by the assignee, who was the main interested party in giving the notice. He asked the reasons for that restriction.

25. Mr. GAUTHIER (Chairman of the Committee of the Whole) referred to the decision of the Working Group reflected in paragraph 32 of the main body of the document under discussion, namely, that it was not necessary to add additional references to a form requirement in paragraph (1) with respect to a waiver of the right to assign proceeds. That raised the question of whether the phrase "or elsewhere agreed by the guarantor/issuer" in paragraph (1) was appropriate. The Working Group had also affirmed that notice of assignment, in order to be reliable, needed to originate from the beneficiary, and that partial assignment was not precluded.



26. Mr. KOZOLCHYK (United States of America), replying to the question raised by the representative of the United Kingdom, said the reason why the beneficiary was the notifying party was that the assignment would not be effective unless there was compliance by the beneficiary with the terms of the bank guarantee or stand-by letter of credit.

27. Ms. FENG Aimin (China) said that the text of article 10 was acceptable to her delegation. With regard to the right of the beneficiary, the assignee had no right to know the source of the payment. Notice given by the beneficiary asking the bank to pay the money to the assignee was sufficient, as had just been explained by the United States representative.

28. Mr. CHOUKRI SBAI (Observer for Morocco) pointed out that it was a mandatory provision that notice be sent by the beneficiary, for a number of important reasons. Firstly, the parties to the undertaking numbered three—the guarantor, the principal/applicant and the beneficiary, and the assignee was not a party to the undertaking. The second reason was that the risk of theft or loss of the undertaking arose, and greater safety would be ensured by providing that only the beneficiary could send the notice. The third reason was that an irrevocable assignment could be carried out only by the beneficiary. His delegation considered that the line taken by the Working Group on the matter had been the right one.

29. Mr. ILLESCAS (Spain) said his delegation too could accept the formulation of article 10 proposed by the Working Group. There were sound arguments for restricting notice of assignment to the beneficiary since, in an international context, the assignee might be completely unknown to the guarantor/issuer, whereas the beneficiary would, at some point at least, be known.

30. The irrevocability of the assignment was a matter of great importance where the obligor's discharge from liability was concerned, and he suggested that attention should be drawn to that point by amending the title of the article to read "Irrevocable assignment of proceeds".

31. Mr. EDWARDS (Australia) said that the formulation "... has received a notice of the beneficiary" was misleading. He would prefer the expression "... a notice originating from the beneficiary", in line with the expression used by the Working Group in paragraph 32 of the main body of the document.

32. Mr. HERRMANN (Secretary of the Commission) said that the wording in paragraph (1) had been chosen by the Working Group, not by the Secretariat. He noted that in the area of receivables financing, on the question of assignment of claims, it was suggested that in order to be effective, such assignment could be made by notice of the assignor or with the authorization of the assignor from the assignee. Such a solution would be a possible way out of the dilemma. The wording "has received a notice of the beneficiary" might be meant to imply notice received not directly but through an intermediary. However, the expression "originating from" should be sufficient to meet the need for reliability and would be consistent with terms used earlier.

33. Mr. FAYERS (United Kingdom) said that, while he could accept the formulation "notice of the beneficiary", that had not been acceptable to some delegations, which had considered that notice should come from the assignor. The wording should make it clear that notice could be given by the beneficiary if that was indeed the intention, since the wording as it stood might be interpreted as not preventing notice being given by the assignee—which, as he understood it, had not been the intention of some members of the Working Group.

34. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the policy question was whether the notice must

originate from the beneficiary or whether a broader provision should apply.

35. Mr. BYRNE (United States of America) agreed that it had been the Working Group's position that, because the species of undertaking embodied in a letter of credit or independent guarantee was a special obligation towards a named person, only the named beneficiary could make a drawing and make an enforceable, irrevocable assignment of proceeds. A notice originating from the assignee would in practice be ignored by a bank as lacking authority. The principle to be preserved was the entitlement or right of the beneficiary alone to be paid. That had been the Working Group's intention, and it should be reflected in the draft.

36. Mr. KOZOLCHYK (United States of America) said that confusion had arisen because the term "notice" covered two separate documents. The first was the beneficiary's irrevocable order to the bank to make payment, which could come only from the beneficiary, and the second was the confirmation sought from the bank by the assignee that he would receive payment.

37. Mr. FAYERS (United Kingdom) said that article 10(2) dealt with the notice given to the bank as to who was to be paid; under English law that particular notice could be given by the assignee, who was in fact the party with the chief interest in giving such notice. His own position was that the provision should not be restricted to the assignor, but if it was the Commission's wish to make the provision more restrictive, and more in line with United States law on the matter, the wording should be clarified.

38. Mr. GAUTHIER (Chairman of the Committee of the Whole) stressed that article 10 was not intended as a codification of the law on assignment of proceeds. Paragraph (1) covered the assignability of proceeds. Paragraph (2) dealt with the specific question of when the guarantor/issuer could consider that he had discharged his obligation under law. The question under discussion was whether notice on that point had to originate from the beneficiary alone.

39. Ms. ASTOLA (Finland) said that, as she saw it, the important issue was that the beneficiary should consent to the assignment. She had interpreted the expression "has received a notice of the beneficiary" to mean that notice could come from any person, given the consent of the beneficiary.

40. Mr. BYRNE (United States of America) said that his delegation's position on the matter was not influenced by United States law on assignments. However, United States law on assignments, though very similar to that of the United Kingdom, differed radically from the law governing the assignment of proceeds under letters of credit, which was mercantile law. The general principle of commercial law that everything could be made assignable did not obtain, because the person with whom the guarantor/issuer was dealing was usually a stranger, and thus the risk of paying the wrong person and having to make double payment would be borne either by the guarantor/issuer or in most cases by the applicant.

41. The banks had therefore instituted very careful procedures, which included three elements: first, a request on the part of the beneficiary for an assignment of proceeds, following which the bank would require the beneficiary to produce the original letter of credit and to state irrevocably to whom the payment was to be made. The second element might be, as pointed out by the United Kingdom representative, a further notice requesting acknowledgement. The third element, which was of most value to the assignee, was acknowledgement from the bank that it had recognized the assignment. The Commission was not trying to set up a universal scheme to regulate the assignment of proceeds, but was rather

trying to clear up confusion regarding discharge of obligation under an international instrument, which would be of great use commercially throughout the world.

42. The critical principle that was addressed in paragraph (2) was that consent to the assignment must originate from the named beneficiary, since otherwise there would be risk of double payment, fraud or forgery.

43. Ms. CZERWENKA (Germany) said she had understood article 10(2) as a very basic, uncontroversial rule, covering the issue of the conditions under which the guarantor/issuer could pay to the assignee and be discharged from liability. The Commission should not try to deal with other matters relating to assignment law in general. In her delegation's view the provision could be very restrictive, stating simply that the notice to the guarantor/issuer must stem from the beneficiary. The liability would then be discharged by payment to the person named. The question whether the guarantor/issuer could rely on any other notice that he might receive did not come within the scope of the Convention.

44. Ms. FENG Aimin (China) endorsed the views of the representatives of the United States and Germany.

45. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he believed it to be the prevailing view in the Commission that notice of assignment, to be acceptable, must be offered by the beneficiary. Accordingly, unless he heard otherwise, he would take it that the Commission wished the text of paragraph (2) to express that principle and that the text be referred to the drafting group on that understanding.

46. *It was so agreed.*

*The meeting was suspended at 3.45 p.m.  
and resumed at 4.10 p.m.*

47. Mr. GAUTHIER (Chairman of the Committee of the Whole) reminded the Commission of the suggestion by Spain that the word "irrevocable" should be inserted before the word "assignment" in the title of article 10. The notion of irrevocability appeared in paragraph (2) but not in paragraph (1); moreover, in some countries, certain kinds of assignment were irrevocable whereas others were not, and also article 49 of the UCP rules did not speak of irrevocability in regard to assignments of the proceeds of documentary credits. He therefore asked the Commission to consider whether, in regard to the proceeds of instruments covered by the Convention, it intended article 10 to apply to irrevocable assignments alone.

48. Mr. BYRNE (United States of America) said he believed that the article should so apply. In any case, the proceeds of instruments covered by the Convention were contingent and consequently their assignment—in reality an irrevocable payment order—was of limited commercial value; if it was to be revocable as well, that value would become little more than illusory. He therefore supported the Spanish suggestion, as a means of drawing attention to the particular nature of the assignments contemplated in article 10.

49. Ms. BAZAROVA (Russian Federation) said that the inclusion of the word "irrevocable" in the title drew attention to an element that it was unnecessary to emphasize, but that her delegation would not oppose the change. Assignment of the proceeds under discussion was a straightforward matter: if the obligor was a bank, an instruction to it from the beneficiary to pay someone else would suffice.

50. Ms. FENG Aimin (China) agreed that it was unnecessary to stress the element of irrevocability. The title was adequate as it

stood, and changing it would not alter the obligor's position. The important point was that article 10 should ensure that, if the beneficiary assigned the proceeds, his instructions would be carried out.

51. Mr. ILLECAS (Spain) said that article 49 of the UCP 500 rules was irrelevant to the Commission's consideration of the issue because it referred the effects of assignment to rules of national law. The Convention, on the other hand, established rules of universal application, and in the case of article 10 they were those applicable to the specific effects of the assignment. Under that article, if the guarantor made payment by means of an irrevocable assignment, it was discharged from its liability, something quite different from what was covered by article 49 of the UCP 500 rules.

52. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the Commission might intend paragraph (1) to mean that a beneficiary could make either an irrevocable or a revocable assignment, while paragraph (2) might be intended to specify what would happen if the beneficiary made an irrevocable assignment. That intention would be expressed by the present wording of paragraph (1), and therefore the title should not be changed. Although titles were not substantive law, the inclusion of "irrevocable" would imply that a similar qualification would also apply to paragraph (1). Unless he heard any objection, he would take it that the Commission wished the title to remain unchanged.

53. *It was so agreed.*

*Article 11 (A/CN.9/408, annex)*

54. Mr. GAUTHIER (Chairman of the Committee of the Whole) reminded the Commission that references to "article 7(1)" should be read as "article 7(2)".

55. In considering article 11, it should be remembered that cessation of the right to demand payment did not necessarily occur at the same time as expiry of the validity period of the undertaking.

56. Ms. ASTOLA (Finland) pointed out that, under article 8(1), an undertaking could be amended in a form other than that prescribed in article 7(2). If the parties could amend an undertaking orally, they should be able to terminate it orally as well. She suggested that article 11(1) be modified to permit that, leaving it to the relevant rules of evidence to determine whether or not termination had taken place.

57. Mr. GAUTHIER (Chairman of the Committee of the Whole) pointed out that the Working Group, at its twenty-first session, had decided that purely oral termination should not be allowed (document A/CN.9/391, paragraph 77).

58. Ms. CZERWENKA (Germany) said that her delegation could agree that the wording of paragraph (1)(b) should be aligned with that of article 8(1), so as to enable oral termination to take place where the undertaking so provided.

59. Paragraph 1(c) raised the question of revolving guarantees. It stipulated that the right to demand payment under the undertaking ceased when the amount available had been paid, unless there was provision for automatic renewal. In her view that was illogical because, if there was automatic renewal, full payment could never be made. She therefore proposed deletion of the words "unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking". In any case the matter of revolving credits should not be overemphasized.

60. Mr. MARKUS (Observer for Switzerland) said that criticism had been directed in his country to the contradictions inherent in the combined effect of paragraph (1)(a) and (b) and paragraph (2). He asked how article 11 would operate where an undertaking stipulated that it must be returned to the sender for cessation of effectiveness and the beneficiary sent the guarantor a statement of release pursuant to paragraph 1(a). It would be anomalous if the beneficiary were still entitled to demand payment. The reasons for cessation in paragraph (1) and paragraph (2) were mutually exclusive and should constitute alternative and not cumulative reasons for cessation of the right to demand payment.

61. Mr. FARIDI ARAGHI (Islamic Republic of Iran) asked whether the "statement" referred to in paragraph (1)(a) could be an oral statement. Bearing in mind the use of the words "in any form" in article 7(2), he believed that should be the case. If not, the term "statement" should be altered to "notice" or a similar word.

62. Mr. GAUTHIER (Chairman of the Committee of the Whole) remarked that article 7(2) excluded an oral statement. He agreed that "notice" might be a more appropriate word than "statement".

63. On a point of drafting, in paragraph (1)(a) the words "statement from the beneficiary" might be preferable to "statement of the beneficiary".

64. Ms. FENG Aimin (China) said that the Convention did not allow undertakings to be issued in oral form; consequently it should not allow statements of release from liability to be given in that form either.

65. Paragraph (1)(c) should be retained, because of the great use made by banks of revolving guarantees.

66. Mr. EDWARDS (Australia) said that he too recommended using the words "statement from the beneficiary".

67. Ms. BAZAROVA (Russian Federation) said that it would be logical to delete the whole of subparagraph (c), in the light of the explanation given by the representative of Germany. But if the idea was to delete only the last clause, beginning with "unless", and keep the first part of the subparagraph, she would have misgivings.

68. Ms. CZERWENKA (Germany) explained that her delegation's proposal was to delete the latter part of the subparagraph, beginning "unless". The key issue was whether the amount available under the undertaking had or had not been paid.

69. Mr. GAUTHIER (Chairman of the Committee of the Whole) said it was his understanding that the term "a statement ... of release" in article 11(a) did not permit an oral statement. It might be possible to say "a release from liability from the beneficiary in a form referred to in paragraph (2) of article 7".

70. Ms. ASTOLA (Finland) said that her suggestion regarding oral termination related to subparagraph (b) and was intended to mean that the undertaking could be terminated orally if there was a stipulation to that effect in the undertaking itself.

71. Ms. BAZAROVA (Russian Federation) asked how in such cases there would be any proof of what had occurred. She thought it would probably be better to leave the subparagraph as it was.

72. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the general rule would remain that termination required documentary evidence. If there was to be an exception to that rule, it would have to be stipulated. The question of proof would then be a matter for the legal systems in question.

*The meeting rose at 5.05 p.m.*

### Summary record of the 553rd meeting

Friday, 5 May 1995, at 9.30 a.m.

[A/CN.9/SR.553]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

*The meeting was called to order at 9.30 a.m.*

#### DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (continued) (A/CN.9/405, A/CN.9/408, A/CN.9/411)

##### Article 11 (continued) (A/CN.9/408, annex)

1. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that it still remained to be decided whether to retain in paragraph (1)(c) of article 11 the words "unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking".

2. After inviting comments regarding the deletion of those words, he noted that the representative of Japan would prefer to

delete them but that the majority of the members of the Commission wished to retain them.

3. Paragraph (1)(c) was retained without change.

4. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the other point to be decided was the scope of paragraph (2), which some had found difficult to understand.

5. Mr. MARKUS (Observer for Switzerland) saw a contradiction between paragraphs (1) and (2). Confusion or fraud by the beneficiary might be the result in cases where the guarantor, pursuant to article 1(a), received a statement of release from liability from the beneficiary when the original instrument had stipulated that only the return of the instrument would lead to a

cessation of the undertaking. That situation could be avoided by adding in the fourth line of paragraph (2) a full stop after "payment" and deleting the words "either alone or in conjunction with one of the events referred to in subparagraphs (a) and (b) of paragraph (1) of this article". The paragraph would then continue: "However, in no case shall retention of any such document by the beneficiary after the right to demand payment ceases in accordance with paragraph (1) of this article preserve any rights of the beneficiary under the undertaking", the words "subparagraphs (c) or (d)" being deleted.

6. Mr. GAUTHIER (Chairman of the Committee of the Whole), referring to the first point made by the Swiss representative, said that there might be a need to make the link between paragraphs (1) and (2) clearer. Paragraph (2) spoke of the return of the instrument being the material consideration for cessation of the right to demand payment, while there was no such reference in paragraph (1).

7. The Swiss representative's second suggestion raised a substantive issue. In the current text, a distinction was made between the cases under paragraph (1)(a) and (b) and those under paragraph (1)(c) and (d). Under the Swiss proposal, all the situations under paragraph (1)(a) to (d) would be subject to the portion of the text reading "However, in no case shall retention of any such document by the beneficiary after the right to demand payment ceases in accordance with paragraph (1) of this article preserve any rights of the beneficiary under the undertaking".

8. Ms. FENG Aimin (China) said that she would prefer to retain the wording of paragraphs (1) and (2), but that if it was changed, the same rules would have to be included in articles 8, 9 and 10. Another solution might be to redraft article 7(2).

9. Ms. ASTOLA (Finland) thought that the confusion arose from the first sentence of paragraph (2). She supported the Swiss proposal. Paragraph (1)(a) and (b) depended on the wish of the beneficiary, whereas paragraph (1)(c) and (d) did not. The explanation in the first sentence of paragraph (2) was unnecessary if the return of the document to the guarantor/issuer was required for the cessation of the right to demand payment. It could not be required if the event referred to in subparagraph (c) or (d) had occurred.

10. Mr. LAMBERTZ (Observer for Sweden) considered the issue to be more one of legal logic than of policy. He too found it a puzzling idea that if the original undertaking required the return of the document and if later the beneficiary released the bank from its liability in a separate statement, or, as provided for in paragraph (1)(b), there was a subsequent agreement on the termination of the undertaking, the provisions of the undertaking should still prevail and not be cancelled by the release.

11. He agreed with the observer for Switzerland that some amendments were needed and suggested the inclusion of a new paragraph (1)(e) stating that the right to demand payment terminated if the undertaking stated when the document had to be returned.

12. Mr. RADWAN (Observer for Arab Association for International Arbitration) suggested that paragraph (2) should be redrafted to say that the return of the document was presumed to have effected cessation and was proof thereof unless there was evidence to the contrary.

13. Mr. CHOUKRI SBAI (Observer for Morocco) considered that paragraph (2) was not mandatory, but explanatory. It was unnecessary to go into such detail, and the parties should be left to choose whatever option was in their best interests. The last sentence of the paragraph was superfluous, since there was no

point in keeping a document after the relevant time period had expired. If payment had been made, proof to that effect would exist. He therefore proposed that paragraph (2) should be deleted.

14. Mr. GAUTHIER (Chairman of the Committee of the Whole) explained that the Working Group had considered it important to stress in paragraph (2) that holding the document did not create the right to demand payment. In certain jurisdictions that was a point of contention, and it was therefore important to clarify the matter in the Convention.

15. Ms. BAZAROVA (Russian Federation) said that in her delegation's view the substance of paragraph (2) should be retained, although its drafting could possibly be improved. The proposed new paragraph (1)(e) did not make clear the voluntary nature of the return of the document embodying the undertaking, but appeared simply to describe an eventuality already provided for in paragraph (1)(a).

16. Mr. SHISHIDO (Japan), agreeing with the remarks made by the representative of the Russian Federation, said that his delegation preferred to keep the text of article 11 as it stood. Under the Swiss proposal, the parties no longer had the option of agreeing to make the return of the document part of the requirement for the cessation of the beneficiary's right to demand payment. Furthermore, a stipulation to the effect that the return of the document would by itself give rise to cessation presented difficulties. Such return merely constituted evidence, and it was difficult to regard it as an expression of the will of the beneficiary.

17. Mr. GAUTHIER (Chairman of the Committee of the Whole) pointed out that the intention behind the proposed new paragraph (1)(e) was not to stipulate that the beneficiary's right to demand payment automatically ceased upon the return of the document embodying the undertaking, but rather to provide for a fifth event whereby that right would be terminated, subject to the parties' having so agreed in the undertaking. The beneficiary's right to demand payment would thus cease upon the first occurrence of one of the eventualities set out in subparagraphs (a) to (e). The Commission might perhaps wish to add a further paragraph, specifying that mere retention of the document following one of those occurrences did not have the effect of reinstating the undertaking.

18. Mr. OGARRIO (Mexico) suggested that the first part of paragraph (2) be redrafted to form the substance of a new paragraph (1)(e) and that the last part of paragraph (2) be retained and make reference to the first four subparagraphs of paragraph (1), but not to the new subparagraph (e), which would itself deal solely with cessation of the right to demand payment in the event of the return of the document, where such an agreement had been made between the parties.

19. Mr. BOSSA (Uganda) said that his delegation also supported the deletion of paragraph (2) and its partial replacement by a new paragraph (1)(e), which could perhaps be worded along the following lines: "If the document embodying the undertaking first stipulates that the document is returned to the guarantor/issuer. However, failure to return such document after the right to demand payment has ceased in accordance with subparagraphs (c) or (d) shall not preserve any rights of the beneficiary under the undertaking".

20. Mr. ADENSAMER (Austria) said that the proposed new paragraph (1)(e) did not satisfactorily deal with cases where, after it had been stipulated in the undertaking that the return of the document alone would give rise to termination of the right to demand payment, an adversarial situation arose, such as subsequent agreement by the guarantor/issuer and beneficiary regarding a different form of termination, as referred to in paragraph (1)(b).

Which of those two arrangements would then apply? In his view, the more recent one should, since it constituted an amendment to the undertaking. He therefore supported the Swiss proposal.

21. The CHAIRMAN, speaking as representative of Singapore, said that, although he saw merit in the proposal to delete paragraph (2) and add a paragraph (1)(e), he shared the concern expressed by other delegations regarding the question of liability in cases where the document was retained. He therefore suggested that paragraph (2) should be kept but amended to read: "Where the right of the beneficiary to demand payment in accordance with paragraph (1) of this article has ceased, retention of the document by the beneficiary shall not preserve any right of the beneficiary under the undertaking".

22. Mr. EDWARDS (Australia) said that, while he could go along with the inclusion of the proposed paragraph (1)(e), that alone would not resolve the concern expressed by the representative of Austria. He thus suggested that a new paragraph (1) be drafted, stating that, if a stipulation was made in the undertaking to the effect that its termination could be effected only by the return of the document, then cessation would occur solely upon such return. Paragraph (2) would then provide for the other cases, i.e. where there was no such stipulation, and would state that termination would occur when one of the expiry events provided for in its subparagraphs (a), (b), (c), (d) and (e) arose, subparagraph (e) covering the eventuality of the simple return of the document. The new paragraph (3) would state that, if termination arose by reason of the occurrence of one of the events set out in paragraphs (2)(a), (b), (c) and (d), then retention of the document would not preserve any rights of the beneficiary.

23. Mr. ILLESCAS (Spain) said that the proposed amendments might affect the balance which the current wording of article 11 maintained with regard to guarantees. His own and many other countries applied the principle that guarantees were not negotiable instruments. The introduction of a new aspect at the end of the validity period of the undertaking might increase the weight of the documentary aspect of cessation to the detriment of its contractual aspect. It was not possible to regard the simple return of the document as constituting a discharge of liability, since that would give it the nature of a negotiable instrument. His delegation therefore preferred to retain the text of the article as it stood.

24. Ms. CZERWENKA (Germany), agreeing with the observations made by the representative of Finland, said that her delegation was in favour of retaining the substance of paragraph (2). If the parties stipulated that the return of the document was necessary for cessation of the beneficiary's right to demand payment, the will of the parties, as provided for in the proposed new paragraph (1)(e), would be overridden by the occurrence of the eventuality provided for in paragraph (1)(a), because the statement of release would be sufficient for cessation of the right to demand payment, regardless of the return of the document.

25. Mr. SHIMIZU (Japan) said that, if the undertaking stipulated that the return of the document alone would have the effect of terminating the undertaking, the parties could avail themselves of article 8 should they wish to amend that arrangement subsequently. A reference to that article might perhaps resolve the concern expressed by the representative of Austria.

26. Mr. GAUTHIER (Chairman of the Committee of the Whole) suggested the following solution. Firstly, a new paragraph (1)(e) should be added, which would in essence state that where it was so stipulated in the undertaking, the right to demand payment ceased when the undertaking was returned to the guarantor/issuer. That would recognize the possibility for parties to stipulate that for the instrument to cease being available for payment, its return by the beneficiary to the guarantor/issuer was required.

Secondly, language could be added to paragraph (2) to the effect that in no case should retention of the undertaking by the beneficiary after the right to demand payment ceased for any of the reasons set forth in subparagraphs (a), (b), (c) and (d) preserve any of the rights of the beneficiary under the undertaking.

*The meeting was suspended at 10.50 a.m.  
and resumed at 11.20 a.m.*

27. Ms. ASTOLA (Finland) asked whether, even under subparagraphs (c) and (d), retention of the undertaking was possible and the right to demand payment remained if it was stipulated that the undertaking must be returned.

28. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the proposed subparagraph (e) represented a new situation, which must be clearly circumscribed, as it was not a mere provision requiring the return of the instrument in view of termination. If that situation occurred before any of the situations described in subparagraphs (a), (b), (c) and (d), that brought the right to demand payment to an end. But if any of those situations occurred first, then mere retention did not give the right to demand payment. As to paragraph (2), that would have to be understood as meaning that if the return of the instrument occurred before any one of the situations described in subparagraphs (a), (b), (c) and (d), then the right ceased. His proposal would also mean that it was no longer a question of the situations described in subparagraphs (a) and (b) being coupled with the question of return. Basically, it would mean that if one were given an instrument which said that the undertaking was terminated, then it was terminated. There would be five possibilities operating distinctly.

29. Mr. CHOUKRI SBAI (Observer for Morocco) said that the proposed addition of subparagraph (e) was a good change, but that the problem was not one of drafting. His delegation had been concerned by the fact that the document could be returned to the guarantor for a reason other than payment, such as correction of an error, in which case the beneficiary would retain it. However, it had been reassured by the explanation given by the Chairman of the Committee of the Whole that there would have to be an explicit reference to the fact that the document was being returned for payment. He asked whether the return of the document was definite proof of payment or whether the contrary could be proved by other means. If return was proof, wording could be added to the effect that the right to payment ceased unless the contrary was proved.

30. Mr. MARKUS (Observer for Switzerland) said that the proposal by the Chairman of the Committee of the Whole fully satisfied the concerns of his delegation and was an excellent way to resolve the problems.

31. Mr. BYRNE (United States of America) said the proposal did not meet the purpose of the first sentence of paragraph (2), which was to clarify that the second sentence did not mean that the prudent and sound practice of requiring the return of the instrument prior to its expiry signified an intent that the undertaking should be prematurely terminated. The idea of preventing the fraudulent re-use or circulation of the operative instrument was not included in the proposal by the Chairman of the Committee of the Whole. Instead, a new element was introduced in its place, which did either too much or too little. There was no need to address a situation in which the undertaking itself had a mechanism for termination by virtue of the return of the instrument, as that was covered by paragraph (1)(b). Any such provision would need to specify the reason for the return, as there were a number of situations in which a return might occur, but in a convention of the present sort to deal with a rather unusual situation which the parties had brought upon themselves was unnecessary and unwise.

32. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that the proposal by the Chairman of the Committee of the Whole would make things more complicated and left the question of payment open. He was satisfied with the present text, which would avoid any misunderstanding.

33. Mr. GAUTHIER (Chairman of the Committee of the Whole) suggested that the idea of a subparagraph (e) should be dropped, that paragraph (1) should be left unchanged and that in the second sentence of paragraph (2) the words "subparagraphs (c) or (d) of" should be deleted.

34. Mr. ILLESCAS (Spain) said that while that change might be acceptable, it should be accompanied by the deletion in the first sentence of paragraph (2) of the words "either alone or" in order to clarify the situation. Those words did not fit with the imperative nature of paragraph (1), which seemed to establish means of cessation without allowing for other possibilities. None the less, the words "either alone or" created a fifth possibility consisting simply of the return, with which he disagreed. Paragraph (1) would then have a considerable bearing on paragraph (2), which would be an appendix to subparagraphs (a) and (b) of paragraph (1), but would not add any element to the issue of the right to demand payment.

35. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he took it that the Commission wished to retain article 11 as drafted.

36. *It was so decided.*

*Article 19 (A/CN.9/408, annex)*

37. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that article 19 was the only provision on which no consensus had been achievable in the Working Group. It was a key provision, because the whole area of bank guarantees, stand-by letters of credit and commercial letters of credit, which were otherwise extremely successful instruments, was plagued by the question of fraud and its effects.

38. Mr. VASSEUR (Observer for Monaco) said that articles 19 and 20 were the pillars of the Convention. Speaking on behalf of the Ministry of Foreign Affairs of Monaco and the Association of Monaco Banks and in the light of letters addressed to the Secretary in May 1993 and September 1994 by the Banking Federation of the European Union, he said that the Banking Federation was deeply disappointed that the draft Convention did not contain explicit provisions on counter-guarantees. It was especially disappointed that article 19 appeared to completely disregard the problem of fraudulent or otherwise improper demands, and in particular the counter-guarantee regime in such cases. The Banking Federation wanted a clear rule that a fraudulent or otherwise improper demand on the first guarantor did not render the counter-guarantee regime itself fraudulent. As a corollary, the counter-guarantee should only be regarded as abusive in the event of complicity between the beneficiary making its demand on unfounded, abusive or fraudulent grounds and the first banker calling on the counter-guarantee. The disappointment of the Banking Federation over the issue was particularly acute in that an earlier draft of article 19 had contained a provision regarding the counter-guarantee. That text had been examined at the seventeenth session of the Working Group in April 1992, and the Working Group had at the time expressly agreed that the issue of counter-guarantees should be covered by article 19. A working paper produced in Vienna in 1992 had also dealt with the subject. Nor had the Working Group, at the twentieth session in November 1993, called explicitly for the deletion of all provisions regarding the counter-guarantee. The Banking Federation urged the Commission to ensure that article 19 covered the counter-guarantee in the event of a fraudulent or otherwise improper demand.

39. The Banking Federation also reserved its position in regard to the wording of article 19(1)(a)(iii), which defined a fraudulent demand as one that had "no conceivable basis". The wording implied that the guarantor/issuer was expected to ask itself whether the demand had a "conceivable basis", a form of words that was not compatible with a guarantee given "on simple demand". If the demand was consistent with the letter of guarantee, it was up to the banker to pay; it was not his job to ask questions. The present wording might compel the banker to undertake verifications, to check that none of the situations mentioned in paragraph (2) applied, before making the payment. It could put an end to guarantees based on simple demand, which were in fact the most common type of guarantee used throughout the world and which the Working Group itself felt should continue in use and be covered by the Convention. Furthermore, the wording used, with its reference to "no conceivable basis", seriously impaired the independence of the guarantee as enshrined in article 3 of the draft Convention. In consequence, the Banking Federation suggested that the first line of article 19(1)(a) should read "if, in the view of the guarantor/issuer, it is manifest, clear and beyond any doubt that" and that paragraph (1)(a)(iii) should be deleted. It also took the view that paragraph (2) was not absolutely necessary, but that if, it was to be retained, the second part of the first line should read "the following are types of situations in which, beyond any doubt, no payment is due". The point was that it should be clear, manifest and beyond any doubt that the call for payment was fraudulent or otherwise improper.

40. He was also dissatisfied with the title of article 19, which had been proposed fairly recently, after the previous title had been justifiably discarded. It should not lay the stress on the behaviour of the banker. In several countries, including France, Germany and Switzerland, recent case law had shown that if the banker wished to make a payment in such circumstances, he could do so, but that he could not request repayment on the part of the principal. It was the banker who gave his guarantee, and if, for his own reasons, such as the desire not to undermine his international credibility, he decided to pay, he should be free to do so. There existed blacklists of banks reputed to be poor payers, and the major European banks had no desire to be placed on such lists. A number of court decisions had been made along those lines in several countries. The words "good faith" in the last line of paragraph (1)(a) were also unsatisfactory, since the real point was whether the banker could reclaim repayment from the principal. In regard to the title, the original reference to abuse and fraud had, it seemed, disconcerted certain countries, especially those with common-law systems, which did not recognize the concept of abuse. The difficulty could be avoided by amending the title to "fraudulent demands and similar situations", in which the term "similar situations" would cover the question of abuse. There were also cases of *force majeure* in which the principal was prevented from executing his obligations; one such case was that of embargoes, which the Convention should not simply ignore.

41. He concluded by stating that the content of articles 19 and 20 as finally decided would determine the future attitude of the banks towards the Convention. Although it was not the role of UNCITRAL to please the banks or of the banks to please UNCITRAL, it had to be remembered that it was essentially the banks that gave guarantees, that article 1 of the Convention made provision for the possibility of exclusion, that it was usually the beneficiary that proposed the text of the guarantee and that it also had the possibility of imposing the exclusion of the application of the guarantee. Beneficiaries would not favour the Convention if it appeared to impair in any way the rigour of the guarantee. Correspondents of major European banks in the principal countries benefiting from guarantees had expressed very strong reservations in regard to articles 19 and 20, and the representative of the United States of America had warned against any provision that might impair the integrity of the argument. All those issues should



be carefully considered in drafting such key articles of the Convention.

42. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that one of the difficulties throughout the process of drafting the text had been the diversity of definitions of fraud and abuse. That was why, after long discussion, a descriptive approach had been adopted in paragraph (1)(a). It would, in his view, be dangerous to return to concepts that were natural to some people because of their training but not to others. The aim must be to achieve consensus.

43. Mr. SHISHIDO (Japan) asked whether article 19 was mandatory or not and whether a party could agree to give the bank absolute freedom to pay or not to pay. If the article was not mandatory, it would not need to be discussed so seriously, but if it was, it would have to be worded very carefully. The whole structure of the article was based on the principle that when a demand was manifestly and clearly improper, no payment would be made, and the beneficiary could not seek damages against the

guarantor/issuer and had no right to reimbursement. Problems would arise because of two exceptional cases that might occur involving misjudgement. In the first, the guarantor/issuer made a payment when he should not have done so. That payment would not be in good faith and the banker would not be able to obtain reimbursement from the principal. In that case, there was a difficulty with the wording of paragraph (1)(a), in which the phrase "in the view of the guarantor/issuer" was ambiguous and misleading. Despite the reasons given for that wording in paragraph 70 of document A/CN.9/408, the terminology used suggested that the payment depended absolutely on the judgement of the guarantor/issuer, which was not the intention. He therefore proposed that the phrase "in the view of the guarantor/issuer" be deleted.

44. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he would invite the representative of Japan to conclude his statement at the next meeting.

*The meeting rose at 12.35 p.m.*

### Summary record of the 554th meeting

Friday, 5 May 1995, at 2 p.m.

[A/CN.9/SR.554]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

*The meeting was called to order at 2.10 p.m.*

#### DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (continued) (A/CN.9/405, A/CN.9/408 and A/CN.9/411)

##### Article 19 (continued) (A/CN.9/408, annex)

1. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the Working Group had come to the conclusion that the terms "fraud" and "*abus de droit*" could not be used because they had so many different connotations, and that it was a better approach to describe certain circumstances under which payment would not be in good faith. That approach had been followed in subparagraphs (a)(i), (ii) and (iii) of paragraph (1). Similarly, paragraph (2) had given examples of situations in which a demand had no conceivable basis. The questions left open, on which the Commission should concentrate, were whether there should be an obligation not to pay, and, if so, what should be the mechanism for establishing such an obligation, or a right not to pay.

2. Mr. SHISHIDO (Japan) recalled that at the previous meeting he had proposed the deletion of the words "in the view of the guarantor/issuer" in paragraph (1)(a), because they might be construed as giving the guarantor/issuer absolute freedom of action. The reference to good faith established a link with articles 14 and 15, implying that the guarantor/issuer need not investigate the propriety or impropriety of documents.

3. His second proposal concerned the eventuality that, through misjudgement, a guarantor/issuer did not pay when he should have paid, after which he might be sued by the beneficiary and be ordered by the court to pay the amount stated in the undertaking, but could recover it from the principal/applicant. The question who would then have to bear the risk of payment of damages to

the beneficiary caused by the delay seemed to be covered by paragraph (1)(b), but it could also be settled by means of an arrangement between the guarantor/issuer and the principal/applicant, so that paragraph (1)(b), including the passage in square brackets at the end, was superfluous and should be deleted.

4. Mr. BYRNE (United States of America) said that his experience of discussions on the substance of the article had shown that it was of critical importance and offered both an opportunity to do much good and a grave danger of producing an imbalanced product that would not be acceptable in the commercial world.

5. A workable system was in place in every country, involving sometimes positive law, sometimes the judicial system, and so on. Whatever the elements of the system, they must be in overall balance in order to enable commerce to function.

6. It was important to bear in mind the elements of the balance and the various interests of all the parties in the eventuality that conforming documents were presented but there was nevertheless an allegation of fraud. One interest was that of the beneficiary, who was entitled to payment unless there was proof of fraud. Secondly, there was the social interest that the guarantor/issuer should not pay when there was clear and manifest evidence of fraud.

7. The third interest was that of the guarantor/issuer, in cases where it was not manifest and clear that there was fraud but there was nevertheless some suspicion or a basis for reasonable suspicion of fraud. The guarantor/issuer should not be put in a position of being required by a court in one jurisdiction to pay the beneficiary while a court in another jurisdiction ruled that it was



not entitled to reimbursement although it had paid in good faith without clear and manifest evidence of fraud.

8. Finally, there was the interest of third parties, such as confirming banks, and innocent third parties which had in good faith presented documents without knowledge of fraud.

9. Unless those interests could be balanced, the instrument would not be workable and acceptable.

10. It seemed to him that agreement should be reached on four questions, without which it would be pointless to discuss the niceties of drafting.

11. First was the question of the risk that the bank undertook with regard to fraud, i.e. what was the role of the guarantor/issuer when fraud arose. Was it the duty of the guarantor/issuer to examine documents for their genuineness and was it obliged to bear the risk of fraud? The answer to that question would greatly affect the rule to be drafted. He suggested that it was the universal understanding of the international operations community that it was not the guarantor/issuer but the principal/applicant that bore the risk of fraud or falsified or forged documents. A letter of credit was not a cheque, the beneficiary was not a customer of the issuer or guarantor but a stranger. The issuer or guarantor had no way of knowing who the beneficiary was or whether its signature was genuine, much less of knowing whether any document presented or any signature on the document was genuine. The undertaking of the issuer or guarantor was to examine documents for facial conformity. That was reflected in article 15 of UCP and article 12 of URDG. Commercial mechanisms were available to protect against the risk of fraud, for instance, through insurance which could be obtained by the applicant. It was not the duty of banks to act as detectives of fraud, nor were they insurers. Their duty was limited to examination of facial conformity.

12. The second question was related to the ability of an issuer or guarantor to dishonour a presentation on grounds of fraud and to the consequences of dishonouring a presentation. Had fraud to be proven? What would happen if a presentation were dishonoured, in good faith, but fraud could not be proven?

13. The third question, assuming that the source of the suspicion of fraud came from the principal/applicant, was whether the guarantor/issuer could contract with the principal/applicant to indemnify the latter for the cost of raising the question of fraud. If a rule were established that there was a duty to dishonour, a question arose in the mind of his delegation and of the banking community of the United States of America whether *ordre public* would prevent contracting for indemnification in such situations.

14. Finally there was the question whether or not there could be innocent third parties and, if so, what the effect would be.

15. It seemed to him that the first possible approach to that situation was not to speak to the question but simply to state grounds for non-payment despite facial compliance and set forth a general rule, without specifically indicating whether a duty, a right or a discretionary right existed with regard to payment.

16. The second approach was to predicate a duty to dishonour in specific situations. If that were to be acceptable, it would also be necessary to make it clear that there was a related right to indemnification.

17. The third approach was to indicate that, where the guarantor/issuer acted in good faith according to recognized standards of international practice in independent guarantees or stand-by letters of credit, it had the ability to dishonour where fraud was alleged and where it was not clear that there was in fact fraud. In

that case, it must be prepared to prove such fraud in an action brought by the beneficiary.

18. It was essential to clarify those questions of principle in order to achieve a genuine consensus.

19. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that the article seemed to stress non-payment rather than payment. It was wrong to make "the view of the guarantor/issuer" a condition for payment or non-payment; the words "in the view of the guarantor/issuer" should be deleted.

20. He supported the proposal of Japan for the deletion of paragraph (1)(b).

21. He agreed with the third option outlined by the delegation of the United States and thought that it should be incorporated in the text as paragraph (3).

22. Mr. FAYERS (United Kingdom), referring to the four principles enunciated by the representative of the United States, said that he accepted the proposition that if there were clear evidence of fraud there would be no payment under the guarantee. The more difficult concept was in areas where there was suspicion of fraud, which again included two types of cases.

23. Though banks should not be obliged to act as detectives, there was a case covered by (1)(b) where the guarantor was put in possession of facts by its customer, which raised the question what action should be taken. It could not be permissible that the bank should turn a blind eye, but, if it accepted the information, the question arose as to the extent to which it must assess the information. That was a difficult area. Investigation of the matter by the bank would entail a monetary cost and also slow down the mechanism of the guarantee. However, there might well be cases in which, as a result of information put before a bank by its customer, it was or should be quite clear that there was fraud.

24. He asked whether the United States banking community would flatly refuse to make any investigation when presented with evidence of fraud and if so whether they would suggest that the customer go to court. Perhaps the representative of the United States would expand on its position with regard to such cases.

25. He quoted a case where the seller diverted a shipment to a port in a different country but presented the documents that named the original port. He found it difficult to believe that, if the buyer pointed out that it was merely necessary to consult Lloyd's list to establish the facts, the bank would then decline to make that simple examination. That area should be investigated further.

26. Mr. LAMBERTZ (Observer for Sweden) welcomed the remarks of the United States and agreed that a balance had to be struck between various interests. A bank had an obligation towards the beneficiary, i.e. an obligation to pay; it also had an obligation towards the principal, namely, not to expose the latter to the risk of losing money. That obligation would exist if the bank was certain that the beneficiary was not entitled to payment. It was therefore justifiable to incorporate the subjective element implicit in the words "if in the view of the guarantor/issuer it is manifest and clear that ..." in the article, though, at an earlier stage in the discussion of the question, he would have agreed with Japan.

27. Though it was impossible either to prove or disprove a subjective assessment by a bank, balancing the interests of the two sides seemed to show that the rule was acceptable.

28. The proposed indemnification clause in paragraph (1)(b) could also be accepted, though he agreed with the Japanese

delegation that the bracketed portion in the last lines of the paragraph should probably be deleted.

29. Taking up a point raised by the United States, he said that the Commission might discuss the inclusion in the Convention of a rule stating that in some instances the bank had a right not to make payment, when it was not sure whether there was fraud or not. That would be a right *vis-à-vis* the beneficiary, whereas the obligation not to pay was an obligation towards the principal. The right not to pay could exist when there was a high probability that the bank was under an obligation not to pay. He therefore favoured adding to the obligation not to pay a right not to pay.

30. He did not believe that it was desirable at the present juncture to discuss the question of innocent third parties—an extremely complex problem that went to the heart of national legislation. The provision in article 1(1) which permitted opting-out from the Convention ought not to apply to articles 19 and 20.

31. Ms. ASTOLA (Finland) said that she shared the views put forward by the representative of Japan. It would be preferable to delete the words "in the view of the guarantor/issuer" but acceptable alternatives would be to make a reference to international banking practice at the beginning of paragraph (1)(a) or to take up the Japanese proposal of simply referring to articles 14 and 16. She shared the view that paragraph (1)(b) should be deleted and replaced by a form of words similar to that used in article 8(3), stating that an amendment had no effect on the rights and obligation of the principal/applicant unless the latter consented to it.

32. The representative of the United States had said that there were three options before the Commission. In her view, however, a fourth possibility would be to avoid mentioning the idea of an obligation not to pay. It could be stated that the guarantor/issuer had a right not to pay in certain circumstances, mentioned in paragraph (1)(a), and that, if the guarantor/issuer chose to pay even when it had the right not to pay, that decision would have no effect on the principal/applicant unless otherwise agreed. Thus the question of indemnification would not be addressed in the article.

33. She did not think it would be possible to reach agreement that the guarantor must pay, whatever the eventuality. It would be more helpful to speak of a "right not to pay" and then link the protection of the principal/applicant to that right. She agreed with the observer for Sweden that the situation of innocent third parties could not be resolved in the article.

34. Mr. KOZOLCHYK (United States of America), speaking in answer to the questions raised by the representative of the United Kingdom, said that banks would generally not consult, say, Lloyd's list before deciding whether to make payment but would base their decision on actual documents.

35. The problem perceived by the representatives of Finland and Japan seemed to be that the phrase "in the view of the guarantor/issuer", i.e. of the bank, appeared to be a subjective and somewhat arbitrary criterion, which explained Finland's preference for a discretionary right not to pay. But that discretion would be based on standards of international practice or good local practice, so that the type of situation in question must, firstly, be serious and, secondly, be manifest and clear, and the criteria concerned would be based on the actual documents. So long as there was a clear and manifest standard that could be objectively established relating both to letters of credit and bank guarantees, it would be reasonable to accept a bank's discretion or right not to pay.

36. The CHAIRMAN, speaking in his capacity as the representative of Singapore, agreed with the United States suggestion that

the real issue was related to the bank's role when the question of non-payment arose. Agreement should be reached on that issue before attempting to find satisfactory wording for the article. In his view, it would be best to follow accepted international banking practice.

37. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the fundamental question before the Commission was one of policy—whether the guarantor/issuer had a duty or a right not to pay. Some speakers had suggested that it might be enough to state that in certain circumstances it would have a right not to pay or a discretionary power as to whether it should or should not pay. Other speakers had argued that, when an irregularity was "manifest and clear", payment must not be made. He pointed out that a right not to pay or to withhold payment had implications for article 20 on provisional court measures. Certain jurisdictions would insist that a request to the court to issue an order must be based on a definite obligation and not on a choice, as would be the case with a right not to pay.

38. Mr. STOUFFLET (France) referred to a distinction drawn by the Working Group between regulating merely the relationship between the guarantor and the beneficiary or including the relationship with the principal/applicant as well. In the first case, the word "may" would suffice. There would be no need for an obligation; the guarantor/issuer would merely have to justify its refusal to pay. In the second case, "may" would not be enough and there would have to be an obligation, with implications regarding the liability of the guarantor/issuer towards the principal/applicant. Ideally, the article should cover all cases but it might be preferable to take a more modest approach and leave the relations between the guarantor and the applicant to be determined by domestic law. That would be a realistic and logical approach, and would be consistent with what had been already decided.

39. Mr. KOZOLCHYK (United States of America), referring to the question whether non-payment should be a duty or a right, said that the representative of the Islamic Republic of Iran had pointed out that the Convention stressed non-payment and that it should contain a statement to the effect that, once any agreed standards of examination had been complied with, the guarantor/issuer must pay. There would then be no problem with stating that, under certain circumstances, the obligation to pay imposed upon the guarantor/issuer could be suspended or revoked. Even if there were facial compliance of the documents, the guarantor/issuer could use its discretion based on other objective factors.

40. Mr. OGARRIO (Mexico) said he had the impression that the question whether there was a duty or a right not to pay had already been dealt with. He asked for distribution of the informal proposal made by the representative of the United States.

41. Mr. BYRNE (United States of America) said that his proposal had simply outlined some possible options.

42. Mr. CHOUKRI SBAI (Observer for Morocco) asked whether the guarantor/issuer automatically had the right to check the authenticity of documents or whether notice from the principal/applicant was necessary. If the guarantor/issuer were notified that the documents were fraudulent, it would be obliged not to pay. In practice, banks paid only after the authenticity of the documents had been thoroughly checked. He suggested that, since the title of article 17 was "Payment on demand", article 19 should simply be entitled "Non-payment". The reference to non-payment in the last line of paragraph (1)(a) might engender some confusion, especially in the Arabic version of the text, so that it might be preferable to choose a form of words to the effect that payment would not be made to the beneficiary if the guarantor/issuer considered that the falsification was manifest as described in subparagraphs (i), (ii) and (iii) of paragraph (1)(a).

43. Mr. OGARRIO (Mexico) said that the provision should establish a right rather than a duty not to make payment. He therefore suggested that the title of article 19 be amended and the wording of the last phrase in paragraph (1)(a) be changed from "payment shall not be made" to "payment may not be made", or words to that effect.

44. For the reasons stated by the French representative, paragraph (1)(b) could be deleted entirely; in his view, the Convention need not cover the relationship between guarantor/issuer and principal/applicant. If the possibility of compensation were included, a principal/applicant might agree to the compensation of issuing banks, thereby inviting the banks not to make payment.

45. Ms. FENG Aimin (China) pointed out an inconsistency between paragraph (1)(a), which gave the guarantor/issuer the right not to make payment in certain circumstances, and article 15 of UCP, which did not give banks such a right.

46. Moreover, article 19 contained no equivalent to article 18(d) of the UCP rules, which read: "The Applicant shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws and usages".

*The meeting was suspended at 3.45 p.m.  
and resumed at 4.10 p.m.*

47. Mr. GAUTHIER (Chairman of the Committee of the Whole) suggested that the Commission should consider what the impact on provisional court measures in the various jurisdictions would be if the guarantor/issuer had the right not to pay. In his country, it was unlikely that provisional court measures would succeed if the bank had the right not to pay.

48. Ms. BAZAROVA (Russian Federation) said that the provision should establish a duty rather than a right. The guarantor/issuer had to be protected. Demand guarantees, which obliged the guarantor to pay the beneficiary, were rather dangerous because of their official nature and offered serious potential for abuse.

49. Mr. BYRNE (United States of America) outlined possible amendments to article 19, as follows:

The title of the article should read:

"Grounds for non-payment despite facial compliance of the documents";

Paragraph (1) should read:

"(1) (a) A ground for non-payment to the beneficiary despite the presentation of facially correct documents exists if:

- (i) any document is not genuine or has been falsified;
- (ii) no payment is due on the basis asserted in the demand and the supporting documents; or
- (iii) judging by the type and purpose of the undertaking, the demand has no conceivable basis."

A new subparagraph (1)(b) would reproduce the current paragraph (2), without any changes.

There were four possible options with regard to a new paragraph (2). The first would focus on a right not to pay and would read:

"If, in the view of the guarantor/issuer, with due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit, it is clear and manifest that a ground for non-payment pursuant to paragraph (1)(a) exists and for that reason payment would not be in good faith, the guarantor/issuer has a right not to pay."

The reference to paragraph (1)(a) was to the proposed revised wording.

The second option would be to retain only paragraph (1) and say nothing further regarding duties or rights.

The third option, based on the current approach in article 19 (1)(b), would be to link a duty not to pay with a contractual right to indemnification. In his delegation's view and in that of his country's banks, such a link was necessary. The text would read:

"(2) (a) If in the view of the guarantor/issuer, with due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit, it is clear and manifest that a ground for non-payment exists, pursuant to paragraph (1)(a) and for that reason payment would not be in good faith, it shall not be made to the beneficiary.

(b) Unless otherwise agreed, the principal/applicant will indemnify the guarantor/issuer against the consequences of dishonour at the request of the principal/applicant."

The fourth option would introduce a discretionary right. The text would read:

"Even if a ground for non-payment has been alleged, a guarantor/issuer acting in good faith with due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit may pay a beneficiary unless ordered otherwise by a court of competent jurisdiction."

50. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted that many delegations could accept the idea of a duty not to pay on certain conditions, such as indemnification, as suggested by the representative of the United States. He asked delegations to state whether they wished article 19 to be couched in terms of a duty or of a right.

51. Mr. ILLESCAS (Spain) said that if a guarantor concluded that payment should not be made because documentary requirements were not met or the documents were false, he was obliged not to pay. However, the situation differed when the guarantor did not arrive at such a firm conclusion or when a third party claimed that the documents did not conform and so informed the guarantor. In such cases, the guarantor had the right not to pay. When there was uncertainty, discretion should be allowed.

52. Mr. GAUTHIER (Chairman of the Committee of the Whole) explained that his request for comments on the question of duty versus right was related only to paragraph (1)(a), which, as currently drafted, restricted the possibility of non-payment to the three cases described in (i) to (iii) of subparagraph (1)(a).

53. Mr. AL-NASSER (Saudi Arabia) considered that the guarantor had both a right and a duty not to pay. Paragraph (1)(a) should begin with the words: "If the guarantor proves . . .", instead of "If, in the view of the guarantor/issuer . . .". In his country's legal system, a guarantor could not decide for itself whether a document was genuine or false: that had to be proved in court. Moreover, since the concept of good faith was construed differently under various legal systems, his delegation thought that the expression "in good faith" should not be used.

54. Paragraph (1)(b), requiring the principal to indemnify the guarantor, would run counter to practice in his country, where a guarantee was an obligation between a guarantor and a beneficiary. The guarantor, and not the principal, should apply for a judicial or arbitral determination that non-payment was justified.

55. Mr. ILLESCAS (Spain) said that the current wording of paragraph (1)(a), with its three subparagraphs, was not acceptable to his delegation. There should be no categorical establishment of

bad faith in the event of the circumstances described in the three subparagraphs. There should be a reference to conduct in accordance with international standards.

56. Mr. STOUFFLET (France), referring to the use of the somewhat ambiguous term "discretionary" during the discussion, said that there was an element of arbitrariness in the French notion of "*discretionnaire*". It would be wrong to convey the impression that in certain circumstances the guarantor/issuer was free to decide against payment. As he understood it, the practical implications of using either the word "shall", implying an obligation, or the word "may", implying an element of choice, did not differ greatly and the criteria to be applied by the guarantor/issuer were the same as those set out in articles 16 and 17. The word "shall", however, implied that the guarantor/issuer could be penalized for its behaviour, in certain circumstances.

57. Ms. FENG Aimin (China) said that she preferred the proposal put forward by the representative of the United States of America because the concept of a right might lead to abuse of rights by banks, whose credibility would suffer as a result.

58. Ms. JASZCZYNSKA (Poland) said that, as Legal Counselor to the National Bank of Poland, she preferred, in practice, the concept of obligation in order to protect the bank as guarantor. That aspect was particularly important in the case of such instruments as independent guarantees with an international dimension.

59. Mr. VASSEUR (Observer for Monaco) said that formulating the question in terms of obligations and rights implied an underlying concern for the situation of the principal. Should the principal reimburse a guarantor who had made payment? The guarantor had issued the undertaking of its own volition and was not the principal's instrument in legal terms. Where the guarantor felt the need to pay in order to safeguard its international credibility, such conduct could not be held against it. With regard to the guarantor's entitlement to reimbursement, the instructions issued by the principal to the guarantor usually contained a clause permitting the latter, once payment had been effected, to debit the principal's account as a matter of course. The principal could then take action against the guarantor, on the understanding, however, that one of the basic principles of guarantee law was: pay first, contest later.

60. Mr. CORELL (Under-Secretary-General, The Legal Counsel), taking the floor at the invitation of the Chairman of the Committee of the Whole, said that the Commission was one of the many bodies served by the Office of Legal Affairs of the United Nations, which had very wide-ranging responsibilities. One of the current tasks of the Office was to assist in establishing the international tribunals set up by the Security Council for the former Yugoslavia and for Rwanda. Another was to provide services for the new organs being established following the entry into force of the United Nations Convention on the Law of the Sea. It was therefore virtually impossible to keep abreast of the substance of every activity under way in the bodies served by the Office.

61. The reports of UNCITRAL were referred to the Sixth Committee of the General Assembly, whose expertise was not, in his view, on a par with that of the Commission. The reports were therefore recognized as being more or less in a final state. It was important, however, to offer Member States an opportunity to comment on their content in the Sixth Committee.

62. When the report on UNCITRAL's current activities was submitted to the Sixth Committee, that Committee might decide to adopt it as it stood or to set up a working group to examine it prior to adoption, following which it would be submitted to the General Assembly. A diplomatic conference would not be necessary, as evidenced by the recent adoption by the General Assembly of the amendment to Chapter II of the Convention on the Law of the Sea or the Convention on the Safety of United Nations and Associated Personnel. It was a matter of convincing Governments that a text was sufficiently clear to allow its immediate adoption by the General Assembly.

63. He had been gratified to note the disciplined way in which the Commission went about its work. Such matters as the time when the meeting was called to order and the time at which it rose were placed on record and were noted by the Fifth Committee. It was important to show Member States that it was possible to work efficiently in the United Nations.

*The meeting rose at 5.10 p.m.*

## Summary record of the 555th meeting

Monday, 8 May 1995, at 9.30 a.m.

[A/CN.9/SR.555]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

*The meeting was called to order at 9.35 a.m.*

### DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (*continued*) (A/CN.9/405, A/CN.9/408, A/CN.9/411)

#### Article 19 (*continued*) (A/CN.9/408, annex)

1. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the discussion on article 19 so far had shown that there existed in substance only two possible approaches, which might be called the "shall" approach and the "may" approach. Under the

"shall" approach, where it was manifest and clear to the guarantor that, in view of the conditions stated in paragraph (1)(a)(i), (ii) and (iii), any payment made would be in bad faith, the guarantor must not pay. The alternative would be that, in the same situation the guarantor/issuer might—rather than must—refuse to pay. The exception to the obligation to pay a demand made in accordance with article 14 could therefore be expressed either by a prohibition limited to very specific circumstances, or by language that did not set out in detail the various types of fraud but merely indicated that in certain situations payment might be refused. He

would caution those preferring the "may" approach against including all kinds of conditions, such as making the right to refuse subject to the view of the guarantor/issuer or to the question of bad faith, as such restrictions might make matters less clear. He invited speakers to indicate their preference for one of those two approaches without going into great detail.

2. Mr. BYRNE (United States of America) said that, after consulting his Government and the banking community, his preference was for a formulation based on a right to withhold payment to the beneficiary. If his suggested formulation was adopted, there would be no need to refer to a contractual right to indemnification in the text, since there would be an understanding between the parties that such a right, though not mentioned, would be available. The formulation he proposed was as follows: "If, in the view of the guarantor/issuer, acting in good faith and with due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit, it is clear and manifest that a ground for non-payment exists, the guarantor/issuer has a right to withhold payment to the beneficiary". A reference to where such grounds for non-payment were formulated in the text would be inserted as appropriate. The suggested approach combined a number of useful elements, including good faith, generally accepted standards of independent guarantees and stand-by letters of credit, the "manifest and clear" requirement, the right to withhold payment and the restriction of the scope by the words "to the beneficiary". Though the other approach would if necessary be acceptable, he felt that the one he suggested represented a useful compromise.

3. Mr. EDWARDS (Australia) considered that the suggestions so far put forward in connection with article 19 did not deal entirely satisfactorily with the matter of central concern to bankers, namely, that article 19, as currently drafted, did not provide sufficient certainty to encourage the financial community to support the Convention. The banking community in Australia was particularly concerned that the grounds set out in paragraph 1(a), by requiring too broad a range of judgements by the guarantor, would make his position untenable. If the necessary documents were presented in proper fashion, the guarantor should be required to pay, except in the case of fraud to which the beneficiary was a party. The banking community was also concerned about the effect upon the assignee's position: when the latter demanded payment, he should not be met with some defence referring to wilful misconduct or fulfilment of the underlying obligation. Though the bankers' views should not be regarded as determinant, they drew attention to the fact that article 19 should not be so broad-ranging and conducive to uncertainty that it weakened the fundamental obligation referred to in article 17, namely, that a demand made in accordance with the provisions of article 14 would, in normal circumstances, result in immediate payment. Accordingly, the debate as to whether article 19 should deal with a right or an obligation not to make payment should not detract from the more important need to achieve a sufficient degree of certainty to safeguard the integrity of the obligation specified in article 17. If the grounds for non-payment could be defined with maximum certainty, they could be backed up by a requirement that payment must not be made in such circumstances. If, on the other hand, such a degree of certainty could not be achieved, the Convention might have to make the right to refuse payment discretionary, as in the United States proposal. In short, the choice of approach would depend on whether greater certainty could be achieved in the grounds mentioned in article 19(1)(a) than was at present the case.

4. Mr. SHISHIDO (Japan) said that, in his view, there was only one possible approach to article 19, but various ways in which it could be expressed. If the demand was manifestly and clearly improper, the guarantor/issuer had a duty not to pay the principal/applicant, but a right not to pay the beneficiary. That requirement

could be expressed in various ways. The word "shall" could be used, as in the current text, suggesting that it was a duty not to pay. It would also be satisfactory for the guarantor/issuer to have the right not to pay, or, to use the terminology suggested by the representative of the United States, to withhold payment. But it should be made perfectly clear that such a right applied in relation to the beneficiary and not the principal/applicant.

5. Ms. CZERWENKA (Germany) said that it was vital to distinguish between two different relationships, that between the principal/applicant and the guarantor/issuer, and that between the guarantor/issuer and the beneficiary. The Working Group had concluded that the former should be taken into account as well as the latter. One important consideration for her delegation was that the rights of the principal/applicant were also dealt with in article 20 on provisional court measures. Article 20 would not make sense if the rights of the principal/applicant were not dealt with as they now were in article 19. It was helpful to have a rule under which the principal/applicant had a right with respect to the guarantor/issuer and could require him not to pay. Regarding the substance of paragraph (1), the criteria it set out were highly restrictive. In particular, the guarantor/issuer would, in her delegation's view, have no obligation to make investigations; the fact that payment would not be in good faith must be "manifest and clear". There should therefore be no serious problems in applying the text, and Germany considered it acceptable as it stood.

6. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, as he understood it, acceptance of article 19 as it stood entailed acceptance of both paragraph (1)(a) and paragraph (1)(b).

7. Ms. CZERWENKA (Germany) said that Germany could accept the rule on indemnification in subparagraph (b) since, as a whole, it complemented subparagraph (a).

8. Mr. VASSEUR (Observer for Monaco) said that too much attention should not be paid to the relationship between the guarantor/issuer and the principal/applicant, since the obligation entered into by the guarantor/issuer was his own. Although the undertaking was made at the request of the principal/applicant, it was entered into by the guarantor/issuer. Any other view would considerably weaken article 19. He therefore urged that the proposal submitted by the United States be adopted.

9. Mr. ADENSAMER (Austria) said that in his view, the clearest solution would be to leave article 19 as it was. Following the comments made by the representatives of Japan and Germany, he could go along with the United States proposal, though it needed to be made perfectly clear that the option to "withhold payment" applied only in regard to the beneficiary. The obligation to withhold payment in the relationship between the principal/applicant and the guarantor/issuer must remain.

10. Mr. CHOUKRI SBAI (Observer for Morocco) said that on balance he considered that withholding payment should be a right, as in the United States proposal, rather than an obligation. That right would have to be exercised in the context of certain specified criteria and, in the event of abuse, the guarantor/issuer would be responsible for paying an indemnity to the beneficiary. The right also gave discretionary authority to the guarantor/issuer, who was responsible for any decision he might take.

11. Mr. LAMBERTZ (Observer for Sweden) said that the Swedish Government and banking industry were in favour of the "shall" approach, since they considered that whatever was stated in the Convention, the principle not to pay under certain circumstances would always exist. The process of drafting the Convention had been initiated because of the need to cope with the problem of improper payments. He therefore failed to understand the argument that the "shall" approach would create uncertainty for

the banks. How could a rule on the obligation not to pay create greater uncertainty than no rule at all? Moreover, in view of the close links between articles 19 and 20, adopting the "may" approach would mean redrafting article 20.

12. There was also the problem of the words "unless the undertaking excludes the application of the Convention" in article 1(1). If the "shall" approach was adopted, he believed it would be impossible to allow that part of the Convention to be excluded even if the parties to the undertaking chose to exclude the rest.

13. Mr. HERRMANN (Secretary of the Commission), referring to the last point raised by the observer for Sweden, said that the exclusion of the Convention as envisaged in article 1(1) was quite different from the exclusion of certain of its provisions. If the Convention were excluded, there would be another applicable law, which might have a rule on the duty or right to refuse to pay. For the Convention to state that there were mandatory provisions in it so important that national law could not be substituted for them would create tremendous problems. There should be a provision to make it possible to exclude the Convention *in toto* and use another legal system instead at the choice of the parties. But the Secretariat would strongly advise against trying to impose one or two provisions on what would otherwise be a consistent legal system, namely, the law that would otherwise apply.

14. Mr. ILLESCAS (Spain) pointed out that there were already three important provisions in the Convention covering the obligations of the guarantor/issuer, namely, articles 14(2), 16(1) and 17(2). Discussion as to whether articles 19 and 20 could be considered separately from one another was therefore superfluous. Articles 14, 16 and 17 made it clear that the guarantor/issuer had to pay in conditions of good faith and that if he did not, the rights of the principal were not affected. Article 19 therefore only had to deal with the possibility of a fraudulent demand for payment, and in that respect the United States proposal was clearer than the present complicated wording of article 19, which, if it were kept, should be made shorter and include a reference to articles 14, 16 and 17.

15. Mr. STOUFFLET (France) supported the United States proposal for the wording of paragraph (1)(a). He would, however, suggest that instead of saying that in certain circumstances the guarantor/issuer need not pay, it might be better to say that in certain circumstances the beneficiary did not have the right to be paid. That would then leave it open for the guarantor to pay up in the end if he so wished, even if the beneficiary did not have the right to demand payment.

16. He had serious reservations about paragraph (1)(b), which implied that the principal/applicant would have control over the execution of the payment. That would run counter to the very nature of the independent guarantee, which assumed that the guarantor was going to be independently liable.

17. Mr. LAMBERTZ (Observer for Sweden), referring to the statement by the Secretary, said that from the standpoint of the national legislator, it was incorrect to say that the question of the mandatory nature of the Convention was quite different from that of the various articles. If the Convention became national law, the question of which rules were to be mandatory would have to be clarified. He asked if the phrase in article 1(1) "unless the undertaking excludes the application of the Convention" meant that there would have to be a reservation by countries that wanted the whole system mandatory.

18. Mr. HERRMANN (Secretary of the Commission) said that his understanding was that it was for those drafting and adopting the Convention to take a position on whether it should be mandatory or not. The current view as reflected in article 1(1) of the

draft Convention was that the Convention was not a mandatory regime and that countries could opt for another one. That issue was, however, very different from the question of which of the provisions of the Convention might be derogated from by the parties once the Convention was in force. In undertakings that were not international, domestic law would apply, but for the international regime a decision on which provisions should be mandatory had to be taken. He stressed the danger of trying to make only certain provisions of a convention mandatory, which would amount to imposing provisions on any other legal system that might be applicable.

19. Ms. BAZAROVA (Russian Federation) wished to retain the idea of the mandatory nature of the obligation not to make payment. The text could perhaps be made clearer by taking the United States proposal and replacing the "may" element by a "shall" element. She supported the retention of paragraph (1)(b) but shared the reservations expressed by the French representative: the independent nature of the undertaking should not be called into question in any way.

20. Mr. KOZOLCHYK (United States of America) said that while at one point a bank had a right to withhold payment or to pay as it chose, the moment it acquired knowledge of the existence of a fraud it had a duty not to pay. There was therefore little sense in trying to separate rights and obligations as if they were alternatives; they were two sides of the same coin.

21. The implications of making it an obligation for the guarantor not to pay had not been fully considered. How long would the obligation last? Would it mean that during a certain period the obligation remained a possible cause of action? If that cause of action was regulated by national law, what was that law's statute of limitations? What were the rights of the parties to the transaction while the obligation not to pay remained unresolved? Uncertainty would arise as to when the obligation not to pay ceased to exist as a cause of action.

22. Since work on the Convention had first been begun, there had been a change of attitude on world markets. Both banks and beneficiaries had come to realize that it was not in their interests to insist on too literal an interpretation of the instruments to which they were parties. To adopt the position that the Convention's sole purpose was to ensure that abusive demands were not made would be as bad as to adopt the position that it had no purpose but to ensure finality of payment. European, United States and Australian banking associations had all indicated at various sessions of the Commission and the Working Group that they could not accept some of the articles, definitions and terminology of the draft Convention, which would be contrary to their practice. It was thus necessary to find a compromise, and one now seemed to be emerging on his delegation's proposal.

*The meeting was suspended at 11 a.m.  
and resumed at 11.25 a.m.*

23. Mr. GAUTHIER (Chairman of the Committee of the Whole), summing up the discussion, said that the proposed amendment of article 19, whereby the obligation of the guarantor/issuer not to make payment would become a discretionary right to withhold payment, had apparently caused some delegations misgivings, in view of its possible effect on the position of the principal/applicant and on the matter of provisional court measures. In an attempt to accommodate those concerns, the Commission might wish to consider whether all the elements of the proposed new formulation were necessary or relevant, and also whether the question of penalties imposed in cases of fraud would have an impact on court measures. The current text of article 19 was restrictively worded, and he did not believe that it would open up wide opportunities for banks to challenge the need to make payments, as some delegations seemed to fear.



24. Mr. FAYERS (United Kingdom) wondered whether in the text of the United States proposal the phrase "with due regard to general accepted standards of international practice . . ." sought to convey anything beyond what was expressed in article 13, paragraph (2). Was the intention to alter the scope of the obligations devolving upon the guarantor/issuer? If their scope were widened, there would be greater justification for adopting the discretionary approach and for accordingly stipulating that the guarantor/issuer had a right not to effect payment.

25. Mr. KOZOLCHYK (United States of America) said that the phrase in question had been inserted to meet the Finnish representative's desire for objectivity, with a view to limiting the guarantor/issuer's discretionary power.

26. Mr. OGARRIO (Mexico) said that his delegation felt that the term "withhold payment" would be preferable to "refuse payment", not only in the body of article 19 but also in its title.

27. With regard to the imposition of penalties in cases where the guarantor/issuer effected payment in bad faith, the relationship between the guarantor/issuer and the principal/applicant should not, in his delegation's view, be over-emphasized in the Convention. The reference to that relationship in article 20 in connection with exceptional circumstances was acceptable. However, it was more appropriate for the question of penalties for breaches of obligations to be dealt with in the contract between the issuing bank and its customer.

28. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that his delegation had been anxious from the outset that the Convention should safeguard the interests of the beneficiary, or at least the independence of the guarantor/beneficiary relationship. The emphasis should be on non-payment rather than payment. Exceptional cases involving fraud should be left to the jurisdiction of the courts. For the sake of balance, however, he could agree that the guarantor/issuer should in manifest and clear cases have some ground for non-payment, as provided for in the United States proposal.

29. Ms. FENG Aimin (China) said that she knew of no actual instances where banks had initiated non-payment measures in their daily transactions. Such steps would be implemented by a bank only after it had received a court order. Her delegation did not feel that the guarantor/issuer should possess the right to decide whether or not payment should be effected. That decision was the responsibility of the courts.

30. Ms. CZERWENKA (Germany) said that the main purpose in defining the situations constituting improper demands in article 19(1) was to explain under what conditions the principal/applicant could intervene. If the text of that article was amended to allow the guarantor/issuer to refuse payment, that would mean admitting other possible instances of improper demands and, in view of the current formulation of article 20, would prevent the principal/applicant from applying for a provisional court order. Her delegation therefore preferred to retain the approach adopted in the existing wording of article 19.

31. Mr. BONELL (Italy), endorsing the views of the representative of Germany, said he had two additional remarks. In the opening line of paragraph (1), he would prefer that the phrase "in the view of the guarantor/issuer" should be deleted, which might meet the concerns of the representative of China. In addition, in paragraph (1)(a)(iii), the phrase "and for that reason payment would not be in good faith" should also be deleted, in order to avoid any misunderstanding, as the situations referred to in paragraph (1) did not cover all cases where payment would not be in good faith. According to article 14, it was the duty of the

guarantor/issuer to act in good faith, and that covered a much broader spectrum than the situations described in paragraph (1).

32. Mr. GAUTHIER (Chairman of the Committee of the Whole) said there were two possibilities. One was to keep the present text, perhaps deleting the phrase "in the view of the guarantor/issuer" as being too subjective: if the facts were manifest and clear, they should be so to anybody. As to the matter of paragraph (1)(a)(i), in certain countries the author of the falsification must be the beneficiary, but that was not the case in many others. The Working Group had therefore felt that the restriction to falsification by the beneficiary should not be retained. Concerning the question of whether the reference to good faith was necessary, in certain jurisdictions that was in fact the test, whereas in others it simply sufficed that the grounds for non-payment be manifest and clear. The Group had therefore considered that, for the purposes of the Convention a combination might be required, under which the situation must be manifest and clear and must also be one in which, for that reason, payment would not be in good faith. That was new language which had been very specifically coined for the present Convention.

33. The other option was to say that where the issuer was in good faith and where it was manifest and clear to that issuer that any of the three circumstances described in paragraph (1) existed, then that guarantor had a right to withhold payment to the beneficiary. As suggested earlier by the representative of Finland, a sentence could be added to the effect that that rule did not affect the rights that the applicant might have under its arrangement with the bank, nor the right the applicant might have to seek relief under article 20. The idea was to show clearly that the right to withhold arose solely within the context of the guarantor/beneficiary relationship, and that other relationships were not affected either in contractual terms or with regard to an applicant's ability to seek provisional measures from a court. To sum up, the Commission should choose to focus either on the right to withhold, making it clear that it did not affect the applicant/guarantor relationship, or on the fact that in certain manifest and clear circumstances the guarantor must not pay, although if the applicant had helped to bring those circumstances to the knowledge of the guarantor, then he assumed the risks by indemnifying the guarantor.

34. Mr. FAYERS (United Kingdom) said that he agreed with the suggestion by the representative of France that the last line of paragraph (1)(a) be inverted. As now worded, it required the guarantor to concentrate on whether what he was doing was in good faith. Rather, he should concentrate on whether the beneficiary was making the demand in good faith. The wording could be replaced by something along the lines of "and for that reason the claim by the beneficiary is not in good faith". That might make it easier for some delegations to accept the mandatory approach.

35. Mr. AL-NASSER (Saudi Arabia) said that the main difficulty seemed to be that the Commission was concentrating on protecting the issuer and the applicant, while not taking due care of the beneficiary. In articles 14, 17, 19 and 20, it was a question of the beneficiary being engaged in falsification or negligence. With regard to such cases the criteria in all letters of credit required that if falsification was proved, a civil case could be brought against the beneficiary in order to recuperate what had been paid unduly. However, the beneficiary could also be the injured party. In Saudi Arabia, for example, which was a consumer of letters of credit, there were numerous problems, as most banks that guaranteed applicants were foreign ones. When a claim was presented or a demand made, they tended to look for reasons for non-payment. He cited the case of a banking consortium which had issued a letter of credit to guarantee the implementation by a number of companies of specific projects in Saudi Arabia. When, however, the State had wished to cash the letter of credit, the banks had



tried to find fault with the criteria it contained, in order to avoid making payment. The principle of sovereignty required the consortium to abide by the law of the land under which the letter of credit had been issued. It had in the end admitted its mistake and paid what it was required to pay. None the less, that example illustrated the problems of the beneficiary, which the Commission

in its present discussion was neglecting in favour of those of the issuer. A satisfactory solution would be one which guaranteed the rights of both parties.

*The meeting rose at 12.30 p.m.*

## Summary record of the 556th meeting

Monday, 8 May 1995, at 2 p.m.

[A/CN.9/SR.556]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

*The meeting was called to order at 2.10 p.m.*

### DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (*continued*) (A/CN.9/405, A/CN.9/408 and A/CN.9/411)

#### Article 19 (*continued*) (A/CN.9/408, annex)

1. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that opinion in the Commission seemed to be divided almost equally and invited those delegations that had not spoken to take the floor. New ideas would also be welcome.

2. Mr. ILLESCAS (Spain) pointed out that there were two different sets of circumstances which should be more broadly recognized in the Convention. The cases covered by paragraphs (1)(a)(i) and (ii) involved facial conformity, where there was a clear duty not to pay on the basis of non-fulfilment of earlier articles of the Convention. In subparagraph (iii), on the other hand, facial conformity did not arise and a bank was given the possibility not to pay, with all the attendant consequences. In that context, the possibility of withholding payment, where the bank would have to take the decision following normal standards, could be recognized unreservedly.

3. Paragraphs (2)(a), (b), (c) and (d) listed circumstances where, despite facial conformity, the guarantor might entertain doubts regarding the basis of the demand, so that payment should be withheld.

4. He thought the term "discretion" was inappropriate because, in Roman law countries, it had the connotation of arbitrariness. In other respects, he supported the solution proposed by the delegation of the United States of America.

5. Mr. EDWARDS (Australia) said that he also had tried to establish a dichotomy between two sets of circumstances, the first in which payment should be withheld and the second in which there should be a right to withhold payment.

6. He proposed amendments to article 19:

Paragraph (1)(a) should be deleted and replaced by the following:

"(1) (a) If, at the time of presentation of the demand to the guarantor, there is information before the guarantor from which it is manifest and clear that:

- (i) Any document is not genuine or has been falsified;

- (ii) No payment is due on the basis asserted in the demand and the supporting documents; or
- (iii) The demand has no conceivable basis,

the guarantor shall withhold payment to the beneficiary."

Paragraph (1)(b) should be deleted and replaced by the following:

"(1) (b) If, at the time of presentation of the demand to the guarantor, the guarantor is of the view that there is a high probability that:

- (i) The document is not genuine or has been falsified;
- (ii) No payment is due on the basis asserted in the demand and the supporting documents; or
- (iii) The demand has no conceivable basis,

the guarantor shall have the right to withhold payment to the beneficiary."

The reference in paragraph (2) to paragraph (1)(a)(iii) should be deleted and replaced by "paragraph (1)(a)(iii) or (1)(b)(iii)."

A new paragraph (3) should be inserted to read:

"The action of the guarantor in withholding payment under paragraph (1)(a) or (1)(b) does not prejudice any rights of the principal or the beneficiary against the guarantor in respect of that action."

7. He explained that he had suggested deleting the words "judging by the type and purpose of the undertaking" from (iii) because they added little to the sense.

8. The purpose of the amendment to paragraph (1)(a) was to define what matters were left to the judgement of the guarantor and to specify that the guarantor was expected merely to make a decision on the basis of the documents before him and was not expected to make a search.

9. Mr. BONELL (Italy) commended the Australian proposal but asked for an explanation of the purpose of the new paragraph (3). That paragraph made sense in the type of situation in which payment might be refused if there were good reasons to do so; however, in a situation where there was a duty not to pay, he did not understand that such a duty could be subject to the condition that the case might later be reopened.

10. Mr. EDWARDS (Australia) said that while paragraph (1)(a) reduced the need for judgements on facts, such judgements nevertheless had to be made by the guarantor. The reason why paragraph (3) dealt with situations covered by paragraph (1)(a) and (1)(b) was that the guarantor might in the course of time be found to have been wrong. The provision was intended to ensure that the financial transaction could proceed with certainty in the commercial market-place. Withholding payment would permit subsequent correction in the case of such an error. However, the occurrence of an error and damage to the principal or guarantor should not prejudice recourse to law.

11. Ms. FENG Aimin (China) suggested that, if paragraph (1) of article 19 were incorporated in article 20, it might constitute a rule on the obligation to be undertaken by the bank. Article 19 merely stipulated that a bank did not pay or withheld payment in accordance with article 20. Her suggestion would mean that the stipulation would be aligned with UCP 500 rules, which did not give the bank the right not to pay.

12. Mr. FAYERS (United Kingdom) welcomed the Australian proposal, which, by its structure, well differentiated between a decision to be made at the time of presentation of a demand and the relevance of such a decision in subsequent later litigation.

13. The purpose of paragraph (3) was to protect the rights of the principal or beneficiary against the guarantor at such a later time, when payment had been withheld, in which case the beneficiary would presumably be the aggrieved party, so that it was difficult to see what rights of the principal needed to be protected in that context.

14. It might be desirable to cover the situation mentioned in paragraph (1)(b) in which the guarantor had the right to withhold payment but decided to pay. In that case the principal, who did not wish his account to be debited, had a right that should be protected.

15. The proposed paragraph (3) seemed to postulate withholding of payment, so that the rights of the beneficiary would not ultimately be prejudiced, and it was not clear what rights of the principal would be infringed.

16. Mr. STOUFFLET (France) commended the Australian proposal.

17. Paragraph (1)(b) would recognize the possibility, not the obligation, that the guarantor would refuse or defer payment when there seemed to him to be a high probability of irregularity. That would, however, derogate from the current practice of courts and the approach advocated in legal writing, which required certainty rather than high probability as the grounds for refusal of payment. The question of high probability also had some bearing on article 20.

18. The CHAIRMAN, speaking in his capacity as the representative of Singapore, supported the Australian proposal.

19. It should perhaps be made clear that, in order to prevent the perpetuation of fraud, the withholding of payment would not prejudice the right of a beneficiary to bring the matter to court.

20. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the Commission should now choose between three options.

21. The first was to adopt the Australian proposal, which provided that the bank either must or might withhold payment or had a right to do so. In that context, the United Kingdom had made a valid point, which would require drafting changes.

22. The second option, on the basis of the United States proposal, would be to provide that the guarantor/issuer, acting in good faith, had the right to withhold payment to the beneficiary if it were manifest and clear that either of the three circumstances described in subparagraphs (i), (ii) or (iii) of paragraph (1) were present.

23. The third option would be to retain the existing text of article 19, except that subparagraph (1)(b)(ii) would be deleted. That text would provide for an obligation not to make payment.

24. The passage "unless otherwise stipulated in the undertaking or agreed elsewhere by the guarantor/issuer and the beneficiary", which was in square brackets, might still have to be discussed.

25. Mr. SHISHIDO (Japan) said that the words "guarantor/issuer acting in good faith" should be added after the words "against the beneficiary" so as to make it clear to whom the guarantor/issuer was acting in good faith.

26. Mr. VASSEUR (Observer for Monaco) said that it was difficult to choose between the three options outlined by the Chairman without written texts. He thought that discussion of article 19, a key provision, should be suspended until those written texts were available for discussion.

27. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted that there seemed to be a plurality in favour of the second option, which might therefore be considered as agreed. He suggested that the Commission move on to the consideration of article 20.

28. A brief procedural discussion followed, in which Mr. BONELL (Italy), Mr. LAMBERTZ (Observer for Sweden) and Mr. GAUTHIER (Chairman of the Committee of the Whole) participated.

#### Article 20 (A/CN.9/408, annex)

29. Mr. VASSEUR (Observer for Monaco) pointed out that, in the view of many member associations of the Banking Federation of the European Union, which he was also representing at the current session, article 20 was unnecessary, primarily because it was a procedural article and questions of procedure should be dealt with under national law and not in the Convention. When the Working Group had discussed rules on conflict of laws at its January 1995 session in New York, procedural questions had arisen and the relevant chapter had been eliminated.

30. Though article 20 on provisional court measures dealt with procedural questions, it had significant gaps; for instance, it did not state whether an appeal against such measures would be possible, whether rulings would be handed down at the mere request of the principal/applicant or after due hearing of the parties, and so on.

31. Secondly, very serious concern regarding article 20 had been expressed in a letter from the Banking Federation of the European Union to the Secretary. One of the most important banking associations in the Federation had stated that article 20 should be deleted because the criteria that it set forth were much less strict than the minimum rules in force permitting provisional court measures in most States of the European Union. Also, in all States of the European Union high probability was not a sufficient criterion.

32. Article 20, if retained, would encourage a principal/applicant to refer a matter to the judge in order to gain time, even if the action had little chance of success.

33. There was inconsistency between the provisions of articles 19 and 20, since article 19 used the phrase "manifest and clear",

whereas article 20 referred merely to "high probability". He therefore proposed, on the assumption that article 20 were retained, that a passage to the effect that a provisional court measure could be issued by the judge when it was manifest and clear, or indubitable or beyond doubt that one of the cases referred to in paragraph (1) of article 19 was present. If the reference to high probability were retained, there should be a new provision stipulating that, on rejection of a request for a provisional court measure by the principal/applicant, the latter be automatically ordered to pay damages; as a result, it would be aware that it should not use article 20 in order to gain time. The prohibition of preventive requests under article 20 was objectionable, because that was a matter for local law.

34. Provisional court measures should be taken only in exceptional circumstances, in which context the criterion that otherwise the principal/applicant would be likely to suffer serious harm was inadequate. The principal/applicant should be expected to know what it was doing. In the context of provisional court measures, it should be stated that the court not only could request the applicant to provide security but must do so.

35. He had for some years been drawing attention to the question of counter-guarantees and it was regrettable that article 20 ignored the situation of the bank as a counter-guarantor in the event of provisional court measures against the first bank, and also the situation of the first bank in the case of provisional court measures against the counter-guarantor bank. Article 20 should firmly state that provisional measures regarding the first guarantee should have no impact on the counter-guarantee, and conversely that such measures regarding the counter-guarantee should have no impact on the first guarantee.

*The meeting was suspended at 3.35 p.m.  
and resumed at 4.05 p.m.*

36. Mr. GAUTHIER (Chairman of the Committee of the Whole) invited the Commission to continue its consideration of article 20.

37. Mr. HARADA (Japan) said that, in his delegation's view, article 20 was unnecessary and should be deleted, for the following reasons. Firstly, there should be no interference with the court's discretion to decide whether or not to issue a provisional order and to decide what was the most appropriate type of order in the light of all the circumstances surrounding the case. Secondly, there should be no infringement of the court's freedom to evaluate the evidence. Thirdly, Japan had no restrictions on provisional measures such as were provided for in article 20, with respect to bills of exchange and promissory notes, even though the holder of such instruments might deserve greater protection than the beneficiary of the undertaking in the Convention.

38. If the proposal for outright deletion was not acceptable, his delegation would propose that the words "there is a high probability that" and "strong" in paragraph (1) and the whole of paragraph (3) should be deleted.

39. If that alternative proposal was not acceptable, either, his delegation would favour a reservation clause like article 22 of the Vienna Convention on the Sale of Goods.

40. Mr. CHOUKRI SBAI (Observer for Morocco) said that the provisional court measures provided for in article 20 were in conformity with his country's judicial system. If the procedure was abused, the party concerned would be liable for damages in respect of any delay in execution of the obligation. The provisions included in the article offered adequate safeguards: the need for "strong evidence", the consideration that the principal/applicant would be likely to suffer "serious harm" and the fact that the court could require the person applying to furnish security. The measures were intended to be available in relation to the cases dealt

with in article 19(1)(a), where the beneficiary was at fault, but they could also protect the beneficiary against the consequences of any deal between the principal/applicant and the guarantor, particularly if the latter was a bank, since banks sometimes opted not to protect their clients from damage. The beneficiary would be able to plead before the court that the allegations by the principal/applicant were not well founded. The court would then have discretion as to what course to adopt.

41. Ms. CZERWENKA (Germany) said that article 20 left many issues to be decided by courts under their national laws. For instance, as it stood, the principal/applicant could apply for provisional court measures even if it had no claim against the guarantor/issuer. Under German law, that was not possible. However that might be, the basic rule was appropriate, namely, that the principal/applicant should have the possibility of applying for such measures. Nevertheless, she agreed with the Japanese representative that the references to "high probability" and "strong" evidence should be deleted. She also thought it unnecessary to provide for the possibility of blocking the proceeds of the undertaking already paid to the beneficiary, which lay outside the sphere that the Convention was intended to regulate.

42. Mr. STOUFFLET (France) said that the introduction of the "high probability" criterion looked like a withdrawal from the position that seemed to have been definitively established in a number of legal systems. Paradoxically, referring to evidence as "strong" might indicate some degree of laxity; it would be more forceful to refer to "immediately available" evidence.

43. He wondered whether the question of counter-guarantees affected only article 20, or whether it was not also relevant to article 19. If the latter, it might be desirable to have a separate article on the subject. The problem was a real one, and it would be unfortunate if it were ignored in the Convention.

44. Mr. LAMBERTZ (Observer for Sweden) said that it was difficult for him to take a position on article 20 without knowing what the final form of article 19 would be. The Working Group had provided for a lower level of proof in article 20, as reflected in the phrase "high probability", on the understanding that article 19 would be a "shall" rule. If, however, article 19 was to become a "may" rule, the link between the two articles would not be clear.

45. Mr. KOZOLCHYK (United States of America) said that the lower degree of proof implied by the phrase "high probability" was what was required when a petitioner was making an initial application for a temporary restraining order. The judge would require a higher level of proof when he came to decide whether to grant an injunction or not. It was proof of the latter sort that seemed to be at issue in article 20, so that the position taken by the representatives of France, Germany and Monaco seemed to be right. It was also in line with the way the Working Group had seen the matter.

46. Mr. BONELL (Italy) said that, notwithstanding that explanation, he agreed with the observer for Sweden that there was a logical link between article 19 and article 20. If the "shall" provision was retained in article 19, the formula in article 20 was correct. If, on the other hand, article 19 was a "may" rule, the scope of article 20 should be narrowed, deleting the references to "high probability" and "strong evidence", so that a reference to "immediately available evidence" should suffice.

47. Ms. FENG Aimin (China) said that the Commission should consider the suggestion made by the representative of Japan. The restrictions on the court under paragraph (3) of article 20 were too severe. The Commission should also consider the relationship between articles 19 and 20.

*The meeting rose at 5 p.m.*

## Summary record of the 557th meeting

Tuesday, 9 May 1995, at 9.30 a.m.

[A/CN.9/SR.557]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

The meeting was called to order at 9.35 a.m.

### DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (*continued*) (A/CN.9/405, A/CN.9/408, A/CN.9/411)

#### Article 12 (A/CN.9/408, annex)

1. Mr. GAUTHIER (Chairman of the Committee of the Whole), introducing article 12, said that subparagraph (a) dealt with the case where an undertaking expired on a particular date. In subparagraph (b) expiry depended on the occurrence of a particular event. If neither of those conditions was met, subparagraph (c) provided for the undertaking to expire six years after issuance. That would allow a clear five years' validity, given that in the first year it might be some months after issuance before the instrument took effect.

2. Ms. CZERWENKA (Germany) said she had two drafting points to raise on article 12. With regard to subparagraph (b), she noted that the term "confirmation" was given a specific definition in article 6, and therefore thought it would be better to replace it with another word, such as "affirmation" or "assurance".

3. Secondly, she felt that the drafting of subparagraph (c) was incomplete. It might well be an undertaking both stated that an act or event had to occur and set an expiry date. As the text stood, it might be taken to mean that in such cases, if the act or event had not yet been established, the stated expiry date was to be ignored in favour of the six-year limit. It would be preferable to add, after the word "document", the words "and an expiry date has not been stated in addition".

4. Mr. HERRMANN (Secretary of the Commission) said he thought the intention was that whenever an expiry date was stated, it would apply, however long the period might be. The six-year limit would then not apply. It made no difference if the undertaking also stipulated the occurrence of an act or event. In that situation, whatever occurred first would trigger expiry—either the expiry date, or an earlier event. If that was not the intention, the text would have to be redrafted.

5. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that he agreed with the representative of Germany on the first point she had raised, concerning the word "confirmation". It was a matter of drafting, and a better word should be found.

6. The second point raised the question of the Working Group's understanding of what subparagraph (c) was meant to achieve. He asked whether the Commission wished to keep to the policy position adopted by the Working Group—namely, that if no date was specified, or if an event was specified but did not occur, then the expiry period was six years beyond the date of issuance, but that the parties were free to provide for an expiry date extending beyond six years if they wished.

7. Ms. CZERWENKA (Germany) said that the matter was not one of substance, but of drafting. As it stood the text was not

clear. Subparagraph (c) stated baldly that if an act or event condition had not been met, the six-year limit would apply. It did not say that that would not be so if an expiry date was also specified.

8. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that if the undertaking stated an expiry date, even if it also stated an expiry event, then the mere fact that there was an expiry date meant that subparagraph (c) would not apply.

9. Mr. FAYERS (United Kingdom) said he agreed with the representative of Germany and that the Commission had to make a policy decision. Where there was both an expiry date and an act or event, the Commission should specify that it was the first of those to occur that would be decisive.

10. Mr. LAMBERTZ (Observer for Sweden) said he supported the analysis made by the representative of Germany. It was not a policy issue; the word "or" caused a problem, which should be dealt with by the drafting group.

11. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the drafting group might be asked to consider if there was a better way to express what was intended, bearing in mind the fact that other provisions in the Convention were drafted along similar lines.

12. Mr. MAHASARANOND (Thailand) asked whether in subparagraph (b) the phrase "not within the guarantor/issuer's sphere of operations" was necessary, because the act or event on which expiry was to depend was based on an agreement between the guarantor/issuer and the principal/applicant.

13. Mr. HERRMANN (Secretary of the Commission) said that the idea had been that where there was a clause in the undertaking making expiry dependent on an act or event, it should in general be limited to a documentary condition, to the exclusion of non-documentary conditions. Bankers did not wish to get involved in the investigations the latter might entail. There was, however, a small range of possible non-documentary acts or events which the Working Group had wished to include and which did not create the risk of placing bankers in that position. One example was when a presentation was made at the bank counter, which the guarantor, by his very presence, could easily verify. Another was where an advance payment had been made or repayment guarantee given at the same bank. Such transactions fell within the sphere of operations of the guarantor/issuer. The Group had felt that it would not be reasonable to exclude them and require documentation of something which the guarantor could verify from his desk, without having to contact another bank.

#### Article 13 (A/CN.9/408, annex)

14. Mr. GAUTHIER (Chairman of the Committee of the Whole) introduced article 13, drawing particular attention to the fact that there had been much discussion in the Working Group, in particular of the latter part of paragraph (2), and more especially of the exact position in the sentence of the word "international".

15. Mr. BONELL (Italy) said that the opening phrase of paragraph (1), "subject to the provisions of this Convention", was the kind of wording that usually indicated the mandatory character of the provisions. With such language the terms in the contract would bind the parties only if consistent with the provisions of the Convention. But that was not the intention with the present text; some conditions were mandatory, but not all of them. As a result he had some difficulty with the language used.

16. Another point of concern to him was that there was an explicit reference in paragraph (1) to the rights and obligations of the guarantor/issuer and the beneficiary, but no mention of the principal/applicant. Certain versions at least of articles 19 and 20 dealt specifically with the rights and duties of the principal/applicant, and he wondered whether they should not also be covered in article 13.

17. Mr. HERRMANN (Secretary of the Commission) said that he did not think the second point raised had ever been discussed in the Working Group. The omission of any reference to the principal/applicant was probably due to the fact that paragraph (1) was concerned with the parties whose rights and obligations were determined by the terms and conditions of the undertaking, not by the provisions of the Convention.

18. As for the introductory phrase, "subject to the provisions of this Convention", it was a form of words that could be found in other UNCITRAL texts. It had been suggested that "subject to the mandatory provisions of this Convention" would be preferable, but that wording would produce a different result. In the present wording, a non-mandatory provision of the Convention gained mandatory effect if not derogated from, that is, if the parties to the undertaking did not stipulate otherwise, either by excluding a particular provision or by regulating the matter differently. If not derogated from, even a non-mandatory provision became applicable and determined the rights and obligations in a given situation. Insertion of the word "mandatory" would imply that the rights and obligations were subject to the mandatory provisions only, thus leaving a gap. The Working Group had chosen the present wording as a more comprehensive formula that did not exclude the non-mandatory provisions.

19. Mr. LAMBERTZ (Observer for Sweden) said that the representative of Italy had raised two important issues, which should, if possible, be dealt with in the report. His understanding of the introductory phrase in paragraph (1) was the same as the Secretary's: to refer to "mandatory provisions" would produce a different meaning. The present wording made it possible to invoke the entire Convention, so that any provision not derogated from became mandatory. In his view, the wording should be kept as it stood, but it might be advisable to consider the problem as and when other articles were examined.

20. In regard to the other point raised by the representative of Italy, in his understanding, article 13(1) did not affect either the rights of the principal/applicant himself or the rights of the guarantor/issuer in relation to the principal/applicant.

21. Mr. HERRMANN (Secretary of the Commission) said that when he had explained his understanding of the phrase "subject to the provisions of this Convention", he had not gone into the issue of whether any given provision of the Convention was mandatory or not, or how that should be expressed. It could have been stated, for instance, that all provisions were mandatory—or, if preferred, non-mandatory—unless otherwise specified. The chosen solution had been to use in any individual provision a form of words such as "unless otherwise stipulated in the undertaking or elsewhere agreed ..." in order to show that it was a non-mandatory provision. If the word "mandatory" were inserted in the first phrase of paragraph (1), the provisions referred to would then be only

mandatory provisions, which would then prevail over the terms and conditions set forth in the undertaking. There could, however, be a practical problem in situations where the parties had not derogated from non-mandatory provisions by excluding a particular provision or by incorporating some positive regulation. It would then not be clear whether the non-mandatory provisions applied or not.

22. Mr. BONELL (Italy) said that he agreed in substance with the Secretary's explanation, but still felt that the present wording "subject to the provisions of this Convention" might be a little ambiguous. It might be preferable to say "The rights and obligations of the guarantor/issuer and the beneficiary are determined by the provisions of this Convention and ...".

23. On the question of mentioning only two of the three parties involved, he would urge that it be made absolutely clear that article 13 referred only to rights and obligations arising from the undertaking.

24. Mr. BYRNE (United States of America) said that the discussion initiated by the first phrase of paragraph (1) had been very interesting and the Secretary's explanation very persuasive. However, an easier way of achieving the desired result and avoiding divergent interpretations might be to delete that opening phrase and add the words "arising under this Convention" after "and the beneficiary". He pointed out that the words "subject to" were used in article 17 to create an exception.

25. Mr. EDWARDS (Australia) said that it would be difficult for him to accept the United States proposal, because, in his view, the rights being protected in paragraph (1) were far more extensive than was suggested by that wording. Any change in the present wording might create more problems than it solved. The present formulation was not an unusual one, and it did not really matter if some room was left for interpretation. He thus supported the text as it stood.

26. Mr. STOUFFLET (France) said that paragraph (2) provided guidance for the judge regarding the interpretation of guarantees and stand-by letters of credit, so that if something was not clear in the text, the judge could take account of international rules and usages. But if the parties in their specific contracts had excluded some international instrument or other, he wondered whether the judge would, even so, be able to take account of such an instrument. It might be more rational to state that international rules and usages of independent guarantee or stand-by letter of credit practice would be taken into account "unless reference to such texts is explicitly excluded".

27. The CHAIRMAN, speaking as representative of Singapore, said that, as his country understood it, the phrase "subject to the provisions of the Convention" in paragraph (1) referred to all provisions in the Convention relevant to a particular problem, and not just to mandatory provisions.

28. Mr. ILLESCAS (Spain), referring to article 13(1), said that it was not entirely clear whether the Convention was mandatory or not in regard to the rights and obligations of the guarantor/issuer and beneficiary. He agreed with the Secretary's explanation, but had his doubts as to whether the terms employed in the text were the most appropriate ones. His delegation would prefer to have a reference at the beginning of article 13 to article 1(1), thus recognizing a possibility for the parties to come to an agreement as to whether or not the guarantees concerned were subject to the Convention. Thus article 13(1) could begin "Subject to the provisions in article 1, paragraph (1), of the present Convention" and then continue as in the present text. That would clarify the mandatory or non-mandatory nature of the provisions of the Convention used by the parties, which were free to decide for

themselves whether or not their agreement was subject to the Convention. The parties could decide that article 1(1) would apply or that the rules and obligations should be determined by the Convention, by the terms and conditions set forth in the undertaking, or by any other rules, general conditions or usages. A similar clause could be introduced into the second paragraph.

29. Mr. MARKUS (Observer for Switzerland) said that he himself agreed with the interpretation of the first phrase of paragraph (1) given by the Secretary, but had come to realize that it could be understood differently by others. It might lead to the erroneous conclusion that every provision not containing the phrase "unless otherwise stipulated or elsewhere agreed" was mandatory. Article 15, for example, did not contain that form of words but was not in his view mandatory. As he saw it, the real problem was with the phrase "subject to" and he wondered whether a more satisfactory term could be found.

30. Mr. FAYERS (United Kingdom) suggested that, in view of the divergent interpretations, the discussion be adjourned and the drafting group asked to submit alternative forms of words from which a choice could be made.

31. Mr. GAUTHIER (Chairman of the Committee of the Whole) suggested that the phrase "subject to the provisions of this Convention" be deleted and the paragraph amended to read: "The rights and obligations of the guarantor/issuer and the beneficiary arising from the undertaking are determined by the provisions of this Convention and by the terms and conditions as set forth in the undertaking, including any rules, general conditions or usages specifically referred to therein".

32. Mr. EDWARDS (Australia) said that some of the problems connected with the words "subject to", which he understood to create difficulties in certain languages, could be resolved by replacing the phrase "Subject to the provisions of this Convention" by "Except where the application of this Convention otherwise determines".

33. Mr. AL-NASSER (Saudi Arabia) said that he had understood that the Spanish proposal had been to amend the provision to read: "The rights and obligations of the guarantor/issuer and the beneficiary are determined by the terms and conditions set forth in the undertaking in conformity with the provisions of this Convention and any rules and general conditions specifically referred to therein".

34. Ms. CZERWENKA (Germany) said that the expression "the rights and obligations arising from the undertaking are determined by the terms and conditions set forth in the undertaking" was somewhat circuitous. She believed that there was in fact a common understanding of the meaning of the words "subject to the provisions of this Convention" and therefore suggested that those words be retained.

35. Ms. FENG Aimin (China) endorsed those views. However, if the text was to be amended it would be better to say: "The rights and obligations of the guarantor/issuer and the beneficiary arising from the undertaking shall be determined by the provisions of this Convention. In the absence of any such provisions, they shall be determined by the terms and conditions of the undertaking."

36. The CHAIRMAN, speaking as representative of Singapore, said that if the suggestion by the Chairman of the Committee of the Whole were accepted, it would not be clear, in the event of a conflict between the provisions of the Convention and any of the terms and conditions in the undertaking, which should prevail, whereas the formula "subject to the provisions of this Convention" in the present text implied that the provisions of the Convention would prevail.

37. Mr. LAMBERTZ (Observer for Sweden) did not agree that all delegations had understood the words "subject to the provisions of this Convention" in the same way. He had always understood that an article would be mandatory if nothing to the contrary was stated. If that was not the right interpretation, the fact should be made clear. The Commission would then have to specify in each article whether it was mandatory or not.

*The meeting was suspended at 11.10 a.m.  
and resumed at 11.40 a.m.*

38. Mr. GAUTHIER (Chairman of the Committee of the Whole) suggested that the reference to the provisions of the Convention might be moved to the end of article 13(1), which would then read: "The rights and obligations of the guarantor/issuer and the beneficiary are determined by the terms and conditions set forth in the undertaking, including any rules, general conditions or usages specifically referred to therein, and by the provisions of this Convention."

39. Several techniques existed to make it clear which articles of the Convention were mandatory. One would be to list them, another to include in the non-mandatory articles the words "unless otherwise agreed". The context, moreover, would indicate whether or not the provision was mandatory.

40. Ms. CZERWENKA (Germany) said that article 13(1) as it stood was sufficiently clear to explain the relationship between the guarantor/issuer and the beneficiary, but that she would have problems if it were amended to include the words "arising from the undertaking".

41. Mr. BONELL (Italy) was in favour of the wording suggested by the Chairman of the Committee of the Whole, which clarified the scope of the provision.

42. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that he took it that in the absence of any objections, the Commission agreed to the wording he had suggested for article 13(1).

43. He invited comments on the French proposal to amend article 13(2) by inserting the phrase "unless reference to such texts is specifically excluded" after the words "regard shall be had".

44. Ms. CZERWENKA (Germany) supported that proposal.

45. Mr. BYRNE (United States of America) said that the present text of article 13(2) was a delicate compromise reached after much deliberation. To introduce the words proposed would upset the balance achieved. He believed that if the parties to an undertaking excluded certain practices that would itself be one of the terms and conditions of the undertaking.

46. Mr. BONELL (Italy) considered that the French proposal would create problems and should not be adopted.

47. Mr. CHOUKRI SBAI (Observer for Morocco) said that his delegation believed that the additional text proposed by the representative of France complicated matters. Judges should have the possibility of taking international standards of practice into account when seeking to find suitable solutions. The text of paragraph (2), as it currently stood, was sufficiently flexible and should remain unchanged.

48. Mr. BOSSA (Uganda), agreeing with the observer for Morocco, said that the French proposal could lead to problems regarding the standards to be applied in cases where neither the undertaking nor the Convention dealt with a particular question and reference to international rules and usages had been excluded.



49. Ms. CZERWENKA (Germany) said that, according to the drafting practice adopted in the Working Group, whenever a provision was not mandatory and it was possible to derogate from it, that possibility had to be expressly stated. Her delegation felt that such a proviso afforded greater flexibility, by allowing the parties to agree whether or not particular rules should be applicable. That was why she had supported the French proposal. In its consideration of article 14(1), the Working Group had discussed at length the degree to which regard should be had to generally accepted standards, and it had finally been agreed, in the interests of flexibility, to employ the phrase "due regard". A similar result might be achieved in article 13(2) by replacing the words "regard shall be had" by "regard may be had".

50. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the current wording of paragraph (2) was the outcome of efforts by the Working Group to achieve a compromise and a balance. He did not believe that the Working Group had ever considered that the text of that paragraph should constitute an invitation to judges or arbitrators to disregard a stipulation made elsewhere by the parties to the effect that specific international rules should not be referred to. Perhaps the issue could be resolved by leaving the text unchanged and stating clearly in the records that it was not the Commission's intention that article 13(2) should imply any such invitation.

51. With regard to the Working Group's agreed practice of inserting a proviso in order to indicate the possibility of derogation, the need for such an insertion did not always arise if it was abundantly clear from the context or the construction of an article that its provisions were not mandatory.

52. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that his delegation supported the view that the current text of paragraph (2) possessed sufficient flexibility and should not be amended.

53. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that he took it that the Commission wished to adopt article 13(2) as it stood.

54. *It was so decided.*

#### Article 14 (A/CN.9/408, annex)

55. Mr. GAUTHIER (Chairman of the Committee of the Whole) introduced the article.

56. Mr. SHISHIDO (Japan), referring to paragraph (2), asked whether the reference to liability applied to the guarantor/issuer's relationship with the beneficiary or also included its relationship with the principal/applicant.

57. Mr. HERRMANN (Secretary of the Commission) said that the question of liability had to be viewed on the basis of the criteria of good faith and reasonable care in the guarantor/issuer's performance of its obligations under the undertaking and the Convention, as indicated in paragraph (1), which had to be read in conjunction with paragraph (2). Thus it was essentially liability towards the beneficiary that was intended, but not exclusively, since, under the Convention, the guarantor/issuer had certain obligations towards the principal/applicant, although they were now fewer than in the earlier stages of its drafting.

58. Ms. FENG Aimin (China) said that her delegation disagreed with the use of the term "grossly" in paragraph (2). It was unlikely that acts constituting gross negligence would occur in banking practice. Banks had to be liable for any negligent conduct on their part.

59. Mr. CHOUKRI SBAI (Observer for Morocco) said that under Moroccan law a prior condition granting exemption from liability could be established in regard to simple negligence but not in regard to gross negligence or fraud. His delegation was therefore in favour of retaining the reference to gross negligence.

60. With reference to the question raised by the representative of Japan, he believed that non-exemption from liability applied primarily to the relationship between the guarantor/issuer and the principal/applicant, since the undertaking was drawn up between those two parties. But the general rules also established protection for the beneficiary. The guarantor/issuer should not be permitted to act towards the beneficiary in bad faith or be grossly negligent in its conduct *vis-à-vis* the beneficiary.

*The meeting rose at 12.30 p.m.*

### Summary record of the 558th meeting

Tuesday, 9 May 1995, at 2 p.m.

[A/CN.9/SR.558]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

*The meeting was called to order at 2.05 p.m.*

#### DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (continued) (A/CN.9/405, A/CN.9/408, A/CN.9/411)

##### Article 14 (A/CN.9/408, annex)

1. Mr. GAUTHIER (Chairman of the Committee of the Whole) invited the Commission to continue its discussion of article 14.

2. The CHAIRMAN, speaking in his capacity as the representative of Singapore, said that he supported the proposal by the

representative of China to delete the word "grossly". If a bank was negligent, it should be liable.

3. Mr. EKENTA (Nigeria), also endorsing the proposal made by the representative of China, said that the provision as it stood allowed the guarantor too much room for manoeuvre.

4. Ms. FENG Aimin (China) said that there was still a problem as to whether negligence resulted in recourse by the applicant.



5. Mr. BYRNE (United States of America) said that paragraph (2) reflected the Working Group's conclusion that the parties could agree by contract that the risk of certain negligent behaviour be borne by one party rather than the other. Paragraph (2) set forth the limits to that ability.

6. The URDG and UCP rules made it clear that specific types of risk were borne by the principal/applicant; that was set forth contractually either expressly or by the incorporation of those standard sets of rules. To disrupt the freedom to contract out with regard to ordinary negligence would render the Convention unacceptable to the banking community. From the standpoint of public policy and public order, however, it was important to express in the article that there were limits to party autonomy.

7. Mr. BONELL (Italy) said that what was at stake was not the liability of a bank for negligent conduct, failing any limitation in the undertaking, but rather a limit to the freedom of the bank vis-à-vis the beneficiary to contract out of such liability in certain instances. The freedom to exclude liability for "near-negligence" was a well-established principle of contract law and should not be denied.

8. Though there might be discussion of the best formulation, he was convinced that the underlying idea of the current draft should be maintained.

9. Mr. CHOUKRI SBAI (Observer for Morocco) supported the remarks made by the representatives of the United States and Italy. The paragraph should be retained in its present form.

10. Ms. FENG Aimin (China) said that she disagreed with the representative of the United States. According to article 16 of UCP 500, the bank assumed no liability for errors in translation, but that did not mean that the bank should not assume any other liability for negligent conduct.

11. Mr. HERRMANN (Secretary of the Commission) said it was important to recognize the difference in legal status and effect of the UCP and URDG rules, which applied to contracts, and the draft Convention, which could effectively establish a firm legal limit. The problem addressed by paragraph (2) of article 14 was one which neither UCP, in most jurisdictions, nor URDG, could effectively address, namely, the limit to the freedom of the parties. There was no inconsistency between the rules on liability in article 15 of URDG and in the draft Convention.

12. Mr. GAUTHIER (Chairman of the Committee of the Whole) took it that the Commission wished to approve the draft of article 14 as it stood.

13. *It was so agreed.*

#### Article 15 (A/CN.9/408, annex)

14. Mr. GAUTHIER (Chairman of the Committee of the Whole) introduced article 15.

15. Ms. CZERWENKA (Germany) said that, to be consistent with article 2, which provided that the Convention should cover only those undertakings where the demand had to be in some documentary form, the last sentence of article 15 should probably be construed as covering only instances where no certification or other document accompanying the demand was required.

16. Mr. HERRMANN (Secretary of the Commission) said that, to understand the rationale of the phrase "certification or other document" in the last sentence of article 15, it should be remembered that, at an earlier stage, the Working Group had decided to include the words "upon presentation of other documents" in

paragraph (1) of article 2 in order to avoid the misinterpretation that the demand was not a document. That had entailed consequential drafting changes.

17. The word "certification" in the last sentence of article 15 was intended to refer to an additional statement, so as to emphasize further that the demand was itself a document. The insertion of the words "in addition to the demand" after the words "or other document" might help to make that point clear. As the representative of Germany had suggested, a document accompanying the demand was referred to.

18. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that he supported the suggestion of the representative of Germany. There were two different types of demand: those which required documentary presentation and those which did not. However, even in the case of a simple demand, there had to be certification that the demand was not improper.

19. Mr. GAUTHIER (Chairman of the Committee of the Whole) explained that it should be understood from the last sentence of the article that, if certification was required, it had to be produced; however, in cases where no such certification was required, the mere fact of making a demand implied certification by the beneficiary that the demand was not being made in bad faith or was not otherwise improper.

20. Mr. EDWARDS (Australia) said that the last sentence of article 15 seemed to be predicated on the assumption that, where additional certification or documentation was provided, it would always be evidence of good faith. However, if that other documentation conveyed nothing about good faith, no such inference could be drawn.

21. Mr. HERRMANN (Secretary of the Commission) said that the wording did not imply an assumption as to whether there was good faith or not; it simply added a provision to cover the case of a simple demand for payment. In a document which called for a statement by the beneficiary concerning performance of a contract, the question of good faith could arise, but there could be no bad faith in a demand for payment as such.

22. Mr. EDWARDS (Australia) said that the Secretary's explanation did not meet his concern, since it appeared to confirm that the other documentation would of itself, and by its very nature, imply good faith. However, such documentation must constitute evidence, otherwise there could be no implied certification of good faith. Assuming that the intended meaning was that there was no requirement of certification or other document, to provide evidence from which good faith might be inferred, so that good faith was to be inferred from the demand itself, then the text should make that clear.

23. Mr. GAUTHIER (Chairman of the Committee of the Whole) explained that the Working Group had always considered that a demand accompanied by other documents would constitute sufficient grounds for payment. Not all documents would contain a certification or representation that the demand was in good faith, but if they were couched in the terms agreed, they would fulfil the obligation. It was only in the case of a simple demand that the Working Group considered that the Convention should state that, by making the demand, the person making it implicitly indicated that the demand was not in bad faith.

24. Mr. BONELL (Italy) said he had some difficulty in understanding the Australian representative's concern. He too would have thought that once a document of the kind envisaged under article 2 was presented, it could be inferred that payment was due. He wondered whether the last sentence in article 15 was in fact necessary, since, as he saw it, article 2, paragraph (1) also related

to simple demand. However, he could accept the formulation proposed.

25. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that article 2 was more definitional and did not fix the law or set boundaries, as this article would.

26. Ms. CZERWENKA (Germany) recalled that there had been some discussion in the Working Group as to whether a supporting statement should be required in addition to the demand. In the end, it had been decided to cover that point by means of the final sentence of article 15, which she believed should be retained.

27. She saw some merit in the question raised by the Australian representative as to why, if all demands were documentary, a distinction should be made between demands consisting of one document and demands consisting of several documents. That concern might be met if the last sentence were amended to read: "The beneficiary, when demanding payment, is deemed to certify that the demand is not in bad faith or otherwise improper".

28. Mr. LAMBERTZ (Observer for Sweden) said he could accept the German suggestion, although he would be inclined to prefer the existing text. Logically, the Australian representative was right to point out that it should be clear that good faith was also implied where the demand was accompanied by documents. However, the need for implied certification was much greater in the case of simple demand.

29. In his view, the first sentence was uncontroversial and self-evident, the second was non-mandatory and the third was a mandatory provision, though that need not be stated explicitly.

30. Mr. FAYERS (United Kingdom) agreed that the last sentence should be redrafted to meet the concern of the German and Australian representatives. However, it was important to include it, in order to provide an eventual cause of action by the principal against the beneficiary in the case of a fraudulent or improper demand.

31. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that in redrafting the sentence it should be borne in mind that its original purpose had been to focus attention on simple demand. The word "improper" might have to be deleted, since it had been agreed not to use it in article 19.

32. Mr. SHISHIDO (Japan) said he would regard the first and third sentences of article 15 as mandatory. The second sentence implied that the parties might stipulate other persons or places of presentation but did not mention time in that context. He asked whether the time referred to at the beginning of the sentence was the time of presentation of the demand or the time of dispatch, or whether there was party autonomy on that point.

33. Mr. HERRMANN (Secretary of the Commission) said that as he saw it the text was to be interpreted as being based on the theory of presentation and not of dispatch. He did not recall that the Working Group had discussed the question, but his impression was that the intent had been to create absolute certainty, even at the risk of thereby disregarding certain provisions, by requiring that the demand had to be presented within the time required if it was to be effective. If the Commission wished to rule that the provision was non-mandatory in regard to the time element, that should be made clear in the text. However, he himself would regard it as mandatory as to time.

34. Mr. BONELLI (Italy) said that, if an undertaking fixed a time within which the demand had to be presented, the question of whether the time element was or was not mandatory did not arise: it was simply a case of *pacta sunt servanda*. With respect

to the receipt versus the dispatch theory, on the other hand, his understanding of the second sentence was that it tended towards the receipt theory but, since it allowed for an alternative, it was in any case not intended to be mandatory.

35. Mr. GAUTHIER (Chairman of the Committee of the Whole) pointed out that the non-mandatory clause beginning "unless" related only to the question of to whom and where the document was to be presented, but not to the time aspect.

36. Mr. STOUFFLET (France) said he did not know whether the second sentence as it stood was to be interpreted as mandatory as to the time element. However, if it were not, he saw no reason to make it so, since it should be for the parties themselves to decide whether the time-limit stipulated should be date of dispatch or date of receipt of the document.

37. Mr. SHISHIDO (Japan) shared that view. Although he agreed with the Secretary's explanation of the second sentence, he considered that a rule based on date of receipt was much more reasonable than a rule based on date of dispatch. He did not see the need to make the time requirement mandatory, in view of the Commission's desire to make the Convention as non-mandatory as possible. The parties might consider it reasonable for the bank to take into account the risk of delays in the mail.

38. Ms. BAZAROVA (Russian Federation) said her delegation considered that the time requirement should be based on date of receipt, since date of dispatch would be very difficult to establish. Failure to include a mandatory time requirement could lead to difficulties and controversies for the guarantor. The issue was an important one which ought to be covered by the Convention, and the provision should not be made too flexible.

39. Mr. BYRNE (United States of America) drew attention to the existence in his country of the notion of warranty of truthfulness of presentation. Because of that, the last sentence of the article should not be modified in any way that touched on that issue; in other words, its substance should continue to be confined to the two issues of absence of bad faith and impropriety of the demand.

40. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, if he heard no further comments, he would take it that the Commission referred article 15 to the drafting group with a request to incorporate in it the notion of full party autonomy with regard to the modalities and time of presentation, and to reconsider the use of the word "improper".

41. *It was so agreed.*

*The meeting was suspended at 3.40 p.m.  
and resumed at 4.10 p.m.*

#### Article 16 (A/CN.9/408, annex)

42. Mr. ADENSAMER (Austria) said that disputes frequently arose about the time from which periods such as the period of seven business days referred to in paragraph (2) began to run. In order to obviate that in the case of the Convention, he suggested the insertion, after the word "days", of the words "from the day following receipt".

43. Mr. MARKUS (Observer for Switzerland) said that, in his country's banking experience, stand-by letters of credit and guarantees normally required the presentation of fewer documents than commercial letters of credit, and three days would therefore be sufficient for the operations contemplated in paragraph (2). Accordingly, he suggested the replacement of the word "seven" by "three" or, if that was considered too short, by "five". By

virtue of the proviso at the beginning of the paragraph, the parties would always have liberty to agree on a different number of days if they wished.

44. Mr. CHOUKRI SBAI (Observer for Morocco) endorsed the Swiss proposal for specifying a shorter period of time, because of the importance of handling transactions quickly.

45. Mr. GAUTHIER (Chairman of the Committee of the Whole) reminded the Commission that the rule in paragraph (2) had been worded so as to cover many situations, from simple demand to that of a stand-by letter of credit requiring the presentation of a large number of documents; it was essentially a rule of reasonable time, not a seven-day rule, and one which accorded with practice, including the practice reflected in the UCP rules.

46. Mr. SHISHIDO (Japan) said that the period of seven business days should be available to each of the banks successively involved in handling a payment demand. That would be consistent with the corresponding provision in article 13(b) of the UCP rules. He therefore suggested the addition, after the words "seven business days", of text to the effect that the prescribed period should count for each entity concerned.

47. Mr. GAUTHIER (Chairman of the Committee of the Whole) reminded the Commission that the Working Group had discussed the point raised by Japan. In approving the provision as it stood, the Group had agreed that it might need to be reviewed.

48. Mr. CHOUKRI SBAI (Observer for Morocco) said that, while recognizing the force of the proviso at the beginning of the paragraph, if the stipulated period was not reduced, problems would arise. Also, it would be useful to specify that the last day of the period was counted, but not the first, and that the period should consist of not more than seven business days, beginning on the day of the demand, or alternatively on the day on which documents were presented.

49. Mr. LAMBERTZ (Observer for Sweden) said that he continued to hold the views about article 16 expressed by the Working Group (see A/CN.9/408, para. 54) and he trusted they were shared by the Commission. If so, paragraph (1) would be supplementary, not mandatory, in the relationship between the guarantor/issuer and the principal/applicant. In the relationship between the guarantor/issuer and the beneficiary, on the other hand, he felt it would be mandatory. That implied a contradiction, since

paragraph (1) referred to the standard of conduct prescribed in article 14(1) which, because of the provision in article 14(2), was not itself mandatory. In drawing the Commission's attention to that situation, his delegation had no proposal for rectifying it and could accept the text as it stood.

50. In reply to a question put by Mr. GAUTHIER (Chairman of the Committee of the Whole), Mr. SHISHIDO (Japan) said that, in suggesting that the seven-day period should be allowed for each entity concerned, he had had in mind the counter-guarantor and the confirmer in addition to the guarantor. However, other entities might conceivably be involved, for example a nominated bank, as mentioned in article 13(b) of the UCP rules.

51. Mr. EDWARDS (Australia) asked whether the intention behind the Japanese suggestion was that the various periods of time should be cumulative.

52. Mr. HERRMANN (Secretary of the Commission) said it had been agreed in the Working Group that the provision in article 16(2) should be seen, in the light of the definition of the term "guarantor/issuer" in article 6, as including a counter-guarantor and a confirmer. In other words, paragraph (2) would mean that, whenever the question arose, the entity concerned, whether a guarantor/issuer or a counter-guarantor or a confirmer, would have a maximum of seven business days in which to act. Looking at article 13(b) of the UCP rules, he did not believe it was intended to have the cumulative effect that, if one entity acted in less than seven business days, for example three business days, the succeeding entity would have ten business days at its disposal. In his view, therefore, the present text of paragraph (2) and the version proposed by Japan had the same meaning.

53. In one respect, though, the two approaches differed, in that the Japanese representative had raised the possibility that a nominated bank might be involved as well. In regard to documentary credits, the UCP rules contemplated that situation in referring to a nominated bank appointed by another entity to act on its behalf in examining documents. In such a case, the nominated bank would simply be an agent, and the Working Group had agreed that the Convention should make no specific provision for the situation of agents, which would be governed by the general law of agency. That being so, article 16(2), as it stood, would apply to a nominated bank.

*The meeting rose at 5 p.m.*

## Summary record of the 559th meeting

Wednesday, 10 May 1995, at 9.30 a.m.

[A/CN.9/SR.559]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

*The meeting was called to order at 9.35 a.m.*

DRAFT CONVENTION ON INDEPENDENT GUARANTEES  
AND STAND-BY LETTERS OF CREDIT (*continued*)  
(A/CN.9/405, A/CN.9/408, A/CN.9/411)

Article 16 (*continued*) (A/CN.9/408, annex)

1. Mr. GAUTHIER (Chairman of the Committee of the Whole) reminded the Commission of the three points that had been raised

in connection with article 16 at the previous meeting: a suggestion by the representative of Japan that additional text be included in order to indicate that the reference to the guarantor/issuer was intended, where appropriate, to apply to the counter-guarantor or the confirmer; a suggestion by the observer for Switzerland that the maximum period referred to in paragraph (2) be reduced from seven to three business days; and a suggestion by the representative of Austria that, for purposes of clarification, a phrase such as

"following receipt of the documents by the guarantor/issuer" be inserted in paragraph (2) after the words "seven business days".

2. Ms. CZERWENKA (Germany), Mr. STOUFFLET (France), Mr. SHISHIDO (Japan) and Mr. CHOUKRI SBAI (Observer for Morocco) expressed support for the Austrian proposal.

3. Mr. GAUTHIER (Chairman of the Committee of the Whole), observing that there were no comments on either the Japanese or the Swiss proposal, said he took it that the Commission wished to adopt article 16 as it stood, subject to drafting changes along the lines suggested by the representative of Austria.

4. *It was so decided.*

#### Article 17 (A/CN.9/408, annex)

5. Mr. GAUTHIER (Chairman of the Committee of the Whole), introducing the article, drew attention to an error in paragraphs (1) and (2), where the reference to article 14 should be to article 15.

6. Mr. STOUFFLET (France) said that the title of article 17—"Payment of demand"—read oddly, at least in the French version. Perhaps it could be shortened to just "Payment".

7. Mr. BONELL (Italy) said that paragraph (1) served primarily to stipulate that the guarantor/issuer would be obliged to pay if the demand was in accordance with article 15. The exceptions to that rule, namely cases of bad faith, which were dealt with in article 19, represented a secondary aspect. Moreover, it was difficult to see how a demand could be in conformity with article 15 if it proved to have been made in bad faith. He therefore proposed that the phrase "Subject to article 19" be deleted from the beginning of paragraph (1).

8. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that his delegation shared the view expressed by the representative of Italy. It would be better to omit the reference to article 19. He also felt that the words "of demand" should be deleted from the title, as had been suggested by the representative of France.

9. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that there seemed to be general agreement that the title should be amended to read "Payment".

10. *It was so decided.*

11. Mr. GAUTHIER (Chairman of the Committee of the Whole), turning to the question of the need for the reference to article 19 in paragraph (1), said that the Working Group had differentiated between demands for payment which were simple, in which case no certification or other documentation was required, and demands which were subject to presentation of documents, in which case, if the documents, upon examination, were deemed to be in facial conformity, the guarantor/issuer would effect payment. Hence there was a possibility that a seemingly proper demand made in accordance with article 15 could in fact be fraudulent or have no conceivable basis, as provided for in article 19. The Working Group had therefore considered it important to show that article 19 was an exception rule.

12. Mr. BONELL (Italy) said that, after listening to the explanation by the Chairman of the Committee of the Whole, he was more than ever convinced of the need to delete the words "Subject to article 19", particularly if the Commission accepted the suggestion made at the previous meeting by the representative of Australia concerning a statement, for all documents presented, certifying that the demand was not in bad faith.

13. Mr. HERRMANN (Secretary of the Commission) said that the draft text provided for the system of payment based on conformity of documents or implied certification that a demand had been made in good faith. The latter concept had to be clearly distinguished from the question whether the act of demanding payment had been made in good faith. It would be possible to use wording other than the emphatic phrasing "Subject to", which, as the representative of Italy had pointed out, drew attention to the fraud exception. In the original draft text, the provisions of article 19 had appeared in article 17. According to a drafting rule applied by the Commission, clauses beginning "Subject to ..." were not normally used when the related points came within the same article. The phrase could be expressed differently or alternatively placed at the end of the sentence.

14. Mr. LAMBERTZ (Observer for Sweden) said that his delegation wished to express its support for the views expressed by the Secretary of the Commission.

15. Mr. OGARRIO (Mexico) said that he too supported the arguments just put forward.

16. Mr. SHISHIDO (Japan) said that his delegation shared the view expressed by the Secretary of the Commission. The words "Subject to article 19" should be retained.

17. Mr. ILLESCAS (Spain) said that his delegation also preferred to keep paragraph (1) as it stood.

18. Mr. CHOUKRI SBAI (Observer for Morocco) said that the current text of paragraph (1) should be maintained. The reference in that paragraph to article 19 was necessary since article 19 was concerned with the rights of all the parties and dealt with the important questions of fraud, forgery, unjustified demands and other wrongful acts.

19. Ms. EKEMEZIE (Nigeria) said that she too wished to retain the article as it stood, particularly after having heard the explanations given by the Chairman of the Committee of the Whole and the Secretary of the Commission. With a view to resolving the concern of the representative of Italy, some reformulation of the text might be necessary in order to avoid the words "Subject to".

20. Mr. STOUFFLET (France) said that his delegation preferred to keep the text as drafted.

21. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that he took it that the Commission wished to adopt article 17 with the inclusion of the reference to article 19.

22. *It was so decided.*

#### Article 18 (A/CN.9/408, annex)

23. Mr. GAUTHIER (Chairman of the Committee of the Whole), introducing the article, explained that the rule of set-off had been made subject to one exception because the Working Group had been anxious to prevent a practice, which it had seen developing, whereby a guarantor/issuer in certain circumstances avoided actual payment by purchasing from the principal/applicant a debt on paper that it then used as a set-off.

24. Ms. FENG Aimin (China) asked whether the right of set-off could be exercised at any time during the validity period of the undertaking. If so, would that mean that the undertaking would expire earlier, or that the guarantor/issuer would be released from liability earlier?

25. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that article 18 described a payment modality. Set-off

was merely one form of discharging an obligation to pay; it could not be employed unless and until the demand for payment had been made and the guarantor/issuer had decided that it was obliged to make payment.

26. Ms. FENG Aimin (China) said that in that case, the set-off should be made conditional on payment against demand. There was no discharge of obligations on the part of either party.

27. Mr. GAUTHIER (Chairman of the Committee of the Whole) suggested replacing the phrase "may discharge the payment obligation" with "may make payment".

28. Ms. FENG Aimin (China) said that if the guarantor acted without the consent of the beneficiary, then even though exercise of the right of set-off was legitimate, the beneficiary might suffer some harm in terms of interest or exchange rates.

29. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the text did not deal in detail with the mechanics or application of set-off, but merely provided that it could be used. It assumed that the first step was to have set-off rules and simply affirmed that the guarantor/issuer could pay through the vehicle of a set-off, with one exception.

30. Ms. FENG Aimin (China) said it was still necessary to have the beneficiary's consent before the right of set-off could be exercised. With that consent, there would be no conflict with the provisions of article 7, paragraph (4), or article 11.

31. Mr. CHOUKRI SBAI (Observer for Morocco), agreeing with the explanation by the Chairman of the Committee of the Whole, said there was no text in civil law which provided for cessation of an obligation. Essentially, an obligation could be fulfilled only through payment, but it could also be discharged through renewal, postponement, prescription or set-off. A set-off was a generally accepted legal instrument, and a guarantor was entitled to avail himself of it, regardless of the wishes of the beneficiary.

32. In the text the word "set-off" had been translated into Arabic as "indemnification". That was incorrect, because both the guarantor and the beneficiary were debtors and creditors to one another, and it was therefore a matter of setting off their obligations against each other, not of one indemnifying the other.

33. Mr. SHISHIDO (Japan) said that his delegation had difficulties with the exception clause. The words "any claim" were too broad, and the words "by the principal/applicant" were too narrow. The clause was quite important, as without it the guarantor/issuer could obtain the same position as the principal/applicant, thereby damaging the independence of the stand-by letter of credit or bank guarantee. The clause made sense only if it meant "except with any claim which relates to the underlying transaction assigned to it by anybody". The only claim to be assigned to the guarantor/issuer was that which derived from the underlying transaction between the principal/applicant and the beneficiary. If the Commission provided for the possibility of assignment by the principal/applicant, it could not prohibit him from assigning the claims from the underlying transaction to a third party, from whom they were then obtained by the guarantor/issuer.

34. Mr. BYRNE (United States of America) said that if the exception clause was kept as drafted, the phrase "or of the instructing party" should also be added, in order to preserve the independence of the letter of credit.

35. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that since parties other than the principal might have assigned their claim, perhaps the words "to it" could be deleted

and the words "or the instructing party" added at the end of the sentence.

36. Ms. CZERWENKA (Germany) asked why the two ideas should be linked.

37. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that if the phrase "to it" was deleted, the text would be concerned with where the assignment originated. The current drafting would mean that the claim was assigned to the guarantor directly by the principal and that there was no one else in the chain. That would be the limit of the exception. With the phrase "except with any claim assigned by the principal/applicant or the instructing party", on the other hand, the text would cover situations where the claim was first assigned by the principal to someone other than the guarantor, and then assigned by that other person to the guarantor. It would be too restrictive to cover only the direct assignment by the principal/applicant to the guarantor. If the claim originated with the principal/applicant or the instructing party and there was a chain which eventually brought it into the hands of the guarantor/issuer, that situation should be covered by the exception.

38. Mr. FAYERS (United Kingdom) said he shared the doubts expressed by the representative of Germany and did not feel that the deletion of "to it" addressed the point, which was that the Commission wished to stop people from assigning claims to the bank so that the bank could then use them as a set-off against the beneficiary. In actual fact, however, it was very exceptional for a bank to have a claim it could set off, although there had once been a decision by an English court to allow such action against a beneficiary.

39. Mr. ADENSAMER (Austria) suggested that the Commission could characterize those claims which could not be used for set-off and concentrate on those which originated from the underlying transaction or from the applicant. It would then be unnecessary to say by whom the claims had been assigned to the guarantor, and whether there had been a chain of assignments or not.

40. Mr. OGARRIO (Mexico) said that if the words "to it" were deleted, it would be unclear which party the claim was being assigned to. It must remain clear that the assignment was being made precisely to the guarantor/issuer. Language could be added to the effect that any assignment made to the issuer, whether directly or through a third party, would not be subject to set-off.

41. Mr. LAMBERTZ (Observer for Sweden), endorsing the suggestion by the Chairman of the Committee of the Whole, said that even though such cases as those described by the representative of the United Kingdom were rare, it would none the less be a good idea to protect the beneficiary from the principal by putting someone between the former and the bank. Deleting the words "to it" would enable a court to interpret the law in the right way. Alternatively, one could say something along the lines of "except with any claim originating with the principal/applicant".

42. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the Commission seemed to feel that the draft was too restrictive as now worded and that the exception should be broadened. It furthermore did not seem to want to allow the guarantor/issuer to use set-off when its rights stemmed from a process of assignment which had started with a principal/applicant or an instructing party. If deleting the words "to it" did not suffice, the text might be amended to say something along the lines of "except with any claim which originates with the principal/applicant or the instructing party", in order to cover the possibility of a chain.

43. Mr. FARIDI ARAGHI (Islamic Republic of Iran), endorsing the views of the representative of China, said that the draft needed to cover the consent of both parties.

44. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that expanding the exception clause raised the question of how one would trace the chain. As now drafted, the advantage of the clause was that there was only a limited need for investigation. The broader the exception, the more difficult it would be to apply.

45. Mr. CHOUKRI SBAI (Observer for Morocco) said that the words "to it" should be retained for the sake of clarity. They referred exclusively to a single person, the guarantor, who could enjoy the right of set-off and who could not negotiate on the matter.

46. Ms. BAZAROVA (Russian Federation) said she supported keeping the text as drafted. She could agree to adding the phrase "or the instructing party", but wondered how the guarantor would then trace the chain, which it would be obliged to do. She asked if the rights of the principal would not be violated if, after it had assigned its rights to someone else and the guarantee had been issued, the claim was subsequently returned. The exception should not be broadened.

47. Mr. SHISHIDO (Japan) said that the suggestion by the Chairman of the Committee of the Whole was not the same as his own. His suggestion contained two points which could not be separated. To take the second one only would make the exception too broad and would excessively restrict the right of banks to set off. His aim had been very precisely articulated by the representative of Austria and he hoped that the text would reflect what the representative of Austria had said.

48. Mr. GAUTHIER (Chairman of the Committee of the Whole), having asked whether there was support for the Japanese proposal to the effect that the exception would concern any claim which related to the underlying transaction assigned to the guarantor/issuer, said it appeared that most representatives preferred not to make that change.

49. In regard to the United States suggestion that the words "or the instructing party" be added at the end of the paragraph, he took it that the Commission wished to incorporate that amendment.

50. He discerned very little support for the suggestion put forward by the representative of China to the effect that no set-off could occur without the consent of the beneficiary.

51. Ms. BAZAROVA (Russian Federation) expressed the view that the proposal put forward by the representative of Japan to the effect that any claim should be related to the underlying obligation for which the guarantee had been given was an excellent idea capable of solving all the problems with the article. It would obviate the danger of abuse on the part of the principal.

52. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the representative of Japan had clearly indicated that the two parts of his proposal could not be divorced. However, his own impression had been that there existed insufficient support to justify introducing into article 18 the concept of "relating to the underlying transaction".

53. Mr. FAYERS (United Kingdom) said that he had not expressed his support for the Japanese proposal partly because, in his view, that was exactly what the article already meant. It covered precisely that type of claim on the part of the principal, but could also include other claims of the principal/applicant in

relation to the beneficiary. He would support the Japanese proposal if it clarified the matter, but he considered that its purpose was already covered by the article.

54. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, in his view, the representative of the United Kingdom was right to say that the text as it stood included such claims, but was not limited to them. However, it was clear to him that the intention of the representative of Japan was to limit the exception to any claim that related to the underlying transaction. He took it that it was the Commission's wish to retain the text as it stood with the addition at the end of the words "or the instructing party".

55. *It was so decided.*

*The meeting was suspended at 11.05 a.m.  
and resumed at 11.30 a.m.*

#### *Article 19 (continued) (A/CN.9/408, annex)*

56. Mr. GAUTHIER (Chairman of the Committee of the Whole) drew attention to document A/CN.9/XXVIII/CRP.3, containing three options for article 19 that had been prepared with a view to facilitating the discussion. Option I consisted of the existing text of the article as it appeared in document A/CN.9/408, with a new text for paragraph (1)(b). Option II represented a text proposed by the representative of Australia. Option III was a text based on a proposal put forward by the representative of the United States.

57. Mr. EDWARDS (Australia) said that in proposing option II, Australia had hoped to mobilize opinion in a particular direction. It had not been successful and therefore thought it would be preferable to focus attention on options I and III. Australia felt able to support option III, which would make for greater efficiency and certainty, important considerations for bankers, but wished to propose a different paragraph (3) along the lines of paragraph (3) of option II, as follows:

"(3) The action of the guarantor/issuer under paragraph (1) does not prejudice any rights of the beneficiary or principal/applicant (including pursuant to article 20)."

His country considered that that formulation provided maximum certainty and made it plain that the relationships between and the rights of the various parties depended on a chosen or national law.

58. Mr. BYRNE (United States of America) said that option II regrettably did not contain the minimum protections regarded as necessary by banks and his Government and hence did not offer a workable text for article 19. The United States would be able to accept option I, but only with reluctance, since it raised many difficulties. It was, for example, not certain that a duty not to pay existed in law; moreover, the banks were clearly uncomfortable with the text and might as a result hesitate to use the Convention. His delegation's preference was for option III, in which it could accept the amendment proposed by the representative of Australia. The amendment would achieve a better balance between the interests of the principal/applicant and those of an innocent beneficiary who might be subject to unfair accusations of fraud. It would also provide a better position for the banks, which did not wish to take on the risk of assessing whether or not fraud was involved. The approach in option III also emphasized the instrument as a payment device and stressed that payment must be made except in the case of fraud.

59. Mr. SHISHIDO (Japan) asked why the representative of Australia thought it necessary to include the beneficiary in his suggested amendment of paragraph (3).



60. Mr. EDWARDS (Australia) said that the flexibility and efficiency of paragraph (1) would be enhanced if the parties knew that the action taken would not prejudice their rights under chosen or national law.

61. Mr. BYRNE (United States of America), referring to the point raised by the representative of Japan, said that the mention of the beneficiary in paragraph (3) indicated that the beneficiary retained a right of action against the guarantor/issuer for wrongful dishonour and that the guarantor/issuer must therefore prove that any one of the elements mentioned in paragraph (1) was present. Some delegations had thought it might be useful to state that the rights of the beneficiary also remained apparent.

62. Mr. OGARRIO (Mexico) said that the amendment to paragraph (3) of option III would produce a more balanced text, since it referred not only to a case where payment was made, but also to action by the guarantor/issuer, which might be payment or refusal to pay, and preserved the rights of any party (beneficiary or principal/applicant) affected by the action taken by the guarantor/issuer. He therefore found option III, as amended by Australia, to be acceptable.

63. Mr. MARKUS (Observer for Switzerland) said that the main difference between option I and option III was that in option I there was an obligation not to pay the beneficiary and in option III a right not to pay the beneficiary. That was a matter of considerable importance, since it was related to the question of whether the principal/applicant was included or not and, if included, to what extent. The problems of all parties in that respect needed to be resolved. In legal reality, the claim of a beneficiary was directly and closely related to the central relationship between the guarantor/issuer and principal/applicant. If the guarantor/issuer received an improper demand, he was, in accordance with the contractual relationship with the principal/applicant, obliged not to pay and, in the case of a demand that was not improper, obliged to pay. To give the beneficiary a discretionary authority to pay or not to pay in any situation would not resolve the problem at all. He therefore preferred option I.

64. In regard to the important point raised by the observer for Monaco, that the bank should not be penalized in any way when it paid in order to safeguard its international reputation and did not subsequently make any claim to be reimbursed, option I did not imply that paying in such circumstances without demanding reimbursement was a criminal act.

65. Ms. CZERWENKA (Germany) expressed a preference for option I, for reasons she had stated earlier, but especially because articles 19 and 20 would always need to be taken together. Article 20 would be incomplete if there did not exist a rule making it an obligation for the guarantor/issuer not to pay in the event of obvious fraud. However, in the text as it stood the "unless" proviso was misleading: the article was dealing with the principal/applicant-bank relationship, and it could be decided only between those parties that there might be an obligation not to pay; it could not be agreed between the guarantor/issuer and the beneficiary to the detriment of the principal/applicant. If option III were chosen, Germany would oppose the amendment proposed by Australia. Including the beneficiary in paragraph (3) was highly questionable, because that provision dealt with fraud that was manifest and clear. In her view, the amendment was very misleading since it appeared to imply that even in the case of an improper demand the beneficiary had a right to obtain payment, a situation that was clearly not the intention of the Convention.

66. Ms. BAZAROVA (Russian Federation) suggested that article 19 might be adopted in its present form, since article 14(2) already provided that a guarantor/issuer might not be exempted from liability for its failure to act in good faith or for any grossly

negligent conduct. However, if subsequent discussion convinced her, she would, as a compromise, accept option III, but not the Australian amendment.

67. Mr. FARIDI ARAGHI (Islamic Republic of Iran) supported option III for the reasons given by the representative of Mexico.

68. The CHAIRMAN, speaking as representative of Singapore, supported option III as amended by the representative of Australia.

69. Mr. BONELL (Italy) supported option I.

70. Mr. LAMBERTZ (Observer for Sweden) supported option I, for the reasons he had previously given. Option III suggested that in no cases other than those set out in paragraph (1) would a bank have a right not to pay. However, there could be no obligation to pay when there was in fact fraud. In the case of a clever falsification of documents, so that a fraud was not immediately manifest and clear, but the bank was practically sure that there was fraud and hence refused payment, the beneficiary could not possibly sue for wrongful dishonour when later it became manifest and clear that fraud had in fact been committed. Clearly, there existed a right not to pay outside the provisions of option III. If that option were adopted, it would lead to confusion, which was why the Working Group had not chosen it.

71. Most delegations, moreover, would agree that the Convention should contain a rule on provisional measures. In his view, such a rule must always be worded as a prohibition against payment, based on a duty not to pay, and not on a right not to pay. In the absence of an explicit rule on a duty not to pay, the prohibition must be based on an implicit duty. If a court was to tell a bank provisionally not to pay, it must believe there was a good chance that it would never have to pay, that there was a duty not to pay. If the Convention did not contain a provision on the duty not to pay, the courts would have to make up their own rules on the matter. It would therefore be better to make the rules explicit in the Convention. A system containing rules on provisional measures, but without rules to base those rules on, would be illogical and impractical, and he would find it difficult to recommend such a system to his Government.

72. Mr. SHISHIDO (Japan) said that his delegation would prefer option I, although it had reservations on subparagraph (b). It could also accept option III, but strongly objected to the Australian amendment, which would be illogical.

73. Mr. ADENSAMER (Austria) also supported option I.

74. Mr. GRANDINO RODAS (Brazil) and Mrs. SCARNATI ALMADA de CURIA (Argentina) were in favour of option III as amended by the Australian representative.

75. Ms. FENG Aimin (China) and Mr. MAHASARANOND (Thailand) were in favour of option III.

76. Mr. STOUFFLET (France) said his delegation had a preference for option I, but would be ready as a compromise to accept option III. However, he would be hesitant to accept the Australian amendment, which was of questionable utility and might be wrongly interpreted.

77. Mr. SAENZ de TEJADA (Spain) supported option III with the Australian amendment.

78. Mr. KRZYZEWSKI (Poland) said he would prefer to retain article 19 in its original form. However, he could accept option III if there was a majority in favour of a change.



79. Ms. EKEMEZIE (Nigeria) was in favour of option I and thought it might be useful to include paragraph (3) of option III in that option.

80. Mr. AL-NASSER (Saudi Arabia) said that his delegation would be in favour of option III with the Australian amendment, but suggested that the drafting group should study the text and take into account the points raised by the observer for Sweden.

81. Mr. FAYERS (United Kingdom) said his delegation preferred option III as amended by Australia, but could accept option I.

82. He wondered if some of the problems had arisen because delegations did not appreciate the fact that article 19 was concerned with a particular moment in time, namely, when the bank was called upon to pay. Trying to deal with questions that might arise years later when rights and wrongs came to light merely confused the issue.

83. On the link between articles 19 and 20 and the argument that if there was no obligation not to pay, it somehow impeded the right to have provisional measures under article 20, he believed that that matter could be accommodated in the text by providing that the courts had jurisdiction in that instance. In English law the courts had, as a matter of public policy, jurisdiction to intervene in any relationship where there was an instance of fraud.

84. Mr. HERRMANN (Secretary of the Commission) said that perhaps some of the considerations voiced in favour of or against

the various options had not been fully understood. Those in favour of option I were primarily representatives of European States with a civil-law tradition. It might be wise to see what was behind their preference and whether there was a way of accommodating it. The main argument in favour of option I and against option III was the link with article 20 and the possibility of having provisional measures. For the States in question, a mere right not to pay could not be a sufficient basis for a provisional order to stop payment, which would have to be founded on a possible obligation not to pay. No State with such a legal system would be able to accept the Convention on the understanding that an exception was being made to that principle with sole reference to the limited area of letters of credit. That point might not have been appreciated by representatives of countries with other legal systems.

85. As to the Swedish concern about fraud that was not immediately manifest, he pointed out that whatever was not covered by article 19 was covered by article 17, which provided that payment should be made on a conforming demand.

86. With respect to the Australian proposal, which had caused some misunderstanding, he said that it would make less obvious the original purpose of paragraph (3), which was to say that it did not prejudice any rights of the principal/applicant. The proposed additional rule added nothing and ought to be regarded as self-evident.

*The meeting rose at 12.30 p.m.*

## Summary record of the 560th meeting

Wednesday, 10 May 1995, at 2 p.m.

[A/CN.9/SR.560]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

*The meeting was called to order at 2.20 p.m.*

### DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (continued) (A/CN.9/405, 408 and 411)

Article 19 (continued) (A/CN.9/408, annex)

1. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that there was no support for option II and that a preference seemed to have emerged for the approach adopted in option III (A/CN.9/XXVIII/CRP.3). But a way had to be found of ensuring that it did not prejudice the right of the principal/applicant to seek provisional court measures before payment was made to the beneficiary in the case of a manifestly improper demand.

2. Ms. CZERWENKA (Germany) said that, if a majority view in favour of option III prevailed, the right of the principal/applicant to take action against the guarantor/issuer in order to stop payment would not be recognized in the draft Convention. National Law would then be applicable to such cases and uniformity would be sacrificed. Moreover, in many jurisdictions the rights of the principal/applicant in the matter were unclear. If article 20 were maintained, it could prove unenforceable in jurisdictions where a claim by the principal/applicant against the guarantor/

issuer to stop payment was not recognized. Option III dealt only with the relationship between the guarantor/issuer and the beneficiary and failed to address the relationship between the guarantor/issuer and the principal/applicant.

3. Mr. BYRNE (United States of America) said that the Secretary had suggested at the end of the previous meeting that the problem with regard to article 19 might be associated with a sub-family of the civil-law system and might be partly of a regional nature. However, the difficulty was to some extent conceptual and theoretical and there was no single valid approach to the problem.

4. Clearly, very different integrated systems existed for dealing with extraordinary relief, but he understood from the Secretary's remarks that there was a necessary conceptual link to the ability of a court to grant extraordinary relief under article 20, which depended on the existence of a bank's obligation not to pay. Referring to a hypothetical case involving the Swedish company Voivo as principal/applicant before a Swedish court, he said that he found it difficult to believe that, where there was irrefutable proof of fraud, a court would refuse to grant extraordinary relief because of a lack of linkage between articles 19 and 20 in the Convention. Even where the fraud was not manifest and clear to

the guarantor/issuer, as implied in option I, he found it hard to imagine that a court would fail to grant such relief. The main difficulty that the approach reflected in option I created for the banking community in his own and other countries was that the entire mechanism hinged on the duty not to pay. Qualifications and protections were then required both by the banking community and by the beneficiary. A provision that unduly prejudiced an innocent beneficiary accused of fraud was unacceptable, since it was not uncommon for principals/applicants to allege fraud when what existed was a dispute concerning the underlying transaction.

5. As he saw it, the only possible alternative to option III was something along the lines suggested by the representative of the United Kingdom, namely, to draw a distinction between, on the one hand, situations in which fraud existed and was found to exist by a court and, on the other, situations in which a bank withheld payment on grounds of fraud and the beneficiary could require a court to determine its entitlement to payment in the absence of such fraud.

6. Mr. LAMBERTZ (Observer for Sweden) said that he shared the view previously expressed by the representative of Germany that option I offered the only possibility of achieving international uniformity. The representative of the United States of America, mentioning a hypothetical case involving the Volvo company, had asked whether there was a way of securing the possibility of provisional court measures. Where fraud was proven, the court would probably grant an injunction even if the Convention did not provide for an obligation not to pay. There was therefore no real need to include such a provision because the court would then have to base its ruling with respect to the provisional measure on the implicit rule in national law.

7. He wondered whether there was a large majority in favour of option III. Option I was still a viable alternative since many of the advocates of option III had said they could accept it. The representative of the United States would be willing to support option I if it included an indemnity clause, which he thought was quite acceptable.

8. Mr. BONELL (Italy) said that he doubted whether it was a mere regional peculiarity that had led almost half the Commission to support option I. However, he was prepared, if necessary, to accept option III.

9. Leaving the question of provisional court measures to be decided under national law would, in his view, make sense and seemed to be the only logical solution in some legal systems. At the same time, it would be preferable to make some provision for such cases in the Convention. Saying that banks had a right not to pay in the event of fraud was merely stating the obvious.

10. He was in favour of keeping paragraph (3) of option III as it stood, without the Australian amendment, and also of maintaining article 20, in order to make it clear that in many jurisdictions provisional court measures should still be possible, notwithstanding the amendment to paragraph (1). He wondered whether the words "as against the beneficiary" in the last line of paragraph (1) could be interpreted as implying that the guarantor/issuer had what amounted to a duty, *vis-à-vis* the principal/applicant, to withhold payment.

11. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that there seemed to be a general feeling that a principal/applicant should have the right to apply for provisional measures in the context of fraud. He asked for comments on the possibility of amending paragraph (3) of option III to state positively that principal/applicant had the right to seek provisional court measures in the circumstances set out in paragraph (1) instead of saying that such a right was not prejudiced.

12. Mr. BURMAN (United States of America) said such an amendment could be helpful in countries where there was inadequate linkage under national legislation and he would therefore support it.

13. The Convention should be drafted in a way that would make it acceptable to banking associations and hence more likely to be ratified by a wide variety of States. Many banking associations would be unwilling to support an instrument that adopted the "obligation not to pay" approach, not only because it would encroach on what they perceived as their business judgement capacity but also because of a concern about what were known as "rating agencies" in his country—agencies that assessed the risk attached to international commercial documents and set the discount rate for stand-by letters of credit and bank guarantees in the light of that assessment. For those agencies, a duty not to pay would probably downgrade the discount value of the paper concerned. He therefore cautioned against an approach that restricted the discretionary function of banks.

14. Mr. MARKUS (Observer for Switzerland) wondered whether the amendment suggested by the Chairman of the Committee of the Whole might be interpreted as encouraging principals/applicants to have immediate recourse to the courts to obtain provisional relief when they believed that an improper demand was being made by the beneficiary. There seemed to be some inconsistency between the right of the principal/applicant to seek an injunction and the right of the guarantor/issuer to exercise discretion in the matter of withholding payment.

15. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that some delegations seemed to favour option I because of their concern about provisional court measures and the establishment of grounds for going to court. Where the principal/applicant had a right to apply to a court for provisional measures, the manner in which that right was discharged was covered by article 20.

16. Mr. EDWARDS (Australia) said that he had been seeking a form of words that covered not only a right to go to court, but also a right on which to found an action before the court. Perhaps it could be stated that under paragraph (1), the guarantor/issuer had a right to withhold payment and would be required to exercise that right where not to do so would constitute a breach of faith towards the principal/applicant.

17. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that he had intended to convey both standing before a court and the foundation for an action. Paragraph (3) should squarely fix a course of action for the applicant.

18. Mr. SHISHIDO (Japan) thought that the Convention should not create standing without a duty of the guarantor/issuer not to pay. That would be necessary in a civil-law country like Japan. Even the inclusion of wording in paragraph (3) to indicate that the principal/applicant had a right to seek provisional court measures would not suffice to create standing before a court. Option III stated that, under certain circumstances, the guarantor/issuer had a right, as against the beneficiary, to withhold payment. It was not stated, however, that, at the same time, the guarantor/issuer had a duty towards the principal/applicant to withhold payment.

19. He advocated retention of the existing text of paragraph (3).

20. Mr. SHIMIZU (Japan) said he thought that the proposal made by the Chairman of the Committee of the Whole would not be acceptable to some delegations.

21. Some delegations believed that articles 19 and 20 could not be separated. However, in the view of his delegation, the

Convention would achieve a degree of uniformity in substantive law, even without article 20.

22. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the Convention could indeed establish standing for a party in court.

23. Mr. BONELL (Italy) felt that there was a triangular relationship, which could be covered by option III. His delegation could accept wording to the effect that the guarantor/issuer had a right, as against the beneficiary, to withhold payment, provided that it was stipulated that the principal/applicant also had rights if the situation mentioned in paragraph (1) should occur. To express that idea, the current text of paragraph (1) could be retained and paragraph (3) could be amended along the lines suggested by the Chairman of the Committee of the Whole; the Australian proposal should also be adopted.

24. Mr. OGARRIO (Mexico) suggested that the title of the article should be changed to mention a right to withhold payment.

25. Two ideas had emerged when touching on article 20 and in the current discussion on article 19, namely, whether provisional measures should be left to local legislation and whether the standards established in article 20 were sufficiently high to be uniform rules. A change in paragraph (3) along the lines proposed by the Chairman of the Committee of the Whole might further lower the standards prevailing in many domestic legislations. The Chairman of the Committee of the Whole had said that Canadian law required the mention of an obligation, and the representative of Germany and the observer for Sweden had confirmed that there was a similar requirement in their countries. He concurred with the comments of the observers for Sweden and Monaco that the requirements for obtaining provisional court measures should be left to national legislation.

26. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the purpose of his proposal was to establish a right in law and not to set up a code. He asked the representative of Mexico to clarify his remarks about standards.

27. Mr. OGARRIO (Mexico) explained that article 20 referred to high probability, a standard which would perhaps be too high in some countries and too low in others. The same applied to the standard of strong evidence. His concern was that it was now proposed that, although the issuing bank was under no obligation to refuse payment, it should have a right to refuse payment and that provisional court measures could be issued in any case.

28. Ms. CZERWENKA (Germany) expressed her delegation's support for the proposal made by the Chairman of the Committee of the Whole to create a right for the principal/applicant.

29. Mr. LAMBERTZ (Observer for Sweden) said that the proposal made by the Chairman of the Committee of the Whole could possibly also be acceptable to Sweden. The remaining major problem in option III was the wording of paragraph (1). He thought that the guarantor/issuer had a right to withhold payment under certain circumstances but that the level of evidence needed was not its concern. It might be better, for example, in paragraph (1), to say that the guarantor/issuer had a right to withhold payment "if any document is not genuine or has been falsified" and to remove the reference to "manifest and clear". Paragraph (2) could be retained and paragraph (3) could be changed to state that, if the principal/applicant believed that there had been a falsification, he could go to court for a provisional measure. The text would then be acceptable to Sweden. That text would not contain an explicit rule on the cases in which there was a duty not to pay, but would be an acceptable compromise.

30. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that deletion of the words "manifest and clear" might admit the interpretation that a guarantor/issuer had a right to withhold payment on the basis of a mere suggestion of impropriety.

31. Mr. FAYERS (United Kingdom) thought that the wording of the Convention should fix the link between articles 19 and 20. He referred to an approach by a German bank to a London court for a provisional measure in a case involving a stand-by letter of credit. The court had ruled that, in the exceptional cases of commercial letters of credit, there was no need for the principal to show a cause of action or that there had been a breach of the obligation. He wondered whether paragraph (3) could be made more general in the context of the inherent power of the court to intervene where it considered it necessary to prevent fraud.

32. Mr. GAUTHIER (Chairman of the Committee of the Whole) pointed out that, in some jurisdictions, there was no inherent power of the court so that it was necessary to create a right.

33. Mr. GILL (India) said that Indian courts had the inherent power to issue an interim injunction if there was evidence of fraud.

34. He was concerned that some countries might find it difficult to reconcile the Convention, in its current wording, with their domestic legislative provisions.

*The meeting was suspended at 3.45 p.m.  
and resumed at 4.10 p.m.*

35. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he took it that the Commission wished to maintain paragraphs (1) and (2) of option III. Subject to redrafting, paragraph (3) would provide that, in the circumstances set out in paragraph (1), the principal/applicant had a substantive right to obtain a provisional court order in accordance with article 20.

36. Mr. SHISHIDO (Japan) asked whether the intended meaning was that the guarantor/issuer had a duty not to pay and the principal/applicant had a right to obtain a provisional court measure, or rather that the guarantor/issuer was under no obligation to withhold payment but the principal/applicant had a right to obtain a provisional court measure. He also asked whether option III was a mandatory or non-mandatory provision.

37. Mr. GAUTHIER (Chairman of the Committee of the Whole) replied that the substance of the first paragraph was that the guarantor/issuer had a right as against the beneficiary to withhold payment. The third paragraph established the substantive right in favour of the principal to obtain provisional court measures in accordance with article 20. With regard to the question whether the provision was mandatory or not, he pointed out that the text did not include any provision allowing the parties to agree otherwise.

38. Mr. EDWARDS (Australia) said that he had difficulty in relation with the distinction between the right to go to court and the right prosecuted in court. There was some doubt whether a party which had obtained a provisional order could obtain permanent relief if it did not have both a substantive right and a right of access. If a substantive right were established onto which article 20 could then attach, that right flowed through to obtaining both permanent and provisional relief.

39. That point might be covered by the drafting group, but it should not be ignored.

40. Mr. LAMBERTZ (Observer for Sweden) concurred with the representative of Australia but said that the question should be dealt with by those who had to apply the law.

41. He reiterated that his real problem with the proposed solution was the phrase "manifest and clear" in paragraph (1).

42. Mr. STOUFFLET (France) agreed with the observer for Sweden. If one considered the relationship between the guarantor and the beneficiary, the phrase "manifest and clear" made no sense, although it did make sense in the context of the relationship with the principal/applicant. The guarantor could be accused of having made payment even though it was "manifest and clear" that certain circumstances had arisen, but, vis-à-vis the beneficiary, the phrase was out of place.

43. Mr. GAUTHIER (Chairman of the Committee of the Whole) asked if the Commission objected to deleting the words "it is manifest and clear that", so that the paragraph would begin: "If: (a) ...".

44. Mr. AL-NASSER (Saudi Arabia) proposed that the words "for example" be added after the phrase "manifest and clear" in order to include situations not explicitly covered under option III. That would meet the concerns raised by Sweden.

45. Ms. CZERWENKA (Germany) sympathized with the concern expressed by the observer for Sweden but objected to the deletion of the phrase "manifest and clear". The criteria had originally been included in order to define the conditions under which the principal/applicant had a right to take action against the guarantor/issuer. The whole structure of the article had now been changed, and the right on the part of the principal/applicant was now stated in paragraph (3), so that the reference to the "manifest and clear" conditions under which there was such a right should be indicated there as well.

46. Mr. BONELL (Italy) agreed with the representative of Germany but thought that the deletion of the phrase "manifest and clear" from paragraph (1) of the amended article 19 would entail changes not in paragraph (3) but in article 20.

47. Deletion of the words "there is a high probability that" from paragraph (1) of article 20, in conjunction with the reference to "immediately available evidence", would express what was intended by the phrase "manifest and clear" in article 19. It was unnecessary to refer to "strong" evidence.

48. All that would then be needed in article 19(3) would be a reference to article 20, with or without the additional language proposed by the representative of Australia.

49. Mr. GAUTHIER (Chairman of the Committee of the Whole) suggested that the Commission should not anticipate too much its consideration of article 20.

50. As he understood it, the concept that a bank could decide to withhold payment only if certain facts were manifest and clear had been introduced in article 19 as a guideline to banks. If that concept were eliminated, the provision might be taken to mean that a decision to withhold payment could be based on a mere allegation.

51. The concept was counterbalanced by the concept of the bank's acting in good faith. Deletion of one would also affect the other.

52. Mr. OGARRIO (Mexico) said that, in all its discussions on the concept of "manifest and clear", the Working Group had never intended to leave the matter to the discretion of the issuing banks. The issuer must pay in all cases, unless some manifest and clear facts such as those described in the three subparagraphs of paragraph (1) had come to light. Deleting the phrase might endanger the rights of the beneficiary because the impression would be given that the issuer might exercise its right to refuse payment on the basis of a mere suggestion by the principal, which would expand the right to withhold payment well beyond what had been intended. The phrase should be retained in order to preserve the general principle that, in the absence of exceptional circumstances, payment must be made.

53. Ms. EKEMEZIE (Nigeria), agreeing with the representative of Mexico, said that it was extremely important to keep the phrase in order to avoid situations of possible abuse.

54. Mr. FAYERS (United Kingdom) supported the remarks of the representative of Germany and of the Chairman of the Committee of the Whole on deletion of the words "manifest and clear". He did not agree with the representative of France that the phrase had no meaning in the relationship between the guarantor and the beneficiary, since it was the basis of the understanding whereby the guarantor could disregard its solemn obligation to pay. As the representative of Germany had said, if the phrase were deleted it would have to be inserted somewhere else. It should be left where it was.

55. Mr. LAMBERTZ (Observer for Sweden) said that he had not intended to imply that the bank did not need a factual basis for its assessment of whether there was falsification or fraud. However, the text as it stood did not, in his view, address the question of the time when the bank had a right not to pay. If a court later established that there had been fraud, it would rule that the bank had been under no obligation to pay.

56. The representative of Mexico had correctly stated that the question of manifest and clear facts had been discussed at length on earlier occasions; however, such discussion had focused on the "duty-not-to-pay" approach and not on the "may" approach, in which context the phrase was inappropriate.

57. If the phrase were deleted, the bank would have to assess the facts and make its decision. That was how it should be.

58. He agreed with the representatives of Germany and Italy that, if the phrase were deleted from the *chapeau* of paragraph (1), it would have to be inserted elsewhere.

59. Mr. AL-NASSER (Saudi Arabia) supported the deletion of the phrase. Very skilfully produced counterfeit currency was being presented to banks day by day, the fact not being discovered until later. Such fraud could not be referred to as immediately manifest and clear.

60. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he took it that the Commission as a whole did not endorse deletion of the phrase "manifest and clear".

61. *It was so agreed.*

*The meeting rose at 5.05 p.m.*

## Summary record of the 561st meeting

Thursday, 11 May 1995, at 9.30 a.m.

[A/CN.9/561]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

The meeting was called to order at 9.35 a.m.

### DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (*continued*) (A/CN.9/405, A/CN.9/408, A/CN.9/411)

#### Article 20 (A/CN.9/408, annex)

1. Mr. GAUTHIER (Chairman of the Committee of the Whole), introducing article 20 on provisional court measures, said that it had been the subject of much discussion and redrafting in the Working Group. The title had been adopted to show that what was involved was not a main action, but a quick process to obtain a court order pending a future final decision.

2. The Working Group's discussion on the words "high probability" was summarized in document A/CN.9/405, paragraph 38. At one time, as shown in document A/CN.9/388, paragraph 48, the proposed wording had been "manifestly and clearly". It had been decided as a compromise to retain the words "high probability" to meet concern as to the possible effects if the level of proof was set too high or too low.

3. The expression "immediately available strong evidence" might also raise questions for some delegations. Paragraph 39 of document A/CN.9/405 referred to the Working Group's discussion on that point. The Working Group had agreed that such a phrase was needed to indicate that the evidence must not only be present and available, but also strong.

4. The Working Group had also decided to retain in the last part of paragraph (1) of article 20 the balance-of-convenience test, since it felt that those words, together with the provision in paragraph (3), allowed adequate room for the interests of the beneficiary to be taken into account (A/CN.9/405, paragraph 41).

5. Mr. VASSEUR (Observer for Monaco) considered that article 20 had no place in the draft Convention. If it were kept in, the European banks would be unable to accept the reference to "high probability", which would only encourage an applicant to invoke it and gain time. Experience showed that when a principal/applicant applied to the court, it was sometimes two or three years before the amount of the guarantee was paid to the beneficiary. A principal/applicant should be able to ask a court to take provisional measures as provided in the last paragraph of the new version of article 19, but in his view such measures were exclusively a matter for national legislation.

6. A previous version of article 20 had mentioned a right of appeal by the beneficiary, whereas the present formulation did not.

7. A judicial measure, provisional or not, ordering a freeze of the amount of the guarantee was not justifiable, since either the guarantee had to be paid or it did not and there was no need for provisional measures. Furthermore the expression "taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious harm" at the end of

paragraph (1) was totally inadequate and should be amended to read "... irreparable harm" as in previous drafts. Some risks had to be incurred in international trade.

8. With respect to paragraph (2), the Convention should not dictate to the court that it should or should not require security. That was a matter for the court to decide.

9. Mr. MAHASARANOND (Thailand) said that under his country's legal system provisional measures could be obtained only when one of the parties initiated an action by suing the other party in court. In the case covered by article 20, the principal/applicant or instructing party would not be able just to apply to the court for provisional measures; he would first have to sue the beneficiary or the guarantor/issuer. He therefore agreed that provisional court measures should be left to national legislation.

10. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that since a court should consider the matter as a whole, the words "taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious harm" at the end of paragraph (1) should be deleted.

11. Ms. FENG Aimin (China) asked, in connection with articles 19 and 20, whether once a bank had paid and the payment had left the sphere of control of the issuer, it would be impossible for an applicant to seek a provisional court measure.

12. Mr. GAUTHIER (Chairman of the Committee of the Whole) explained that article 20 focused on the effect of provisional court measures, which could take different forms according to the jurisdiction involved. One form would be to ensure that the beneficiary did not receive payment. A second form would be that the amount of the undertaking was held by the guarantor. A third form would be to intercept or block the proceeds at the beneficiary's level.

13. He was not familiar with the procedures in all jurisdictions, but in a situation where, for instance, under the guarantee or stand-by credit the instructions to the bank were to make payment into an account in the same jurisdiction, an attempt could be made to block the payment there.

14. Mr. LAMBERTZ (Observer for Sweden) considered it important to include a rule on provisional measures in the Convention. However, since the standard of proof required under article 19 ("manifest and clear") was higher than that required under article 20 ("high probability"), in practical terms that would result in a situation in which a bank had to pay, but a court might still issue an order to prohibit it from paying. To make the Convention consistent, the wording therefore had to be changed. One possibility might be to raise the standard of proof in article 20, another to remove the words "manifest and clear" from article 19, which was the solution that he would prefer.

15. Mr. HERRMANN (Secretary of the Commission), replying to the argument of the observer for Sweden, pointed out that the

different standards in articles 19 and 20 had coexisted for some time. Delegations in favour of different standards had clearly distinguished between the situations covered by the two articles. Moreover, almost all laws established that difference.

16. Replying to the remark by the observer for Monaco about the expression "high probability", he said that the Secretariat had found that in national case-law "high probability" was very close to the standard used for provisional measures in a number of continental European countries, although it was not expressed in those terms. The idea in article 20 was that the court might, and in fact should, apply a lower standard, which also explained the additional conditions of the balance-of-convenience test and the possibility of asking the person applying for a provisional order to furnish security if it later turned out that what had seemed almost certain was not certain at all.

17. Mr. LAMBERTZ (Observer for Sweden) said that the link between articles 19 and 20 no longer existed. Most participants in the Working Group, including himself, had previously been in favour of lower standards in article 20 than in article 19. However, that was logical only if there was a mandatory rule in article 19. It was unacceptable to state that the bank "must" pay and that the court "might" order the bank not to pay.

18. Mr. SHIMIZU (Japan) said that his delegation wished to reiterate its proposal that article 20 be deleted in full. If that proposal was not accepted, he would suggest that the words "high" and "strong" in paragraph (1) and the whole of paragraph (3) be deleted. If that proposal also failed to gain support, he would suggest that a new paragraph be added, in the form of a reservation clause.

19. Mr. CHOUKRI SBAI (Observer for Morocco) said that his delegation still believed that article 20 should be retained. Its provisions were consistent with the Moroccan legal system, which allowed for emergency measures. The blocking of payments could only be provisional, since otherwise the beneficiary could apply for cancellation of the court order. He understood that the situation regarding the possibility of adopting provisional measures was not the same in all countries. Article 20 accordingly sought to harmonize the situation.

20. The draft Convention could not deny the issuing bank the right to withhold payment in manifest cases of fraud or disallow the court the option of blocking payment, a decision taken only after it had examined the evidence. Article 2 referred not only to banks but also to other institutions and persons. Thus, limits might be set, through the judicial process, on forms of abuse.

21. In his delegation's view, the word "strong" should be deleted from paragraph (1). The matter of assessing the weight of evidence should be left to the courts.

22. Mr. STOUFFLET (France) reiterated his delegation's misgivings regarding the term "high probability" appearing in paragraph (1). The choice of those words had arisen from the view that, while the issuing bank's decision whether to effect payment had to be made quickly on the basis of scant information, a judge would have some days in which to assess the evidence submitted. In practice, however, judges tended first to issue an order to block the payment and then consider whether the beneficiary was entitled to it. His delegation would therefore prefer to replace "high probability" by a formulation indicating that provisional measures should be adopted only when there was certainty of an improper demand.

23. Mr. OGARRIO (Mexico) associated himself with those speakers who had expressed a preference for domestic law to determine the requirements for granting provisional court

measures. His delegation consequently favoured deletion of article 20. If that article was retained, then the standards laid down in it should be high. There should also be no lowering of the standards in article 19. In article 20, paragraph (1), the "high probability" test should match the standard of "manifest and clear" fraud stipulated in article 19, the standard of "strong evidence" could possibly be increased to the level of "irrefutable evidence", and the standard of "serious harm" should be raised to that of "irreparable harm". Paragraph (2) should establish an obligation on the part of the court to require the applicant to furnish a security. The reason for ensuring such high standards was to prevent applicants from obtaining court orders with a view to delaying payment.

24. Mr. GAUTHIER (Chairman of the Committee of the Whole), speaking as observer for Canada, recognized that the procedure differed in different countries. In Canada, if it was necessary to establish fraud irrefutably at the stage where provisional measures were being sought, that would usually be done through *ex parte* proceedings, with a five-day limit, involving an adversarial debate. To require fraud to be so established from the outset would in effect nullify the procedure provided for in article 20. The last clause of paragraph (1), for example, would hardly apply. It was clear from the text of the draft Convention that the guarantor/issuer generally effected payment against a conforming demand and did not enter into a commercial dispute, the sole exception being cases of fraud. Article 19 defined the situations constituting fraud and specified the relevant standard of assessment, namely, manifest and clear evidence. On the question of the link between articles 19 and 20, the principal/applicant's right of access to the courts could be expressly stipulated in order to overcome the lack of an "obligation not to pay" provision. As to the arguments in favour of uniform standards, it should be borne in mind that the court was a disinterested third party and that its needless intervention in the payment process had to be avoided. The granting of provisional measures had thus been limited to the context of fraud. It was therefore hard to see how there could be any question of an invitation to issuing banks to apply to the courts in cases of commercial disputes.

25. Article 20 was intended not to establish a procedural rule, but rather to provide a general policy direction for the courts. The test for the granting of provisional measures was already based on very high standards, namely, the high probability of fraud, immediately available strong evidence and the likelihood of serious harm to the principal/applicant. If it were set any higher, the securing of such court orders could be rendered virtually impossible.

26. Mr. GRANDINO RODAS (Brazil) said that his delegation supported the view that article 20 should be deleted. The question of provisional court measures should be left entirely to internal legislations.

27. Mr. GILL (India) said that, in his delegation's view, mere *prima facie* evidence should be a sufficient basis for the courts to issue provisional measures to prevent payment to the beneficiary.

28. Mr. BONELL (Italy) said that the adoption at the previous meeting of option III for article 19 (A/CN.9/XXVIII/CRP.3) constituted a concession to the guarantor/issuer. The equally legitimate interests of the other parties, primarily the applicant/principal, also had to be considered. That was the intention in article 20, together with the proviso contained in article 19, paragraph (3).

29. No delegations had argued that the draft Convention should expressly deny the principal/applicant the right in certain circumstances to apply to the courts for the granting of provisional measures. That right was generally recognized in national laws and could usefully be included in article 20 as a counterbalance.



30. With regard to the question of lower standards, provisional court measures were often sought prior to the beneficiary's submission of its demand for payment. Therefore, the "high probability" test, i.e. *prima facie* evidence, had to be an acceptable basis. Moreover, provisional court orders were granted under the *inaudita altera parte* or non-adversary procedure, and it was difficult to conceive of a judicial ruling based on the establishment of a fact as certain without the other party having been heard. For those and other reasons, he felt that the substance of article 20 should be retained.

31. Mr. SHISHIDO (Japan) said that he shared the views expressed by the observer for Canada. On the subject of the standard of proof, he did not agree with those who considered that the standard required in article 20 was lower than in article 19. Even after the adoption of the "may" approach for article 19, the standard required in article 20 was higher, because the judgement allowing the guarantor/issuer to stop payment was only possible when there was "high probability" that the demand was manifestly and clearly improper. That was presumably the intention, but the wording used was not absolutely clear. He hoped that the drafting group would be able to establish beyond a doubt that the reference to "one of the elements referred to in paragraph (1) of article 19" included the concept of "manifest and clear" impropriety. In his view, the test introduced by the term "high probability" was in fact too strong. As there already existed a "manifest and clear" test at the guarantor level, he did not see why a higher standard was required for an application to the court. It should be possible to rely on the court's impartial judgement. The words "high probability" might therefore be deleted.

32. Mr. HERRMANN (Secretary of the Commission) hoped that Japan would reconsider its suggestion to delete "high probability". In his view, article 20, paragraph (1), meant what it said in speaking of a "high probability that ... one of the elements referred to in paragraph (1) of article 19 is present". The elements referred to were the three situations involving an abuse of land described in article 19 (1). At least one of them had to be merely "present", not "manifest and clear". It would be too much to expect there to be a "high probability" that the presence of such an element would be "manifest and clear" to everyone. It might be possible to clarify the text by using the word "instances", as in previous versions, or some other word, or by including a more specific reference to the actual phrases used in article 19(1)(a), (b) and (c). The aim of the paragraph was to express the link between the evidence presented and the inference to be drawn in order to decide whether one of the elements or instances used to define fraud or abuse was present. That was reflected in the use of the terms "high probability" and "strong" evidence, the effect of which was much the same.

33. Mr. FAYERS (United Kingdom) said that in practical terms, article 20 left many gaps to be filled by national procedures. One of the most important aspects was the speed with which a court measure could be taken. In the United Kingdom, for example, it could be taken within no more than five to ten days, which made it acceptable to have a lower standard. The procedure was particularly quick in the United Kingdom because the banks were very active in going to court to apply for the discharge of an injunction. The speed of the procedure might penalize the principal, because he was given so little time to produce evidence for maintaining the injunction. However, if the procedure took a lot longer, as it appeared to do in certain countries, that could also raise problems. The United Kingdom tended to favour the principle "pay first, argue later".

34. The paragraph as it stood represented a compromise arrived at after many years of discussion. The term "high probability" was equivalent to "a strong *prima facie* case" or the expression

"seriously arguable" used in the United Kingdom. He was happy with the text as it stood.

35. Mr. BYRNE (United States of America) said that the Convention would provide not an internal but an international regime that would reassure beneficiaries, applicants, issuers or confirmers in one country that there existed an international regime with a reasonable degree of certainty as to standards for dealing with disputes arising in other countries. That international certainty, though not perfect, was, on the specific issues covered in articles 19 and 20, of great value for independent guarantees and standby letters of credit. Article 20 should therefore be retained. The wording represented the outcome of many years of discussion and, though he and others might have preferred something different, the present text was workable. He did not think that any major change would elicit sufficient support. The report of the Commission should, however, reflect the Working Group's understanding that the insolvency of a principal/applicant could not be a defence for the obligation of the guarantor/issuer to pay or a ground for extraordinary provisional relief.

36. The CHAIRMAN speaking as representative of Singapore said that article 20 should be retained as part of the Convention. He associated himself with the remarks made by the observer for Canada.

37. Mr. EDWARDS (Australia), referring to the comparison made by certain speakers between the "manifest and clear" test in article 19 and the "high probability" test in article 20, said that they were two different concepts, which had been usefully articulated in two different ways. The situation confronting a banker when asked to make a payment was quite different from that confronting a court, and that difference was reflected in the language used. In his view article 20 should be retained as it stood.

*The meeting was suspended at 11.15 a.m.  
and resumed at 11.50 a.m.*

38. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that it was his impression that the majority of members wished to retain article 20. After listening to the arguments for and against retaining the words "high probability", he considered that the term should be retained. Regarding the word "elements", it clearly referred only to subparagraphs (a), (b) and (c) in paragraph (1) of the redrafted article 19 and not to the full text of that article. The drafting group should therefore examine the present text of article 20, paragraph (1), to ensure that the reference made was to those elements in article 19 only. A few comments had been made on the word "strong", but he did not feel there had been sufficient support to warrant its deletion. Nor had there been sufficient support for the deletion or amendment of the last part of paragraph (1), "taking into account whether in the absence of such an order the principal/applicant will be likely to suffer serious harm". In regard to paragraph (2), the suggestion that nothing should be said to courts regarding the provision of any form of security had not received much support. He therefore suggested that the text should remain as it stood. There had been no comments on paragraph (3), which he took to mean that it was acceptable.

39. Mr. AL-NASSER (Saudi Arabia) said that his country had already proposed an amendment with respect to article 20, the purpose of which was to avoid giving the impression of intervening within the jurisdiction of the courts. In the case of an application by the principal/applicant or any other party that produced evidence, proof or a high probability of the presence of the elements referred to in article 19(1) in relation to a demand made, or expected to be made, by the beneficiary, the guarantor could request the court to take action. He therefore suggested that the text of paragraph (1) be amended after the words "paragraph (1) of



article 19 is present" to read "the guarantor may ask the court, on the basis of immediately available strong evidence, to issue a provisional order . . .".

40. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted an absence of support for the amendment suggested by the representative of Saudi Arabia.

41. Mr. STOUFFLET (France) said he wished to propose additional language on counter-guarantees or counter-guarantors in order to cover a situation which was quite common in European and French practice but which was not dealt with in the present text. In that type of situation, a guarantee had been requested and paid and the first principal/applicant—most frequently an exporter—considered the request to have been made in bad faith, i.e. the beneficiary should not have requested the guarantee, but had done so anyway and received payment, the exporter would then try to block the counter-guarantee by obtaining a provisional measure. His solution was that provisional measures *vis-à-vis* counter-guarantees should be possible only with evidence that the guarantor, upon making payment, had been in bad faith, i.e. that it had paid even though it knew that the final beneficiary had made an improper demand. That solution, which was the principle applied by French courts, was a balanced one, as the first guarantor could not be penalized if it had acted in good faith simply because the beneficiary had acted in bad faith. Accordingly, language might be added to the following effect: "A provisional order may be issued with regard to a counter-guarantee only if the undertaking to which the counter-guarantee refers has been executed in bad faith by the guarantor/issuer".

42. Mr. HERRMANN (Secretary of the Commission) said that it was not true that article 20 did not apply to a counter-guarantor, because in accordance with article 6, the word "guarantor/issuer" could equally be read as "counter-guarantor"; the counter-guarantor was in fact a guarantor. In the situation raised by the representative of France, the procedure would be to determine whether the demand by the first guarantor on the counter-guarantor fell within the scope of subparagraph (a), (b) or (c) of article 19, paragraph (1). The purpose of adding a reference to the counter-guarantor could thus only be to either widen or narrow the area of possible fraud. There were a number of substantive questions about the instances of fraud or abuse that should be covered. But if it was wished to deal specifically with provisional measures against counter-guarantors, it might be more appropriate to do so by including a corresponding instance in article 19, to which article 20 would then refer.

43. Mr. STOUFFLET (France) said that none of the situations described in article 19(1)(a), (b) or (c) specifically covered the case he had mentioned. In that example payment had been made, and therefore it could not be said that the first guarantor was demanding something which it had not paid. Payment had in fact been made, but in something approaching complicity with the beneficiary. He agreed that the matter might be dealt with by adding to the instances given in article 19.

44. Mr. BYRNE (United States of America) said that he had a similar question regarding a confirming bank or another bank

nominated to pay and which had in good faith paid. The technique used in the Convention with regard to confirming banks was to subsume them in the term "issuer". He wondered if, in the application of article 20, that technique was satisfactory to deal with a situation where a request was made for provisional relief as to payment by an issuing bank and where a confirming bank or other bank nominated to make payment had already done so, and was now applying to the issuing bank for reimbursement. If that bank had acted in good faith, a provisional measure would not be appropriate. He did not think that was clear from the text and wondered whether it was supposed to be self-evident or whether the Commission needed to consider the matter.

45. Mr. HERRMANN (Secretary of the Commission) said that the issue was not dealt with as such in the Convention. It would be approached through article 2, which explained to which types of undertaking or commitment the Convention applied. The Working Group had discussed whether it should cover other types of commitments, including reimbursement undertakings, and had decided to mention only stand-by letters of credit and independent guarantees. In fact, a counter-guarantee was a guarantee; according to the definitions in article 6, the term "undertaking" included counter-guarantees. If any such instrument was given for reimbursement, then it was covered. Hence, the question of whether there was or was not a reason for provisional measures should be covered by a single provision, relating to guarantees and counter-guarantees alike.

46. Mr. BYRNE (United States of America) said he disagreed with the Secretary's conclusions. Article 20 provided for provisional relief which was not sufficiently narrowed in scope, so that it could have an impact on a reimbursement obligation. The solution might be to make it clear that the reference was only to situations where the beneficiary was the object of the order or payment, but the existing language raised the possibility that those funds could be blocked in situations other than ones in which the beneficiary was applying for payment directly to the issuer, and that would constitute an intrusion into an area which the Commission did not mean to regulate, namely, reimbursement on the undertaking by the issuer to the confirmer. The drafting should clarify the idea that there would be no ability to interfere in situations where the confirming bank or other nominated bank had paid in good faith.

47. Mr. VASSEUR (Observer for Monaco) said it could simply be stated somewhere, perhaps in article 6, that the rules applicable to guarantees were equally applicable to counter-guarantees and confirmations. That would cover both article 19 and article 20, which would then apply to all situations involving counter-guarantees—for example, when the first guarantee was being extended.

48. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the Working Group had always felt that the rules applied equally to counter-guarantees and confirmations and that the matter had been sufficiently clarified through the definitions in article 6.

*The meeting rose at 12.35 p.m.*

## Summary record of the 562nd meeting

Thursday, 11 May 1995, at 2 p.m.

[A/CN.9/SR.562]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

The meeting was called to order at 2.10 p.m.

DRAFT CONVENTION ON INDEPENDENT GUARANTEES  
AND STAND-BY LETTERS OF CREDIT (continued)  
(A/CN.9/405, A/CN.9/408, A/CN.9/411)

## Article 20 (continued) (A/CN.9/408, annex)

1. Mr. HERRMANN (Secretary of the Commission) said that following consultations, it was suggested, to take into account the point raised by the representative of the United States of America at the previous meeting, that the wording in the fourth, fifth and sixth lines of paragraph (1), beginning with the words "a provisional order" and ending with the words "are blocked", should be amended to read: "a provisional order to the effect that the beneficiary does not receive payment, including an order that the guarantor/issuer hold the amount of the undertaking, or a provisional order blocking the proceeds of the undertaking paid to the beneficiary".

2. Mr. VASSEUR (Observer for Monaco) asked for an explanation of the purpose of the change.

3. Mr. BYRNE (United States of America) said that the new language addressed the concern that the present paragraph (1) of article 20 permitted the court to make a provisional order whose scope might be sufficiently broad as to be interpreted as interfering with the obligation of an issuing bank to reimburse a confirming bank, or other bank nominated to pay, which had in good faith made payment prior to, without the knowledge of or in a country not subject to the jurisdiction of the court issuing the provisional order prohibiting payment. The suggested text read out by the Secretary was, he thought, the least disruptive way of making clear that the provisional order would only affect payment by the guarantor/issuer directly to the beneficiary. It sought to deal with a situation that had not been foreseen.

4. Mr. GAUTHIER (Chairman of the Committee of the Whole), after asking whether there were objections to the proposed wording, said he took it that the Commission agreed to it. He then invited the Commission to take up the question of counter-guarantees raised at the previous meeting.

5. Mr. HERRMANN (Secretary of the Commission) said that, to meet the concern expressed by the representative of France, it was suggested that a new subparagraph (e) should be added to paragraph (2) of article 19 worded as follows:

"In the case of a counter-guarantee, the beneficiary of the counter-guarantee has made payment, as guarantor/issuer of the other undertaking to which the counter-guarantee relates, although it knew that the payment demand against it was made in bad faith."

The undertaking to which the counter-guarantee related was the guarantee referred to in French as *garantie de premier rang*.

6. Mr. VASSEUR (Observer for Monaco) suggested that the following text should be inserted in article 19:

"The fact that the beneficiary has made a call on the first-ranking guarantee (*garantie de premier rang*) in one of the cases provided for in paragraph (1) of this article having resulted in the rejection of its demand cannot for that reason alone justify the rejection of the demand on the counter-guarantee invoked by the first-ranking guarantor (*garant de premier rang*) unless the latter has absolutely certain knowledge of the bad faith of the beneficiary making a call on the counter-guarantee."

The following text was suggested for insertion in article 20:

"Provisional orders issued against a beneficiary having made a call on the first-ranking guarantee shall not automatically extend to the counter-guarantee from which the first-ranking guarantor benefits. Similarly, provisional orders issued against the first-ranking guarantor beneficiary of the counter-guarantee shall not automatically extend to the first-ranking guarantee existing in favour of the beneficiary."

7. Ms. FENG Aimin (China) expressed her concern that if the counter-guarantor addressed the local court to obtain provisional court measures that might raise problems of jurisdiction.

8. Mr. HERRMANN (Secretary of the Commission) said that the Working Group had at one point decided to delete the provisions on jurisdiction, a solution which might have clarified somewhat what and whom the court had jurisdiction over and solved some of the concerns of the representative of China. Article 20 should be regarded as a substantive procedural rule irrespective of whether the court had or had not jurisdiction, because the latter issue had not been addressed. When considering provisional court measures against the counter-guarantor, it was necessary to see whether, for the undertaking in question, the Convention actually applied, and the answer to that question lay in article 1.

9. Mr. GAUTHIER (Chairman of the Committee of the Whole) asked for an indication of support for the amendments suggested by the observer for Monaco and for the suggested additional subparagraph for article 19(2).

10. Mr. SHIMIZU (Japan) said that, in considering the text suggested to deal with the United States point, the Chairman had not asked whether the suggestion was supported but whether there were objections to it.

11. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that in the present case there existed two proposals on the same subject.

12. Ms. BAZAROVA (Russian Federation) said that until recently she had accepted the general approach adopted by the Secretariat and been under the impression that the draft Convention covered counter-guarantees. The statement by the observer for Monaco left her confused in that regard.

13. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, in his understanding, article 6 made it clear that counter-guarantees were indeed covered by the draft Convention. The point at issue was whether counter-guarantees needed to be mentioned in the articles under consideration, and whether the draft Convention needed a provision regarding counter-guarantees in the specific context of fraud and provisional court measures.

14. Mr. ABASCAL ZAMORA (Mexico) expressed agreement with the point raised by the representative of Japan. He was not sure whether the text adopted at the suggestion of the United States solved the problem completely. It did not entirely dispel the ambiguity that arose when a payment was made in good faith by the guarantor. The guarantor had an undeniable right to be reimbursed. But if the text meant that provisional court measures would be authorized only when the guarantor/issuer had not paid the beneficiary it might be better to say exactly that. In other words, the text could be made clearer than it was at present by amending it to state that "the judge may issue a provisional order to the effect that the guarantor/issuer shall not pay the beneficiary". The second part of the paragraph would then no longer be necessary and the text would be clearer. The provisional order would be issued only when the guarantor/issuer did not pay the beneficiary and would be without prejudice to other situations.

15. Mr. HERRMANN (Secretary of the Commission) said that, if he had understood it right, the Mexican proposal entailed a major change in substance. It would be possible to do away with blocking orders, in which case the problem addressed by the United States proposal would not arise, but the United States proposal was designed to clarify the fact that the order to block funds had always been intended only for the purpose of preventing the beneficiary from receiving payment. If the beneficiary had already been paid, the question did not arise.

16. Mr. LAMBERTZ (Observer for Sweden) said he had much sympathy with the position of the representative of the Russian Federation. However, he thought that it was too late for the Commission to reopen the question of counter-guarantees.

17. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted that there was no support for the text suggested by the observer for Monaco.

18. Mr. EDWARDS (Australia) suggested that the drafting group should include in the proposed new subparagraph (e) a formulation along the following lines: "... and without limiting the possible application to a counter-guarantee of the types of situation referred to in subparagraphs (a), (b), (c) and (d)".

19. Mr. BYRNE (United States of America) said it would be useful for the Commission's report to reflect the fact that the Commission had decided not to accept the text suggested by the observer for Monaco not because it wished to exclude the issue of counter-guarantees from the Convention but because it had already decided to follow a system taking account of the issue of counter-guarantees and because it had been thought inappropriate to introduce a new formulation at such a late stage.

20. Mr. OGARRIO (Mexico) said that, as he saw it, the intent of the text was to provide for a situation where payment effected by the guarantor was not in good faith. The text as it stood was not clear and he would prefer an alternative wording.

21. Mr. ADENSAMER (Austria) said he had the same problem with the text as the representative of Mexico and agreed with the suggestion that it be redrafted.

22. Mr. OGARRIO (Mexico), in reply to a question from Mr. GAUTHIER, explained that, in his view, instead of making the

new text a new subparagraph (b), it should be made a separate paragraph.

*The meeting was suspended at 3.25 p.m.  
and resumed at 4.10 p.m.*

23. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, following consultations with a number of delegations, the following text was suggested for a new subparagraph (e) to be added to paragraph (2) of article 19:

"In the case of a demand against a counter-guarantor, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter-guarantee relates."

24. He took it that it was the Commission's wish to adopt that proposal.

#### Article 21

25. Mr. PELICHET (Observer for the Hague Conference on Private International Law) said his delegation regretted that the subject of conflict of laws was being treated in such a summary fashion in the text of the Convention. On a point of drafting, he pointed out that most codifications of international private law allowed for the possibility of choice of applicable law, but that choice was subject to much more stringent conditions than those set out in article 21. The text proposed did not specify those conditions, which in his view raised a problem in relation to other conventions, and would also leave the way open for reversion to the old idea that, when the parties had not expressly designated their will, their hypothetical will would be deemed to apply. He therefore suggested that the drafting group should review the text, in order to bring it more into line with that of other conventions.

26. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that it was his understanding that the current formulation was in part drawn from existing conventions; however, the question was not one of drafting but of substance.

27. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that under Iranian law the parties explicitly stipulated the applicable law in the undertaking. The words "or demonstrated by the terms and conditions of the undertaking" in article 21(1)(a) were confusing and he proposed their deletion.

28. His delegation believed that articles 21 and 22 should be combined, article 22 becoming paragraph (1)(c) in article 21.

29. Mr. STOUFFLET (France) did not share the pessimism of the observer for the Hague Conference with regard to article 21(1)(a). It would be taking things too far to consider the reference to the terms of the undertaking as a resurgence of the old idea of the hypothetical will of the parties. However, the text could be aligned with that used in other conventions.

30. Mr. FAYERS (United Kingdom) said that a possibility would be to add to article 21(1)(a) the words "or the circumstances of the case". He would, however, prefer to leave the text as it stood.

31. Mr. GAUTHIER (Chairman of the Committee of the Whole), having asked whether there was support for the proposal of the representative of the Islamic Republic of Iran for the deletion of the words "or demonstrated by the terms and conditions of the undertaking", said it appeared that there was none.

32. He wondered whether there was support for the Iranian proposal to merge articles 21 and 22, although that was really a drafting matter.

33. Ms. CZERWENKA (Germany) said that article 21 dealt with the choice of applicable law, whereas article 22 dealt with the situation where there was no choice of law. Merging the two would not be appropriate.

34. Mr. LAMBERTZ (Observer for Sweden) said that the question whether the principal should be governed by a decision of the bank and the beneficiary might arise in connection with article 21 if the bank and the beneficiary stipulated in the undertaking that the undertaking should be governed by a given law. The bank's obligation to the principal to check that the documents were genuine and not pay if they were fraudulent would not arise from the undertaking itself. He wondered whether the bank and the beneficiary could decide something on behalf of the principal and what law would govern the relation between the principal and the bank.

35. Returning to article 1, he said that article 1(1) provided that the undertaking might exclude the application of the Convention in the undertaking. In his view it would be odd if the bank and the beneficiary could exclude the application of those parts of the Convention that were designed to protect the principal, since the bank had an obligation towards the principal that was outside the undertaking. For the Convention to be complete, therefore, there should be an addition to article 1(1) to the effect that for the Convention rules not to apply to the relation between the bank and the principal there had to be an exclusion of the Convention between the two of them. He therefore suggested adding at the end of article 1(1) the words "or, as concerns the relation between the guarantor/issuer and the principal/applicant, unless those parties exclude the application of the Convention".

36. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the point made by the observer for Sweden did not relate to article 21. He took it that the Commission had concluded its discussion on article 21.

#### *Article 22*

37. Mr. PELICHET (Observer for the Hague Conference on Private International Law) said that under article 2 of the Convention the guarantor/issuer might not be a bank but a private person. Article 22 was therefore not complete: if the guarantor/issuer was a private person and had no place of business, a rule had to be found to apply to that situation. He therefore suggested the addition at the end of article 22 of a comma and the words "and in cases where there is no place of business, the place of habitual residence".

38. Mr. MARKUS (Observer for Switzerland) said that, for the sake of consistency, that wording should be added to article 1(1)(a) if it was added to article 22.

39. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he took it that the Commission agreed to align articles 22 and 1(1)(a). The drafting group should be asked to make the necessary amendments, and he suggested that a text be included in the definitions to the effect that, where there was no place of business, the rule of habitual residence would apply. In any case, the problem would rarely arise.

40. Mr. BURMAN (United States of America) concurred with that view.

41. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the Commission had concluded its deliberations on article 22.

#### *Article 1 (continued)*

42. Mr. GAUTHIER (Chairman of the Committee of the Whole) requested the Secretary to respond to the question raised by the observer for Sweden on article 1(1).

43. Mr. HERRMANN (Secretary of the Commission) said that, in considering the Swedish suggestion, the Commission should consider how the reference to the relation between principal and guarantor was to be understood. A fairly usable test was needed in a "scope of application" provision. However, although the focus of the Convention was on the guarantor-beneficiary relationship, there would be certain effects on the principal that could be obviated by the amendment suggested by Sweden. An agreement to exclude the application of the Convention did not mean that there would be a legal vacuum: another legal order would apply.

44. Mr. GAUTHIER (Chairman of the Committee of the Whole) asked for reactions to the Swedish suggestion to amend article 1(1).

45. Mr. MARKUS (Observer for Switzerland) supported the Swedish suggestion. The principal/applicant should not be made subject to a legal regime that he had not desired.

46. Ms. CZERWENKA (Germany) considered that although the amendment was desirable in theory it was not needed and would rarely be used. If the principal and the guarantor/issuer opted out of the Convention, the national law and good faith would apply. She did not support the amendment.

47. Mr. SHISHIDO (Japan) said that since few articles and provisions would be affected and it was important for the sake of fairness to ensure that the principal/applicant had an opportunity to exclude application of the Convention, he supported the Swedish suggestion.

48. Mr. FAYERS (United Kingdom) agreed with the representative of Germany. Although desirable in theory, the Swedish suggestion would give rise to great practical difficulties.

49. Mr. OGARRIO (Mexico), supported by Mr. BYRNE (United States of America) and Mr. ADENSAMER (Austria), endorsed the view of the representatives of Germany and the United Kingdom. At that stage he did not think that a matter that had already been decided should be reopened.

50. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he took it that the Commission did not accept the Swedish amendment.

*The meeting rose at 5 p.m.*

## Summary record of the 563rd meeting

Friday, 12 May 1995, at 9.30 a.m.

[A/CN.9/SR.563]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

The meeting was called to order at 9.45 a.m.

### DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (*continued*)

(A/CN.9/405, A/CN.9/408, A/CN.9/411)

#### Draft final clauses for the draft Convention (A/CN.9/411)

1. Mr. HERRMANN (Secretary of the Commission), introducing the note by the Secretariat containing a draft of final clauses to be included in the draft Convention (A/CN.9/411), said that it comprised a set of standard provisions, which were closely modelled, where appropriate, on those in other Conventions emanating from the Commission's work.

2. Article B, paragraph (1), concerned the date up to which the Convention would be open for signature. He wondered whether the Commission wished to fix a limit at all, as there might be reasons for leaving it open. In article E, which stated that "no reservations may be made to this Convention", the purpose was not so much to decide whether there should or should not be any reservations in the text of the draft Convention, but rather to state that, apart from those that were explicitly included, no other reservation could be made. There were a number of other Conventions of the Commission which contained a similar provision, and the language was included because otherwise there might be some doubt, despite the Vienna Convention on the Law of Treaties, which had the same rule. Article F, paragraph (1), contained a bracket round the number of instruments of ratification, acceptance, approval or accession required for the Convention to enter into force. The word "fifth" was bracketed because there might be good reason to have a lesser number, in the light of the Commission's experience with the United Nations Convention on International Bills of Exchange and International Promissory Notes, for which ratification by 10 States was required; a group of three States which were considering implementation of that Convention were facing technical difficulties owing to the requirement of 10 ratifications.

3. Mr. GAUTHIER (Chairman of the Committee of the Whole) invited the Commission to consider the draft final clauses proposed by the Secretariat article by article.

#### Article A

4. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted that there were no comments.

#### Article B

5. Mr. BURMAN (United States of America) suggested that the Convention should be open for signature for two or perhaps three years from the date of adoption. While signature did not carry substantial legal significance, it did have some value for some States. In his country's experience, if a specific period was named for which a Convention would remain open for signature, that could encourage Governments to begin the process leading to ratification.

#### Article C

6. Mr. EDWARDS (Australia) noted that paragraph (3) referred to circumstances in which the place of business was in a territorial unit that was not included in a declaration of the territorial units to which the Convention was to extend. According to paragraph (2)(b) of article 4, which defined the internationality of an undertaking, "if the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant"—but obviously not finally determinative—"for determining the international character of the undertaking". He wondered whether there ought to be a reference to the habitual residence in paragraph (3) of article C.

7. Mr. HERRMANN (Secretary of the Commission) said that article 4 dealt with a situation where a guarantor or other party might not have a place of business, in which case the habitual residence would be relevant. It had been suggested that the same clarification could also be made in article 22, which referred to the place of business as a connecting factor, or that a more general approach should be taken, which would be applicable to the entire Convention, to the effect that where there was no place of business, what counted was the habitual residence. The drafting group had proposed making such an addition to article 22, but not to article 1. The intent was, however, the same, and the Commission was already familiar with the idea from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, under which reciprocity would not obtain if the place where such an award had been made was in a territory that had not implemented the Convention. The matter would be taken up under the Commission's discussion of article 1, at which stage it might or might not be decided either to have a general provision or to deal with the matter in individual articles.

#### Article D

8. Mr. BURMAN (United States of America) pointed out that the Commission had not yet formally adopted a provision on declarations and that if it did not do so, it would not need to keep article D.

#### Article E

9. Mr. SHIMIZU (Japan) said he had two problems with articles 1 and 20, which affected his delegation's ability to accept article E. He could not understand the legal nature of article 1, paragraph (2), and asked whether an international letter of credit always had the same independent character as the undertaking defined by article 2. If that was so, there was no problem; if it was not always so, however, it did not make sense to apply the Convention to that type of letter of credit, and Contracting States should be permitted to opt out by way of reservation.

10. As to article 20, while he fully understood the underlying policy of limiting a situation in which the principal/applicant could intervene in the relationship between the guarantor and the

beneficiary in order to secure the independent character of the undertaking, the way it was expressed was somewhat questionable and in fact went too far. In particular, the phrases "high probability" and "strong evidence" were acceptable if they were confined only to the present Convention, but if in the context of Japan's national legal system as a whole, such a provision would seem very strange. It would mean qualifying the strength of evidence in accordance with the legal character of each monetary claim. Paragraph (3) of article 20 was also too restrictive. While he agreed as to the value of the uniformity of application, he also valued the importance of achieving justice in a given place, especially at the preliminary injunction stage. Accordingly, he proposed that a Contracting State might declare at the time of signature or acceptance that it would not be bound by article 20 of the Convention.

11. Mr. HERRMANN (Secretary of the Commission) said, with reference to article 20, that if Japan became a party to the Convention and took advantage of the possibility of making a reservation, as that country's representative had proposed it should be able to, its courts would not apply the provisions of article 20. There might still be some uncertainties if there was a guarantor in Japan and a principal in another country, or vice versa. The question at issue, however, emerged more clearly in relation to article 1, paragraph (2). In a situation where the parties—a bank from one country and a beneficiary from another, for example—stipulated in their letter of credit that the Convention would apply, the question was, if a dispute arose and the case went before a court in Japan, whether that court, by virtue of the reservation at present being envisaged, would be bound not to recognize the parties' choice. Alternatively, the reservation might be intended to have an effect similar to that in article 12 of the United Nations Convention on Contracts for the International Sale of Goods, which would be to have a closer link to some party in Japan. The question of effect had indeed led to some controversy with regard to article 12 of the Sales Convention. Such questions should, therefore, be asked, particularly with regard to article 1, paragraph (2), in which it was important to clarify what the intended effect was, because that would dictate how to phrase the reservation.

12. Mr. SHIMIZU (Japan) said that the notion of an international letter of credit was still unclear, as there might be a case in which such a letter did not have the independent character defined in article 2. If the parties to a given international letter of credit chose to apply the Convention, even when that letter did not have an independent character, it was not reasonable to oblige the Contracting State to apply the provisions of the Convention to that type of letter of credit.

13. Mr. LAMBERTZ (Observer for Sweden) asked in connection with article 1(1) whether a reservation would be needed if a country wished to pass a law making the Convention system mandatory in whole or in part. If parties to an undertaking agreed that the Convention should not apply to their undertaking, but the country of one party had made the Convention mandatory and it was the law of that country that applied, he assumed that the Convention would apply despite the parties' agreement to the contrary.

14. Mr. HERRMANN (Secretary of the Commission) drew attention to article 1(1)(b), which provided that the Convention would apply if the rules of private international law led to the application of the law of a Contracting State. If that law contained a provision stating that the Convention was excluded in certain transactions, effect would have to be given to it. A solution might be for the Contracting State to abrogate all its national rules on independent guarantees and stand-by letters of credit and use the Convention system instead.

15. Mr. GRANDINO RODAS (Brazil) agreed with the Japanese representative's proposal on the possibility of making reservations to article 20. He understood that if such a reservation were made, the question of provisional court measures would be left entirely to national law.

16. Mr. BURMAN (United States of America), referring to questions asked about the independence of an international letter of credit, said that in his experience no international letter of credit properly denominated as such was not independent. He had found no difficulty with the language in question in letter-of-credit law. Moreover, if the provision was optional for the parties, that should provide sufficient protection.

17. With regard to the comments on article 20, he stressed that that article was a crucial provision in the Convention, since it was essential to have a fairly high level of assurance of payment. One way to achieve that was to make it clear when provisional court measures could be sought. He recommended that no modifications should be made to a provision which had been very carefully drafted.

18. Ms. CZERWENKA (Germany) considered that reservations should not be allowed, since they would weaken the uniform rules of the Convention, which had been developed over many years. She understood that many delegations might have problems with implementing article 20 because of their national laws, but believed that the article was a very basic one, merely signalling that provisional court measures should be allowed in certain circumstances. She agreed with the drafting group's view that the provision should stand.

19. She shared the concern expressed by the representative of Japan on article 1(2), that the rule dealt with issues falling outside the scope of application of the Convention and that States would be bound by that rule without knowing exactly what it involved. The best way would be to delete the paragraph altogether. However, she did not think that a reservation clause would be justified.

20. She did not agree with the observer for Sweden that it was necessary to allow by way of reservation that the Convention should be mandatory. There had been general agreement that the Convention should be non-mandatory because parties to an undertaking could opt out, and she did not wish to change that approach.

21. Mr. SHANG Ming (China) agreed with the points made by the representative of Japan on reservations and considered that reservations should be allowed on articles of the Convention conflicting with national law.

22. Mr. GAUTHIER (Chairman of the Committee of the Whole) observed that, after a consensus had been reached on the substantive terms of the Convention, those who disliked that consensus were now using the suggestion that reservations should be allowed as a last opportunity to restate their positions. He did not approve of that approach. A reservation would not apply merely to an individual country, but would restrict that country's dealings with all other signatories. He had understood that the representative of China was asking to be given freedom to choose the articles it wished to apply by means of a reservation.

23. Mr. SHANG Ming (China) replied that his delegation was not trying to overturn what had been agreed, but merely to express its desire that the Convention should receive broad international acceptance. In the absence of a reservation clause, many States would be unable to sign the Convention. There were certain important articles on which there were conflicting views, and it should be possible for delegations to enter reservations on those points.

24. Mr. LAMBERTZ (Observer for Sweden) asked for a clear answer as to whether, if Sweden ratified the Convention, it could, without entering a reservation, incorporate into its law a provision stating that the Convention was to apply as Swedish law and that the parties to an undertaking might not exclude the application of that law. If not, it might be possible to provide that parties to an undertaking might not exclude the application of Swedish law as it concerned the relation between beneficiary and principal.

25. Mr. HERRMANN (Secretary of the Commission) said that the desired result could probably be achieved by embodying the legal system of the Convention in Swedish law. Excluding the application of one legal system meant that another legal system was applicable. Sweden would have a right to regulate only when Swedish law, not another law, applied. For that a reservation would not be required. The obligation of a signatory, unless it entered a reservation, was to apply the Convention as it stood, including the parties' possibility of excluding its application.

26. Mr. LAMBERTZ (Observer for Sweden) said that he was satisfied with that reply and would not ask for the possibility of entering a reservation.

27. Mr. BONELL (Italy) urged delegations not to insist on having a reservation clause included in the Convention. There had been a time in the process of drafting the Convention when the approach had been that in order to get an international instrument on the table, it was better to proceed as quickly as possible, without worrying too much about content, and that it would always be possible to put in a reservation at a late stage. However, it was not possible in an instrument of private international law to pick out certain articles from a systematic body of rules and then pretend that the substance survived. All too many countries might wish to take advantage of the possibility of making reservations, and the result would be chaos.

28. Mr. MARKUS (Observer for Switzerland), agreeing with the representative of Italy, said that reservations should be avoided wherever possible. The Chinese proposal for a wide range of reservations would, in his view, render the application of the entire draft Convention virtually impossible. It should be borne in mind that a reservation entered to a rule by one Contracting State would lead to non-application of that rule by the other States parties and their courts. In particular, reservations should not be permitted on article 20. That article was the cornerstone of the draft Convention and dealt with its most sensitive legal issue. Like the representative of Germany, he regarded article 20 as a minimum standard for national procedural law and not as a precise rule. States with higher standards were unjustified in fearing that without the possibility of reservations they would sacrifice something procedurally. With regard to the Japanese proposal to allow reservations to article 1, paragraph (2), he would have preferred to adopt the solution of deleting the provision, as suggested by the German delegation, but it was now too late.

29. The CHAIRMAN, speaking as representative of Singapore, said that his delegation was not in favour of including in the draft Convention a provision allowing reservations to be made to any of its articles. The Commission had spent years endeavouring to achieve uniformity in the law on stand-by letters of credit and independent guarantees. To permit reservations would mean that the international trading community would have no certainty as to the rules governing payment.

30. Mr. MAHASARANOND (Thailand) said that his delegation shared the view that reservations should be possible. The draft Convention was a type of model law, and States should be allowed flexibility in its implementation. Otherwise they might be reluctant to become parties to it.

31. Mr. CHOUKRI SBAI (Observer for Morocco) said that his delegation considered that the discussion on whether to allow reservations should not be linked to individual articles of the draft Convention, since full agreement had already been reached on the text. Adoption of the Chinese proposal could have led to reservations permitting non-application of the entire draft Convention, which was unacceptable. The instrument contained a number of flexible provisions, particularly those in articles 21 and 22. Article E of the final clauses should therefore be retained; that would contribute towards the pursuit of the Commission's aim of fostering the harmonization of international trade law.

32. In Morocco, ratification of a convention gave rise to the enactment of a new law and the corresponding amendment of previous laws. The question whether international law should prevail over national law in cases of conflict was a matter for consideration by jurists and not the Commission. Conflict situations could arise in connection with all international instruments, not just the present draft Convention.

33. Mr. EDWARDS (Australia) said that after all the years spent on achieving consensus, the moment had now come for the Commission to decide whether it wished to adopt article E. He believed that there was considerable support for its retention.

34. Ms. BAZAROVA (Russian Federation) said that her delegation was in favour of retaining article E. Accepting that some countries might not become signatories to the draft Convention was preferable to envisaging the difficulties to which the entering of reservations would give rise. It was more important to have a unified international instrument.

35. Mr. GAUTHIER (Chairman of the Committee of the Whole) pointed out that the draft Convention reinforced party autonomy in many respects. If parties were denied the right to make reservations, that would to some extent be counterbalanced by their ability to adapt the rules to suit themselves. He felt that there was general agreement that reservations should not be permitted and took it that the Commission wished to approve article E as it stood.

*The meeting was suspended at 11.25 a.m.  
and resumed at 11.50 a.m.*

#### Article F (A/CN.9/411)

36. Mr. BURMAN (United States of America) said that his delegation had originally considered that five ratifications constituted a convenient threshold for entry into force of the draft Convention, but that he understood that some delegations might prefer three.

37. Ms. CZERWENKA (Germany) said that in her delegation's view, the adoption of a smaller minimum number of ratifications would impair the Convention's international character. The text of the article should therefore retain the word "fifth".

38. Mr. LAMBERTZ (Observer for Sweden) pointed out that the word "States" appearing in the second line of paragraph (3) should in fact be in the singular.

39. Mr. BURMAN (United States of America) wondered whether it should be specified that the conflict-of-laws rule under paragraph (1 *bis*) of article 1 (A/CN.9/XXVIII/CRP.2), which presumably had force solely in a Contracting State, also applied only to undertakings issued on or after the date when that State became a party to the draft Convention.

40. Mr. HERRMANN (Secretary of the Commission) said that there were arguments on both sides. It could be said that



whenever a court had to determine a conflict-of-laws issue, the provisions should apply irrespective of when the Contracting State accepted such rules and the undertaking was issued. If, however, it was felt that some time-limit should be set, it would be necessary to find the right place for it. The present provision did not cover the problem, since it did not refer to articles 21 and 22. In a substantive law regime there was good reason for a time-limit in that the parties to a transaction ought to know their obligations and rights. However, he felt there was less practical need for such a limit in relation to the question as to which rules of private international law applied, which would indirectly determine the relevant substantive law. The differences were not great. There seemed to him less need for preventing the parties from getting into a situation in which their instrument would later become subject to a private international law regime because they had not foreseen at the time that their State would become a Contracting Party.

41. Mr. BURMAN (United States of America), observing there to be little interest in the issue, withdrew his suggestion.

42. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he took it that article F, with the drafting change suggestion by Sweden, was acceptable.

#### Article G (A/CN.9/411)

43. Mr. BURMAN (United States of America) wondered whether it would be possible to change the word "denunciation", which in English was very strong, for a milder term such as "withdrawal". He realized that the word "denunciation" was the normal term used in treaty language, but many people examining the treaty tended to assume that it implied a major political act rather than mere withdrawal. It was purely a matter of drafting.

44. Ms. CZERWENKA (Germany) considered that the text should stick to the normal treaty language, since a change might raise the question as to why it had been made. In regard to paragraph (1), she wondered whether it was a common practice to allow denunciation "at any time", which could mean before the Convention entered into force. Some conventions set restrictions on when they could be denounced.

45. Mr. HERRMANN (Secretary of the Commission) said that the paragraph implied that only a Contracting State could denounce the Convention, though any Government was of course free to make any declaration it wished on the subject.

46. Ms. CZERWENKA (Germany) said that use of the term "Contracting State" did not make it entirely clear whether the treaty had entered into force for that State.

47. Mr. HERRMANN (Secretary of the Commission) said that if, for example, only three States had so far signed the Convention, any one of them could reduce the chances of its entering into force by denouncing it.

48. Mr. PELICHET (Observer for the Hague Conference of Private International Law) asked whether the fact that no provision had been made for a federal State to denounce the Convention on behalf of one of its territorial units was deliberate.

49. Mr. HERRMANN (Secretary of the Commission) said that if a federal State wished to have other clauses, the Commission would first have to decide on the principle and the Secretariat would then assist such a State to find the additional wording necessary.

50. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he took it that the Commission preferred to retain the

word "denunciation" and was satisfied with the text of the article as it stood.

#### Report of the drafting group (A/CN.9/XXVIII/CRP.2 and Add. 1-4)

51. Mr. SAHAYDACHNY (Secretariat), introducing the report of the drafting group (A/CN.9/XXVIII/CRP.2 and Add. 1-4), said that article 1 contained a new paragraph (1 *bis*) that was not new in substance, but represented a reformulation of the previous paragraph (3) concerning the application of articles 21 and 22. The drafting group had considered moving that provision to chapter VI, but had decided to keep it in article 1 in order to clarify the intended effect. The group had also discussed the advisability of including the term "habitual residence" to cover cases in which a party did not have a "place of business", the term used in paragraph (1)(a), but had decided against, partly because the possibility of issuing an undertaking from a "habitual residence" was suggested by the use of that term in article 4(2)(b). The drafting group had also felt that use of "habitual residence" for "place of business" as a general rule for interpretation of the Convention might have unforeseen implications. As the term was needed in article 4(2)(b), its inclusion as a general rule in article 1 might appear to repeat that provision. Moreover, such a rule of interpretation might detract from the general approach used in the Convention, that relevant information such as the place of issuance should appear on the face of the instruments. It might be possible to include a specific reference to the "habitual residence" in article 22 for the purpose of determining the applicable law, but that might require a reference to the term in article 1(1)(a).

52. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that as members might want to think over the observations just made regarding the term "habitual residence", he would return to the question later.

53. He took it that paragraph (2) reflected the decisions of the Commission.

54. He asked whether paragraph (1 *bis*) reflected the Commission's request to the drafting group to produce a more accurate and satisfactory text.

55. Ms. CZERWENKA (Germany) said that Germany had several problems with the draft of article 1, paragraph (1 *bis*). The opening phrase "In any situation involving a choice between the laws of different States" was presumably intended to replace the word "international", but she did not recall any suggestion that that word should be interpreted in such a way. She was not sure what the phrase meant, but upon its meaning depended the application of articles 21 and 22. In her view, the text lacked clarity. Germany's position was that the scope of articles 21 and 22 should be limited to international undertakings, a view that had been reflected in the previous version of the draft Convention reproduced in document A/CN.9/408 by use of the term "international undertakings". There should only be one definition of internationality, so that the scope of application for articles 21 and 22 would be limited to international undertakings as defined in articles 2 and 4, but that view had not been properly reflected in the wording chosen by the drafting group. The opening phrase of paragraph (1 *bis*) was not identical to the definition given in article 4 and the text did not reflect the discussion in the Commission. There also appeared to be a problem with the general structure of paragraphs (1) and (1 *bis*). Paragraph (1) stated that the Convention, meaning the Convention as a whole and not the Convention except for articles 21 and 22, applied in certain specific circumstances. But should specific provisions rather than the Convention as a whole be applied, problems might be raised regarding the application of articles 5 and 6. In Germany's view, those articles should be seen as part of articles 21 and 22. In short,

the draft text had not captured the original idea that the Convention applied to all international undertakings defined in article 2 but that the substantive provisions—that is, articles 7 to 20—should have a more limited scope of application. She did not think that the text had solved the problems discussed in the Working Group. Germany had put forward a drafting proposal, which, however, had not been accepted by the Secretary.

56. Mr. HERRMANN (Secretary of the Commission) said that it was not at all up to the Secretary to decide whether a proposed amendment was acceptable or not. He had seen the draft submitted, had made comments upon it and had understood that the explanation he had given had satisfied the representative of Germany. One reason why there was no specific link between paragraphs (1) and (1 *bis*) arose from the drafting technique used by UNCITRAL, according to which no cross-reference was made to

another part of the same article. Consideration had been given to placing the provision in a later part of the Convention, but that would only have increased Germany's concern. It might be possible to introduce a new article, which would be article 23 in chapter VI, and amount to a separate convention within the Convention.

57. Mr. SAHAYDACHNY (Secretariat) read out the suggested text, which was as follows:

*"Article 23*

*"The provisions of articles 21 and 22 apply to international undertakings referred to in article 2 independently of article 1, paragraph (1)."*

*The meeting rose at 12.40 p.m.*

### Summary record (partial)\* of the 564th meeting

Friday, 12 May 1995, at 2 p.m.

[A/CN.9/SR.564]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

*The meeting was called to order at 2.10 p.m.*

DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (*continued*)  
(A/CN.9/405, A/CN.9/408, A/CN.9/411)

Report of the drafting group (*continued*) (A/CN.9/XXVIII/CRP.2 and Add.1-5)

1. Mr. GAUTHIER (Chairman of the Committee of the Whole) reminded the Commission that two points were outstanding on article 1: the idea of making a reference to "habitual residence" and the question of the conflict-of-law rule. There were two alternatives for the latter: paragraph (1 *bis*) as proposed by the drafting group (A/CN.9/XXVIII/CRP.2) and the article 23 suggested by the Secretariat at the end of the previous meeting. Both of them raised the issue whether the rule should refer to "international undertakings" or simply "undertakings". He invited the Commission to deal with the conflict rule first.

2. Mr. PELICHET (Observer for the Hague Conference on Private International Law) said that the conflict-of-law rule was intended to be a general rule operating independently of the Convention, and should therefore cover all situations in which a conflict of laws could arise in a State. Consequently, he urged the deletion of the word "international".

3. Mr. FAYERS (United Kingdom) agreed that the word "international" should be deleted.

4. Mr. BONELL (Italy) disagreed. His delegation understood that articles 21 and 22 applied to international undertakings precisely because they appeared in an instrument dealing with undertakings of that kind. The deletion of the word "international" from the conflict rule would create considerable problems, because the rule would then suggest that, under article 21, a purely internal guarantee could be subjected to the law of a foreign jurisdiction.

With regard to the location of the conflict rule, which for the moment he would call "article X", his delegation wished it to be moved from article 1 to chapter VI, or a possible chapter VII. It should read as suggested by the Secretariat, but with the words "as referred to in article 2" replaced by the words "as defined in article 2 and article 4". In addition, in order to alert the reader to the situation from the start, the provision in article 1(1) should begin with the following words: "Subject to article X, this Convention applies ...".

5. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he did not think there was any intention that the Convention should apply to domestic undertakings.

6. Mr. EDWARDS (Australia) said his delegation could accept the rule with or without the word "international". It would prefer the word to be retained, however, so as to dispel any idea that the Convention might apply to undertakings generally.

7. Ms. FENG Aimin (China) said that the term "undertaking" was new in the context of the subject and had been coined specifically for the purposes of the Convention. Consequently, she could not see that a problem would arise if the word "international" were omitted.

8. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted that there was no strong support for the deletion of the word. He took it that the Commission wished to retain it.

9. *It was so agreed.*

10. Mr. PELICHET (Observer for the Hague Conference on Private International Law), referring to the question of the location of the conflict rule, said that he had a strong preference for the suggestion that it should be placed in chapter VI. If it remained in article 1, there was a risk of misinterpretation. Moreover, the wording suggested by the Secretariat was simpler and

\*No summary record was prepared for the rest of the meeting.

partly disposed of the concern expressed by the German delegation at the previous meeting.

11. Mr. BURMAN (United States of America) endorsed the suggestion to move the conflict rule to chapter VI. He asked whether acceptance of that suggestion implied acceptance of the amending language proposed by Italy.

12. Ms. CZERWENKA (Germany) said that the scope of the conflict rule suggested by the Secretariat would not be clear without an express reference to articles 4 and 6.

13. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that a possible solution might be to replace paragraph (1) *bis* by a modified version of article 1(3) of the Working Group's draft (A/CN.9/408), as follows: "The provisions of articles 21 and 22 apply to international undertakings as defined in article 2, independently of paragraph (1) of this article".

14. Ms. CZERWENKA (Germany) said that she could accept the Chairman's proposal but would suggest that the words "as defined in article 2" be replaced by "as defined in this Convention". That would broaden the reference to include the definition of internationality and would overcome the problem of deciding to which provisions reference should be made.

15. Mr. GAUTHIER (Chairman of the Committee of the Whole) asked whether there was support for that suggestion.

16. Mr. BURMAN (United States of America) said that, since it had been decided earlier that the qualifying word "international" should be retained, it would be inappropriate to refer to article 2 only. Otherwise, it was a matter of drafting.

17. Mr. HERRMANN (Secretary of the Commission) said that the Commission had already approved the wording of article 1(1), which included the phrase "an international undertaking referred to in article 2", to which no further qualification was added. It would not be the same to say "as defined in the Convention", since that brought in rights and obligations.

18. Mr. BONELL (Italy) said that he disagreed with that view. A reference limited to article 2 would leave in doubt not only the meaning of "international" but also other points related to what an undertaking was. The problems would be solved by the suggestion made by the German delegation.

19. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the present task of the Commission was to ensure that its decisions had been implemented by the drafting group in its report and not to re-open discussions on matters already decided upon when article 1 had originally been discussed. He therefore suggested that the Commission should take up the question of habitual residence. He recalled that the drafting group had decided against including the term "habitual residence" in article 1 and he wished to propose that language be inserted in article 6 as follows: "'place of business' refers to habitual residence if the person in question does not have a place of business", on the understanding that the rule contained in article 4(2)(b) would not be amended.

20. Ms. CZERWENKA (Germany) said it appeared that the discussion on the conflict-of-law question was to be regarded as closed. In her view, the matter had been one of drafting and not of substance. She regretted that the Commission had not been able to agree to clarify drafting issues. It would be more difficult for States to adhere to the Convention if they were uncertain as to the meaning of terms.

21. Mr. FAYERS (United Kingdom) said that he endorsed the remarks of the representative of Germany. Whenever points in doubt were raised by any delegation, it was necessary to attempt to clarify them.

22. Mr. PELICHET (Observer for the Hague Conference on Private International Law) said that the positioning and wording of the conflict-of-law rule was, in his opinion, not a drafting question but a substantive issue.

23. Turning to the proposal concerning habitual residence, he felt that the drafting group's approach of dealing with the matter in article 22 only was a good one. If it was dealt with in article 6, there would still be a need to refer to the term "habitual residence" in article 22, since article 22 would apply independently of the Convention in cases where the Convention was not applicable. Moreover, if it was stated in article 6 that "place of business" meant "habitual residence" where there was no place of business, that would affect the scope of application in article 1. Replacing "place of business" by "habitual residence" in article 1(1)(a) would have the result of requiring the place of issuance to coincide with the habitual residence of the guarantor/issuer. That could not be the intention. It would be better to have the rare cases involving habitual residence dealt with only under the conflict rule in article 22.

24. Mr. LAMBERTZ (Observer for Sweden) said that, although he would have supported the German proposal for a reference to the whole Convention, he agreed that the discussion on that matter should now be closed. With regard to the term "habitual residence", he was in favour of including explanatory language in article 6, as the Chairman proposed. That would be preferable to having different definitions in article 1 and article 22.

25. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that his suggestion was to have a definition of "place of business" in article 6 and no reference to "habitual residence" in article 22.

26. Mr. PELICHET (Observer for the Hague Conference on Private International Law) asked how article 1(1)(a) would then be interpreted, for example if a private person issued an undertaking at a place that was not his habitual residence. Clearly, if the Commission agreed to add the proposed rule in article 6, it would be necessary to reformulate article 1(1)(a).

27. Mr. HERRMANN (Secretary of the Commission) wondered whether, if persons without a place of business were not to be covered by article 1(1)(a), the intention was that they should be covered under article 1(1)(b), under rules of private international law. The Chairman's proposal was to deal with the matter in a rule of interpretation in article 6. In cases such as that referred to by the observer for the Hague Conference on Private International Law, the assumption was that common sense would be relied on in the interpretation of the Convention.

28. Mr. MARKUS (Observer for Switzerland) said he was concerned that the inclusion of the proposed rule of interpretation in article 6 would have the effect of extending the scope of application of the Convention under article 1. He therefore had doubts about the proposed change in article 6. With regard to article 22, it would be best to be consistent and not include a reference to "habitual residence" there unless one was to be included in article 1 also.

29. Mr. BURMAN (United States of America) said that the easiest solution might be to delete the reference to "habitual residence" in article 22. Certainly there should be no reference to "habitual residence" in article 1. The point that the proposals attempted to cover was of minimal importance to the business world. Private persons need not be regulated by the Convention.

30. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the solution of deleting the reference in article 22 was perhaps the best one. He would take it that the Commission wished to adopt the text of article 1 proposed by the drafting group, with paragraph (1 *bis*) replaced by a new paragraph (3) with the wording that he had read out, on the understanding that the reference to habitual residence would be deleted in article 22.

31. *It was so decided.*

*Article 2, paragraph (1)*

32. Mr. SHISHIDO (Japan) wondered whether the insertion of the words "subject to article 15" after "determinable amount" in the third and fourth lines might make it clearer that purely oral demands were not admissible.

33. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he believed that there was general agreement that the phrase "accompanied by other documents", appearing in the fourth line, adequately conveyed the idea that all demands had to be documentary in nature. He took it that the Commission wished to adopt the changes proposed by the drafting group.

34. *It was so decided.*

*Article 3*

35. *The proposed changes were adopted.*

*Article 6*

36. Ms. CZERWENKA (Germany) wondered why her delegation's proposal that subparagraph (f) be amended to read "'confirmer' means the person issuing the confirmation" had not been taken up by the drafting group.

37. Mr. SAHAYDACHNY (Secretariat) explained that the drafting group had felt that to use the word "issuing" raised a drafting problem in that it might bring in the notion of the issuance of the undertaking.

38. Mr. FAYERS (United Kingdom) suggested that the problem might be solved by using the word "adding" rather than "issuing" in the text proposed by Germany.

39. Mr. GAUTHIER (Chairman of the Committee of the Whole) asked whether there was agreement that subparagraph (f) should read: "'confirmer' means the person adding a confirmation to an undertaking".

40. *It was so decided.*

41. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he took it that the Commission wished to adopt the text of article 6 proposed by the drafting group, as amended.

42. *It was so decided.*

*Article 8*

43. Mr. SAHAYDACHNY (Secretariat) said that the text proposed by the drafting group (A/CN.9/XXVIII/CRP.2/Add.1) attempted to implement the Commission's decision to eliminate the reference to an amendment consisting solely of an extension to the validity period of the undertaking, as had appeared in the earlier draft of paragraph (2) (A/CN.9/408, annex). A new paragraph (2 *bis*) had been created in order to make it clearer that the rule concerning the effective date of a previously authorized amendment and the rule concerning the effective date of other amendments were both subject to party autonomy.

44. Ms. FENG Aimin (China) said that her delegation still felt that article 8 would give rise to problems of interpretation in the banking world. Its provisions differed considerably from those of the Uniform Customs and Practice for Documentary Credits (UCP); for example, the UCP terms stipulated that the presentation of documents could also serve as a form of amendment. If no further changes were made to the article, she hoped that a reference to the issue would be included in the Commission's report.

45. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that he appreciated the point raised by the representative of China but took it that the Commission was generally satisfied with the text proposed by the drafting group and wished to adopt it.

46. *It was so decided.*

*Article 9, paragraph (1)*

47. *The proposed change was adopted.*

*Article 10, paragraph (2)*

48. *The proposed change was adopted.*

*Article 11, paragraph (1) (A/CN.9/XXVIII/CRP.2/Add.2)*

49. *The proposed changes were adopted.*

*Article 12 (b)*

50. Mr. FAYERS (United Kingdom) said that the words "is informed" had been proposed by the drafting group to replace "receives confirmation" because the latter phrase might present difficulties given that "confirmation" was a defined term. He believed that a delegation was not in favour of the formulation "is informed", and he therefore wondered whether "receives a notice" would be a more acceptable alternative.

51. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the phrase "receives a notice" might imply that two documents were involved.

52. Mr. BONELL (Italy) agreed that a notice could be understood as constituting a separate communication from the document presented.

53. Mr. BURMAN (United States of America) said that the word "informed" had an informal connotation in legal usage. Perhaps the expression "receives acknowledgement" would better convey the content of a business communication.

54. Mr. EDWARDS (Australia) suggested that the words "is advised" should be used.

55. *It was so decided.*

*Article 12 (c)*

56. Mr. SAHAYDACHNY (Secretariat) explained that the drafting group had inserted the phrase "and an expiry date has not been stated in addition" in order to reflect a proposal made by Germany, but had placed it inside square brackets since it was not felt to be strictly necessary.

57. Mr. EDWARDS (Australia) said that in his view the inserted phrase read awkwardly. Perhaps it would be helpful if the square brackets were replaced by round brackets.

58. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he did not think that brackets were needed. If he

heard no objection, he would take it that the Commission wished to adopt the proposed text (A/CN.9/XXVIII/CRP.2/Add.3) subject to deletion of the square brackets.

59. *It was so decided.*

#### Article 13, paragraph (1)

60. *The proposed changes were adopted.*

#### Article 15

61. Ms. CZERWENKA (Germany) drew attention to the inconsistency between the reference in paragraph (3) to subparagraphs (i), (ii) and (iii) of article 19 (1) and the redrafted form of article 19 itself.

62. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the Secretariat would amend the reference accordingly. He took it that the Commission wished to adopt the proposed text on that understanding.

63. *It was so decided.*

#### Article 16

64. Mr. SAHAYDACHNY (Secretariat) recalled that the drafting group had been asked to consider whether, in order to reinforce the notion of the documentary character of the demand, the word "other" should be inserted at those points where the draft Convention referred to accompanying documents, as had been done, for example, in article 2. The word "other" therefore appeared in paragraph (1) and in the *chapeau* and subparagraph (a) of paragraph (2) but had been placed inside square brackets since it had been felt that the context of the article might render its insertion unnecessary (see document A/CN.9/XXVIII/CRP.2/Add.4).

65. Mr. BURMAN (United States of America) questioned the need for a comma after "other".

66. The CHAIRMAN, speaking as representative of Singapore, said that his delegation felt that the inclusion of the word "other" was unnecessary. It wished to propose that the phrase "and any [other,] accompanying documents" be replaced by "and accompanying documents, if any".

67. Mr. HERRMANN (Secretary of the Commission) said that it had long been the Commission's drafting practice to use "any ..." to signify "... if any". With regard to the comma appearing after "other", its omission would mean that the accompanying documents were in addition to an existing set of accompanying documents.

68. Mr. EDWARDS (Australia) said that, as he saw it, if the formulation "any accompanying documents" was used, the word "other" would be redundant. The present case was not comparable with article 2, since the text there said "demand accompanied by other documents". That was an entirely different usage of language. He therefore recommended that "[other,]" be deleted in the three instances where it appeared.

69. *It was so decided.*

70. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he took it that the Commission wished to adopt the drafting group's text as amended.

71. *It was so decided.*

#### Article 17

72. *The proposed change was adopted.*

*The meeting was suspended at 4 p.m.  
and resumed at 4.10 p.m.*

#### Article 18

73. *The proposed change was adopted.*

#### Article 19, paragraph (2)(c) (A/CN.9/XXVIII/CRP.2/Add.5)

74. *The proposed change was adopted.*

#### Article 19, paragraph (3)

75. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, with a view to avoiding a protracted discussion of the text, he wished to propose that the opening phrase "In the circumstances set out in paragraph (1) of this article" be deleted and the rest be reworded as follows: "The principal/applicant is entitled to provisional court measures in accordance with article 20". If the reference to paragraph (1) was omitted, the difficulties encountered by the Commission regarding the standard of manifest and clear evidence would be circumvented, and the adoption of the simplified formulation "is entitled to provisional court measures" would resolve the problem of choosing between the verbs "obtain" and "seek", both of which had drawbacks.

76. Mr. EDWARDS (Australia) thought that the word "seek" was needed, since otherwise the text would imply an entitlement to the measures of injunctive relief themselves.

77. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that in some jurisdictions the word "seek" did not go as far as signifying a substantive right to apply to the court. The word "obtain" was also unsatisfactory, since it might create the impression that the applicant was virtually certain of being granted a provisional court order.

78. Mr. BURMAN (United States of America) said that, if the paragraph was amended as suggested, it would be unclear to the reader why it appeared in article 19 at all. As to the choice of verb, he felt that "seek" did not satisfactorily convey the idea of entitlement to initiate court action. If "obtain" was used, the problem it involved might be solved by qualifying it along the following lines: "a right to obtain depending upon proper evidence ...".

79. Mr. BONELL (Italy) agreed that the proposed new wording was open to misunderstanding. Perhaps paragraph (3) should be deleted altogether.

80. Mr. FAYERS (United Kingdom) said that his delegation could agree to the proposal made by the Chairman of the Committee of the Whole. However, some delegations required language that would first establish a ground for action to which the injunctive relief would be linked. It might therefore be better to retain the phrase "In the circumstances set out in paragraph (1) of this article".

81. Ms. CZERWENKA (Germany) said that while she appreciated that the reason for the proposed deletion of the opening phrase of paragraph (3) was to avoid a reference to the standard of manifest and clear proof in paragraph (1), she nevertheless felt that some linkage between the two paragraphs was necessary. She would suggest that the opening phrase be retained but amended to

read "In the circumstances set out in subparagraphs (a), (b) and (c) of paragraph (1) of this article". With regard to the choice of verb, her delegation could accept either "is entitled to a provisional court order" or "has a right to obtain a provisional court order".

82. Mr. HERRMANN (Secretary of the Commission) said that if a reference was made in paragraph (3) to the specific circumstances indicated in subparagraphs (a), (b) and (c) of paragraph (1), that would create a more restrictive provision than if a reference was made to the "manifest and clear" evidential standard. The reason why it was now being proposed that a reference to paragraph (1) be omitted was the fact that the slightly lower standard of "high probability" was provided for in article 20, and it was important to avoid having two potentially conflicting rules. It would be almost impossible to describe precisely the conditions under which there would be a right to obtain provisional relief without virtually duplicating what was said in article 20. It was thus preferable to omit a specific link between paragraphs (1) and (3) and to rely on the fact that they appeared in the same article and should therefore be read in conjunction.

83. Mr. BURMAN (United States of America) said that he would prefer to risk the possibility of an inappropriate standard of evidence being applied than the possibility of paragraph (3) being taken out of context and misinterpreted as relating not just to article 19.

84. Mr. GAUTHIER (Chairman of the Committee of the Whole) wondered whether, in view of the lack of support for his proposal, the Commission might wish to consider the wording: "In the circumstances set out in paragraph (1) of this article, the principal/applicant has a right to obtain a provisional court order in accordance with article 20".

85. Mr. BURMAN (United States of America) said that he found that wording generally acceptable but felt that it should make a restrictive reference to subparagraphs (a), (b) and (c) of paragraph (1). That would imply that the standard of manifest and clear evidence would not be used. It might be helpful if an explanatory statement was included in the Commission's report.

86. Mr. BONELL (Italy) agreed with the view expressed by the representatives of Germany and the United States of America.

87. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he took it that the Commission wished to adopt the text he had just read out with the change suggested by the United States representative.

88. *It was so decided.*

#### Article 20, paragraph (1)

89. Mr. AL-ZEID (Observer for Kuwait) said that there was a discrepancy between the Arabic and English versions of paragraph (1); the phrase "instructing party" was inaccurately rendered in the Arabic text. The Arabic version should be brought into line.

90. Mr. FAYERS (United Kingdom) said that his delegation wished to suggest that the words "issue a provisional order to the effect that" be removed from the last line of the *chapeau* and be inserted at the beginning of both subparagraph (a) and subparagraph (b). That would assist the flow of the text, particularly in view of the addition in subparagraph (a) of the phrase "including an order that the guarantor/issuer hold the amount of the undertaking".

91. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he took it that the Commission wished to adopt the

text proposed by the drafting group with the change suggested by the representative of the United Kingdom.

92. *It was so decided.*

#### Article 20, paragraph (3)

93. Mr. PELICHET (Observer for the Hague Conference on Private International Law) said that, in the French version, instead of "*pour toute circonstance autre*", it would be preferable to say "*pour toute raison autre*" or "*dans toute autre circonstance*".

94. Mr. SHIMIZU (Japan) said that, in the contractual relationship between the principal and guarantor, the principal was often entitled to require the guarantor to refuse to effect payment to the beneficiary. He wished to know whether article 19(3) would have the effect of invalidating that contractual right by specifying the scope of a right that might be wider than the circumstances set out in subparagraphs (a), (b) and (c) of article 19(1), and whether article 20(3) would be construed as preventing the principal from seeking provisional court measures pursuant to its local law in connection with its contract with the guarantor. If his interpretation was correct, he would like it to be reflected in the Commission's report. The point had been discussed in the Working Group (A/CN.9/388, para. 38).

95. Mr. BURMAN (United States of America) thought that that point should be dealt with later, at the time of discussion of the Commission's report.

96. Mr. GAUTHIER (Chairman of the Committee of the Whole), agreeing with the representative of the United States of America, said he took it that the Commission wished to adopt the proposed text subject to amendment of the French version as requested by the observer for the Hague Conference on Private International Law.

97. *It was so decided.*

#### Article 22

98. Mr. GAUTHIER (Chairman of the Committee of the Whole) recalled that, in its earlier discussion of article 1, the Commission had agreed to delete the phrase "or the habitual residence" in article 22. He took it that the text was adopted without those words.

99. *It was so decided.*

100. Mr. PELICHET (Observer for the Hague Conference on Private International Law) said that he regretted that decision.

101. *The text set out in the report of the drafting group (A/CN.9/XXVIII/CRP.2 and Add.1-5), as amended, was adopted.*

#### Decision of the Commission and recommendation to the General Assembly (A/CN.9/XXVIII/CRP.4)

102. Mr. HERRMANN (Secretary of the Commission), introducing the document, said that, following past practice, notably in the case of the Convention on International Bills of Exchange and International Promissory Notes, the Secretariat was proposing that the Commission submit its finalized text of the draft Convention to the General Assembly with the recommendation that the General Assembly itself should conclude and adopt a United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. As a sub-organ of the General Assembly, the Commission could not bind the General Assembly to do so, but he had been given to understand that such a recommendation would most probably receive a favourable response.

103. Mr. BURMAN (United States of America) said that his delegation welcomed the Secretariat's recommendation. The approach that it had adopted displayed an awareness of the budgetary constraints within the United Nations system and would be well received. Also, because of changes in the agenda of the Sixth Committee, there was a likelihood that there would be time for the recommendation, if made, to be processed at the forthcoming session of the General Assembly.

104. Mr. GAUTHIER (Chairman of the Committee of the Whole), observing that there were no objections, said he took it that the Commission wished to adopt the proposed decision.

105. *It was so decided.*

*The discussion covered in the summary record ended at 4.50 p.m.*

## Summary record of the 565th meeting

Monday, 15 May 1995, at 9.30 a.m.

[A/CN.9/SR.565]

Chairman: Mr. GOH (Singapore)

*The meeting was called to order at 9.40 a.m.*

### ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4)

1. The CHAIRMAN invited the Commission to begin its consideration of the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, contained in the annex to the report of the Working Group on EDI on the work of its twenty-eighth session (A/CN.9/406). The Commission also had before it a compilation of comments on the text by Governments and international organizations (A/CN.9/409 and Add.1-4).

2. Mr. SORIEUL (Secretariat) drew attention to the report of the Working Group on the work of its twenty-ninth session (A/CN.9/407), at which the Group had considered a draft commentary on the Model Law and suggested possible improvements to the draft Model Law itself. Those comments, which referred to paragraphs 46, 52, 57, 68, 87, 89 and 96, should be considered by the Commission in its present discussion.

3. In the text of the draft Model Law (A/CN.9/406, annex), in all language versions except Spanish, the reference in article 8, paragraph (3), to "subparagraph (b) of paragraph (1) of article 8" should rather be to "article 7".

#### *Title*

4. The CHAIRMAN said that the Model Law was at present entitled "Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication". China had proposed that the law be called "Model Law on electronic commerce" (A/CN.9/409/Add.2). Mexico had proposed that the law be called "Model Law on legal aspects of electronic commerce" (A/CN.9/409/Add.1); and Singapore had proposed "Model Law on electronic data interchange" (A/CN.9/409).

5. Mr. ABASCAL ZAMORA (Mexico) said that two different concepts had been considered by the Working Group in its formulation of the title: a strict technical definition of EDI as structured language which passed between computers, and a broader concept which covered all other means of communication, such as e-mail, fax and the like. The Working Group had decided to adopt the latter concept, including both EDI in the strictly technical sense and other means of communication. Since it had felt that the Model Law could not cover all aspects of the subject, it had added the reference to "legal aspects" in the title.

6. A proposal had been made to replace the phrase "electronic data interchange" by "electronic commerce" in order to enable readers unfamiliar with the subject to understand what the contents of the Model Law were. That proposal would not change the scope of the Model Law. It had not won the necessary support in the Working Group but was now being put forward again by Mexico (A/CN.9/409/Add.1).

7. Mr. CHOUKRI SBAI (Observer for Morocco) said that the present title was acceptable to his Government, but that it could usefully be shortened. It was not necessary to add the words "international" or "commercial", as that might result in a text which was insufficiently flexible in the light of unforeseeable future developments in technology. Civil engineering works had attained such an importance in the international economy that the Model Law should apply to them as well as to commercial activities. The title should be "Model Law on electronic data interchange".

8. Mr. BURMAN (United States of America) said that he supported the proposals by China and Mexico and was also in favour of deleting the phrase "legal aspects of". For practical reasons the text should be entitled "Model Law on Electronic Commerce". A short title would be simpler to use, would make it easier to explain the issues to outsiders and would thus help win acceptance for the Model Law. The present title, on the other hand, might make people think immediately of computer law, computer security, the regulatory aspects of communication or property rights to data.

9. Ms. ZHANG Yuejiao (China) said she supported the proposals by the representatives of Mexico and the United States. It was the task of the Commission to regulate the application of new technologies to electronic commerce. Changing the title would bring it more into line with the Commission's mandate to develop international trade law. A short title would make the Model Law more easily acceptable.

10. Ms. de LA PRESLE (France) said that she disagreed with the representative of Mexico that changing the title of the draft Model Law would not change its scope of application. The originality and interest of the text lay in the fact that it dealt with electronic communication, which concerned a number of other areas besides electronic commerce, such as civil engineering, health and the environment. If the impression was given that the text was not relevant to such areas, electronic commerce itself might be affected, since it needed to have dealings with operators



in those fields. It was also necessary to make the Model Law "sellable". The title could therefore be "Model Law on Electronic Communication".

11. Mr. ALLEN (United Kingdom) said that he agreed with the representatives of France and Morocco. First of all, to refer to "electronic commerce" in the title was to focus on entirely the wrong aspect. The focus should be on the means of communication, not on the subject; it was not a question of the underlying transaction, but simply of the procedure. Secondly, chapter II of the draft, which concerned the application of legal requirements to data messages, was based on general provisions of the law which were not limited to the commercial field. Hence, the Commission's rules, which modified those provisions, were also not limited to the commercial field. Even chapter III of the draft Model Law, on communication of data messages, was not expressly limited to commercial transactions as such. The Working Group had included article 1, which stated that the Model Law formed a part of commercial law, as a compromise. If the title itself were changed to "electronic commerce", the Commission would actually be changing the subject matter and shifting the focus in a way that would limit its freedom in discussing the substantive provisions. In addition, the word "commerce" was unclear and not widely used in law. If the Commission wished for a short title, it might consider "Model Law on Electronic Communication" as suggested by the French representative.

12. Ms. BAZAROVA (Russian Federation) said that she was in favour of the idea of shortening the title, but wished to keep the phrase "legal aspects". She agreed with the representatives of France and the United Kingdom that the title should have a broader scope of application and accordingly proposed "Model Law on Legal Aspects of Electronic Data Interchange".

13. Mr. BONELL (Italy) said that he fully shared the views expressed about the desirability of changing the title. However, he could not but agree with the comments made by the United Kingdom, as it would not be clear what the word "commerce" referred to. The phrase "electronic communication", on the other hand, was fairly neutral and would be comprehensible to those not familiar with the subject matter. He favoured the title "Model Law on Electronic Communication".

14. Mr. CHAY (Singapore) said that if the Model Law was intended to cover all aspects of electronic data interchange, the reference to "legal aspects" was redundant; he agreed with the representative of the United States that it should be deleted. He had some reservations as to the term "electronic commerce", because the Model Law was intended to govern the means of communication rather than the content, and the use of "electronic commerce" might shift the emphasis to the underlying transactions. In his view, the title should be shortened to "Model Law on Electronic Data Interchange".

15. Mr. UCHIDA (Japan) agreed that it would be preferable to change the title, especially in order to clarify the focus of the Model Law. In his view, the title should be "Model Law on Legal Aspects of Electronic Commerce" or "Model Law on Electronic Commerce".

16. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that the words "legal aspects" should be retained. He was strongly in favour of taking a broader approach and considered that the best title would be "Model Law on Legal Aspects of Electronic Data Interchange".

17. Mr. BISCHOFF (Observer for Switzerland) expressed his agreement with the views put forward by the representatives of France and the United Kingdom. The term "electronic commerce" was new, unknown as a legal expression and might be misleading.

But he agreed with the representative of the United States of America that the title could be shortened by deleting the words "legal aspects of". He suggested that a possible compromise might be "Model Law on Electronic Communication, especially Electronic Data Interchange".

18. Ms. BOSS (United States of America) said that there clearly existed a consensus on the need to shorten the title and to make it broad and descriptive, but that there was disagreement on how those goals were to be attained. All the suggestions put forward so far had their advantages and disadvantages. The first suggestion, that the title should be "Model Law on Electronic Data Interchange", was the narrowest and referred only to one means of electronic communication. As it did not reflect the full scope of what the Model Law was intended to cover, her country could not support that suggestion. The second suggestion, "Model Law on Electronic Communication", was short and descriptive and reflected the Model Law's aim to cover electronic communications and their use in commercial transactions. In the United States, however, communication law was defined as the regulation of communication carriers, whereas the present Model Law was not a regulatory document but a document designed to facilitate commerce. As for "Model Law on Electronic Commerce", she recognized that "electronic commerce" was a new term, but it had been adopted in the United States and in much literature pertaining to the field in question. In everyday use it did not refer to transactions such as the sale of electronic equipment, but to the means by which trade was conducted. Although the phrase might not necessarily be used in other countries with that meaning, she nevertheless considered it the best solution. Her second choice would be "Model Law on Electronic Communication".

19. Mr. MAHASARANOND (Thailand) agreed with the representative of the United Kingdom that the title should place the emphasis on electronic communication. The reference to international trade law could be expressed by an additional phrase. He suggested that the title should read "Model Law on Electronic Communication in International Trade Law".

20. Mr. GRIFFITH (Australia) considered that reference to electronic data interchange alone was too narrow, but recognized that, to some representatives, the term "electronic commerce" constituted a new expression of somewhat uncertain meaning. He suggested that the title should read "Model Law on the Legal Aspects of Electronic Commerce, including Electronic Data Interchange". An alternative means of achieving the same effect would be to insert the words "including EDI" in article 1 on the sphere of application. In his understanding, the application of the Model Law was intended to be commercial. That should be shown in the title, and the shortest way of doing so was to use the phrase "electronic commerce".

21. Mr. SCHNEIDER (Germany) considered that the present title was too long, too complicated and too narrow. The term "electronic data interchange" was not perfectly clear as a legal expression. The title should be short and clear and should help to make the Model Law acceptable. As the suggestion made by the representative of Italy to call it "Model Law on Electronic Communication" might be misleading in the United States, it might be possible to replace the word "communication" by the words "data messages in commerce". That said, however, he could go along with the term "electronic commerce".

22. Mr. GILL (India) said that, in his understanding, electronic data interchange referred to paperless trading involving the computer-to-computer transfer of transactions using agreed standards to structure the data. He agreed with Germany that a shorter name would be preferable and more attractive to potential users of the Model Law. He therefore supported the title "Model Law on Electronic Commerce".

23. Ms. REMSU (Observer for Canada) agreed with France, Morocco and the United Kingdom. There should be no reference to "commerce", as that would give the wrong focus. The title should reflect a broader approach. The present title appeared to be inconsistent with the principles followed in the Working Group that the title should be neutral with respect to the media and should cover information that was stored but not communicated. She suggested that a title along the lines of "Legal Aspects Related to the Use of Electronic Technologies" would be sufficiently broad and not misleading.

24. Mr. VRELLIS (Observer for Greece) felt that the title of the law should not necessarily have to reflect all its contents. There were many examples in national systems of laws which covered more than their titles suggested. He therefore supported the title "Model Law on Electronic Commerce", it being understood that nobody could expect all electronic commerce to be governed by such a text.

25. Mr. CHOUKRI SBAI (Observer for Morocco) said that the term "electronic commerce" was meaningless, unhelpful and a potential source of confusion and ambiguity. The subject matter was not so much commerce as communication: the text was concerned with data that were produced, stored and communicated by electronic, optical or similar means. Such data might be related to commerce, but could also be related to the environment, to civil works or to other matters. Conventional methods of communication, such as writing or the telephone, had recently been joined by more sophisticated means such as computers, and it was the latter field that the law was meant to cover. It was not concerned with electronic commerce in the sense of the sale of electronic equipment.

26. Mr. AL-NASSER (Saudi Arabia) said that the title should not be confined to electronic commerce, as that would give the impression that the law was only concerned with electronic equipment. He therefore agreed with other speakers that a reference to data that were exchanged by computer should be included. Such data could be related to records, or to the preparation of contracts by computer rather than on paper.

27. Mr. ABASCAL ZAMORA (Mexico) felt that it would be helpful to suspend the discussion for the time being and consider the Model Law's actual scope and the meaning of the terms used. It would then be possible to discuss the title with a clearer idea of what was wanted.

28. Mr. AL-ZEID (Observer for Kuwait) said that the title should be brief, to the point and as broad as possible. The word "interchange" covered all forms of information and thus gave the Model Law a broader scope than a reference to "international commerce" would have done. For example, as the representative of France had pointed out, the interchange could be concerned with the environment or civil works.

29. The CHAIRMAN said he had gathered the impression that the Commission considered the present title too long. Three suggestions had been put forward, namely, to call the text a "Model Law on Electronic Data Interchange", a "Model Law on Electronic Commerce", or a "Model Law on Electronic Communication". He suggested a fourth possibility, namely, a "Model Law on Electronic Means of Communication". After having asked members to indicate their preferences, he said that the majority appeared to favour the first suggestion, namely, "Model Law on Electronic Data Interchange".

30. Mr. GRIFFITH (Australia) said that it was not fair to ask people to vote on a choice before knowing the alternatives. It was necessary to reduce the possibilities to two before a majority view could be ascertained.

31. Mrs. SCARNATI ALMADA de CURIA (Argentina) asked whether the procedure just followed had been a formal vote, or merely an indication as to the general direction in which a consensus might lie. If it had been a formal vote, observers should not have been taking part.

32. The CHAIRMAN said that he had merely been asking for an indication of preferences.

*The meeting was suspended at 11.05 a.m.  
and resumed at 11.35 a.m.*

33. Mr. HERRMANN (Secretary of the Commission), referring to the procedural question raised by the Argentine representative, said that there had been no departure from the usual practice of the Commission, which followed the procedures of the General Assembly as one of its organs. Only members of the Commission were entitled to take part in formal votes; however, in 20 years there had only been a single instance of a formal vote being taken. The Commission used indicative voting, because it relied on the consensus principle, and it had always been its tradition to allow observers to participate in the indicative voting, since that enabled the views of the whole international community with its different legal traditions to be taken into account. It was a way of speeding up the procedure by not requiring each delegation to state its preference.

34. Mr. BURMAN (United States of America) observed that the Commission was a technical body and followed non-political traditions. It was generally accepted that the Commission should use indicative signs of support, which, although sometimes referred to as indicative votes, were understood not to be formal voting procedures. It was important that no distinction should be made in those informal voting procedures between observers and members so that it would be possible to get a true picture of the extent of support for a given proposal and hence of the possibility of achieving widespread utilization of the Commission's instruments.

35. Ms. REMSU (Observer for Canada), returning to the question of the title, asked for clarification as to the difference between "Electronic means of communication" and "Electronic communication".

36. Mr. ALLEN (United Kingdom) suggested that another possible title would be "Model Law on Electronic Messages and Records".

37. The CHAIRMAN explained that concern had been expressed that "Electronic communication" could be considered too broad, as it covered the use of broadcasting, satellites and telephones. "Electronic means of communication" might thus be a better title, since the instrument covered the sending and receipt of messages.

38. He suggested that further debate on the title should be postponed in order to allow time for informal consultations.

#### *Article 1*

39. Mr. SORIEUL (Secretariat) said that the present version of article 1 was the result of a compromise reached by the Working Group at its latest session. Discussion had centred on whether the text should contain a reference to commerce, to commercial information, or to commercial transactions. The solution adopted was to say that the Model Law formed part of commercial law and to refer in a footnote to the definition of the term "commercial".

40. He drew attention to the other two footnotes, the first stating that the Model Law did not overrule any rule of law intended for

the protection of consumers and the second suggesting a text for States that might wish to limit the applicability of the Model Law to international data messages.

41. Mr. BONELL (Italy) said that the words "This Law forms part of commercial law" in article 1 created many problems. "Commercial law" had different meanings in different countries and even within them. In Italy, for instance, there were at least four or five opinions on what commercial law was, and in fact the term no longer appeared in Italian legal texts. The definition in the footnote had been taken from the Model Law on International Commercial Arbitration, but it made no sense in the context of the Model Law under discussion and did not properly describe commercial law, at least as understood in some national jurisdictions. The Commission should therefore try to find wording reflecting the main concern, which was that the Model Law should not affect laws designed to protect the consumer.

42. Mr. CHOUKRI SBAI (Observer for Morocco) said that his delegation found the formulation of article 1 too restrictive, even though Morocco did apply commercial law. If the instrument was to be comprehensive, covering all types of information in the form of data messages, whether commercial, environmental, agricultural or other, the text of article 1 was inadequate. The commercial law mentioned in article 1 did not apply to all persons, undertakings or activities, but only to traders or merchants. He therefore proposed the following wording: "This Law forms part of commercial law. It applies to any kind of information in the form of a data message, regardless of the parties to the relation, be they merchants or not."

43. Mr. ABASCAL ZAMORA (Mexico), referring to the remarks made by the representative of Italy, said that it had emerged in the course of the preliminary deliberations in the Working Group that, if the draft Model Law was to provide a set of rules encompassing all aspects of all branches of law in all countries, it would be virtually impossible to reach consensus. That would have required universal agreement on the notions of writing, signature and original, on the admissibility of data messages as evidence in judicial, arbitral and administrative proceedings, on the binding nature of all expressions of intent made through data communications, and on the obligation to keep records and information stored in data form, which would call for agreement regarding invoices, documents for presentation to customs authorities, wills, claims and petitions brought before the courts and administrative authorities, reports submitted to the authorities, including financial statements to regulatory bodies, and many other matters. The Working Group had therefore decided to adopt the working principle of confining itself to the natural ambit of UNCITRAL, namely, the regulation of trade. That was the reason for the reference to commercial law in article 1.

44. It should be pointed out that the scope of application was not restrictive. Indeed, the Working Group had previously rejected a suggestion that article 1 be amended to state that the draft Model Law did not apply to administrative and other non-commercial activities, and, at its twenty-ninth session, a proposal had been made to change the text of the draft Guide to Enactment with a view to allowing implementing States to extend the scope beyond the commercial sphere (A/CN.9/407, para. 38).

45. With regard to the question of defining the term "commercial", a similar problem had arisen at the time of drafting the Model Law on International Commercial Arbitration. There had been difficulties not only for common-law countries, which did not differentiate between civil and commercial law, but also for countries that did. The concept of commercial law in Mexico, for example, did not cover the same areas as in Brazil or Spain, despite their close cultural ties. The Working Group had accord-

ingly adopted the solution of including a footnote along the lines of the footnote in article 1 of the Model Law on International Commercial Arbitration.

46. Mr. SCHNEIDER (Germany) said that the Working Group had been fully aware of the problems that would be created in practice by the issue just raised by the representative of Italy. Most members of the Working Group had been of the opinion that the Model Law should deal solely with data messages in commerce and not outside it; the difficulty lay in the drafting. The Italian representative's proposal for the simple exclusion of consumers was unsatisfactory, since there were possibly as many as 10 different definitions of that term within European law alone. Problems would undoubtedly have arisen whatever definition had been chosen. The current formulation of article 1 was the outcome of a compromise and should not be changed.

47. Mr. BURMAN (United States of America) said that his delegation wished to associate itself with the remarks of the representative of Germany. The wording of article 1 was not perfect, but was the product of substantial discussions in the Working Group. If further clarification was necessary, perhaps the amendment suggested by the Government of Singapore (A/CN.9/409) might serve to improve the language.

48. From the comments made by some speakers at the current meeting, he felt that the Commission needed to decide how it was going to proceed in its deliberations. It had two options: it could follow the usual practice, whereby, when a draft text was submitted for consideration in plenary session after having undergone discussion at the working group level over several years, it was for the purpose of final adjustment, clarification of any unresolved points and possible textual improvements, and the text would remain essentially intact unless there was a strong body of contrary opinion; alternatively, it could reopen the entire debate, as if the years of concentrated working group effort had never taken place. Were the Commission to adopt the second approach, even three weeks would not be enough to complete its discussion of the current agenda item. He hoped that the Chairman would provide some clarification on the matter.

49. Mr. VRELLIS (Observer for Greece) said that the term "commercial law" appearing in article 1 was at the very least ambiguous. A matter that was part of commercial law in one country could come within civil or penal law in another. It would be preferable to reconsider the use of the term. If there had to be provision on the matter, a formulation already used in some international instruments binding common-law and civil-law countries—such as the Convention concerning judicial competence and the execution of decisions in civil and commercial matters (1968)—could be adopted, in which case article 1 might read: "This Law applies to any kind of information in the form of a data message in the commercial sphere".

50. Ms. ZHANG Yuejiao (China) proposed that article 1 be amended to read: "This Law applies to any kind of information in the form of a data message in commercial activities". That formulation would resolve the problem of different definitions of commercial law in different countries and would also underscore the main purpose of the Model Law.

51. Mr. GRIFFITH (Australia) considered the Commission should refrain from substantial rewriting or re-discussion of the draft text at the present stage. In his view, the first sentence of article 1 meant nothing, and he therefore did not object to it. At previous sessions of the Working Group, some States had considered it useful for their purposes. However, if it was purely a matter of form, the sentence could perhaps be repositioned at the beginning of the footnote. That would make the text cleaner, and enacting States would be aware that they could limit the Model

Law to commercial law or give it a wider sphere of operation should they so wish.

52. Mr. BONELL (Italy) said that he had raised the issue of the meaning of "commercial law" not only because it was a matter of great importance but also because his delegation understood that the wording in question was the result of a last-minute drafting change. As an alternative, he would be in favour of adopting a formulation along the lines suggested by Singapore and Greece, together with the proposed amendment of the footnote.

53. Mr. ALLEN (United Kingdom), endorsing the remarks made by the representatives of the United States of America and Germany, said that, although the text of article 1 as it stood was not ideal, it was unlikely that the Commission could arrive at

another formulation that would achieve consensus. He agreed with what the representatives of Australia and Italy had just said. It would further the compromise if the footnote to the text of article 1 was remodelled in line with the footnote to the heading of the article.

54. Mr. CHOUKRI SBAI (Observer for Morocco) said that his delegation felt that the debates in the Commission's plenary sessions were useful and necessary. With regard to the matter under discussion, he wished to propose that the first sentence of article 1 be deleted and that the second sentence be reworded as follows: "This Law applies to any kind of information in the form of a data message". That would accommodate all the wishes expressed.

*The meeting rose at 12.30 p.m.*

### Summary record of the 566th meeting

Monday, 15 May 1995, at 2 p.m.

[A/CN.9/566]

*Chairman:* Mr. GOH (Singapore)

*The meeting was called to order at 2.10 p.m.*

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW (*continued*) (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4)

#### *Article 1 (continued)*

1. Ms. REMSU (Observer for Canada) said that she agreed with the representatives of Germany and the United States on the undesirability of upsetting the compromise that had been achieved in the Working Group on Electronic Data Interchange on the wording of article 1. The first sentence could be accommodated within Canada's statutory framework, and she was in favour of leaving the article as proposed by the Working Group (A/CN.9/406, annex). The proposal made by the representative of Australia was interesting but might prove contentious.

2. Mr. CHAY (Singapore) said that the intention of his Government's proposal (A/CN.9/409), that article 1 should be amended to: "This Law applies to commercial transactions where information in the form of a data message is used" was not to reopen the discussion on the scope of application of the Model Law but simply to offer a drafting alternative aimed at achieving consistency with other UNCITRAL texts and avoiding the term "commercial law", which was virtually meaningless in Singapore. He supported the idea of explaining the term "commercial" in a footnote.

3. Mr. BURMAN (United States of America) said that the Singaporean proposal might be a way of improving the wording of the article while retaining the basic ingredients of the compromise. The footnote should remain, with perhaps an addition to the effect that any State might expand the scope of the Model Law to cover other forms of data communication.

4. Mr. BONELL (Italy) said that he supported the Singaporean proposal with the qualification put forward by the representative of the United States of America.

5. Mr. SCHNEIDER (Germany) said that, in his view, the first sentence of article 1 was far from meaningless but the Singaporean

proposal achieved the same aim of restricting the scope of the Model Law to commercial transactions. He therefore supported it, with the refinement suggested by the representative of the United States of America.

6. Mr. ALLEN (United Kingdom) said that he could not support the proposed Singaporean amendment. It was much more restrictive than the existing first sentence of article 1, which represented a careful compromise reached after lengthy discussion in the Working Group. He could envisage going along with the Singaporean proposal if it were incorporated as a footnote along the lines of the present footnote allowing individual States to restrict the scope of the Model Law if they chose.

7. Mr. ABASCAL ZAMORA (Mexico) said that he was inclined to support the Singaporean proposal with the qualification put forward by the representative of the United States of America. However, if other representatives felt that it might upset the existing compromise, he would agree to leave the wording as it stood.

8. Ms. de LA PRESLE (France) said that she agreed with the representative of the United Kingdom that it was important to maintain the option provided for in the Working Group's text. If some States were unhappy with the scope of the Model Law as specified in article 1, they could opt for the alternative set forth in the footnote concerning applicability. Incorporating the content of the footnote in the text of article 1 meant encouraging States to limit the applicability of the Model Law.

9. Mr. GRANDINO RODAS (Brazil) said that he supported the Singaporean proposal with the amendment suggested by the representative of the United States of America.

10. Ms. REMSU (Observer for Canada) said that she agreed with the representatives of the United Kingdom and France that the reference to commercial transactions should be confined to a footnote.

11. Mr. GRIFFITH (Australia) said that he would also opt for the footnote solution.

12. Mr. BURMAN (United States of America) said that, in expressing support for the Singaporean proposal, he had been referring to the text of the article, not to the inclusion of the Singaporean wording in a footnote. Such a move would, in his view, amount to a substantial change. Under those circumstances, he would prefer to keep the existing version of the article.

13. The CHAIRMAN said that, as he saw it, there were two options: limiting the Model Law to commercial transactions, in which case the Singaporean suggestion would be a possible solution; or broadening it to include other transactions, in which case the first sentence would be deleted and some redrafting would be necessary.

14. Mr. GRIFFITH (Australia) said that it was important to say something substantive in the article, rather than leaving it to the footnote. He felt that the Singaporean Government's suggestion was the best. It improved the wording of the article without affecting the consensus that had emerged from the Working Group. States that wished to widen the sphere of application of the Model Law to non-commercial areas would be entirely free to do so.

15. Mr. ABASCAL ZAMORA (Mexico) said that, as he saw it, the intention of the Working Group had been to restrict the sphere of application to commercial transactions. The compromise reached would be overturned if the text were to be broadened to include other transactions. An interminable debate would ensue on a vast array of new issues. Perhaps the wording of the first sentence could be improved but not at the cost of undermining the existing compromise.

16. Mr. ALLEN (United Kingdom) said that the Working Group had deliberately avoided the words "This Law applies to commercial transactions" because the Model Law dealt in large measure with rules of evidence that had no particular relation to transactions as such. Article 5, for example, applied to any communication between parties, whether or not it led to a transaction. All of that was quite irrespective of whether States wished to apply the same rules to dealings between commercial parties and administrative authorities. Even where there had been a commercial transaction using electronic data interchange, the resulting evidence might later be needed in the context of transmissions between a commercial party and administrative authorities, for example in connection with tax or customs law. Any reference to commercial transactions therefore represented a substantial departure from the compromise reached.

17. Mr. BURMAN (United States of America) suggested that the term "transactions" might be replaced by some other word such as "activities". He had not realized that the Singaporean suggestion might affect the compromise reached, and the Working Group's text could certainly be retained. He joined the representatives of Australia and Mexico in warning against the possibility of opening up the entire draft Model Law to debate by introducing a substantial amendment. If any redrafting were necessary, it should be left to the drafting group, on the understanding that due account would be taken of the concerns expressed by the representative of the United Kingdom.

18. Mr. BONELL (Italy) said that there seemed to be considerable support for a rewording of the article. Some delegations seemed to feel that the Working Group's text could be left because it was meaningless, but he feared, on the contrary, that it meant too much. A majority also seemed to be in favour of restricting the sphere of application of the draft Model Law to the commercial field. The Singaporean proposal seemed to be acceptable except for the objection to the word "transactions" raised by the representative of the United Kingdom. Perhaps the provision could state that the Law applied "in the context of commercial

activities". He urged that the matter should be referred to the drafting group.

19. Mr. UCHIDA (Japan) expressed support for the Singaporean proposal.

20. Ms. REMSU (Observer for Canada) said that she wished to express strong support for the maintenance of article 1 as it stood. She was against any incorporation of terms such as "transactions" or "commercial activities" since they were unduly restrictive.

21. Mr. SCHNEIDER (Germany) said that the first sentence of article 1 as drafted by the Working Group had an important meaning for his delegation, namely that the Model Law would be restricted to the commercial sphere, but other delegations interpreted it differently. He believed that the version of the article proposed by Singapore would resolve the ambiguity and should be accepted.

22. Mr. CHOUKRI SBAI (Observer for Morocco) said that the first sentence as it stood would restrict the Model Law to commercial transactions. His delegation wished the Model Law to be broad enough to cover matters such as rules of evidence, communications and signatures in general, transmission of data messages, acknowledgements of receipt, formation of contracts, and place of dispatch and receipt of data messages. The law should apply to all transactions. He supported the views expressed on that subject by the United Kingdom.

23. Mr. BONELL (Italy) said that the Commission must address two separate issues: whether to restrict the scope of the Model Law to the commercial field and, having resolved that point, whether to restrict it to transactions *stricto sensu* or extend it to other matters. Both article 1 as it stood and the wording proposed by Singapore would restrict the Law to the commercial sphere, and of the two versions he preferred the latter.

24. The CHAIRMAN said he believed the Commission might accept the Singaporean proposal for article 1, supplemented by a footnote allowing States wishing to do so to extend the scope of the Model Law to non-commercial matters.

25. Mr. ALLEN (United Kingdom) said that his country would be unable to enact a provision which spoke of commercial law, although it could entertain the notion of a commercial transaction. He suggested treating the question of the scope of the law differently according to the chapter concerned. For example chapter II, which covered rules of evidence and did not apply only to transactions, might have a footnote stating that countries wishing to do so could restrict the provisions of the chapter to commercial transactions. Chapter III might then provide that the articles it contained applied to commercial matters only.

26. Ms. BOSS (United States of America) believed that the solution proposed by the United Kingdom would make for confusion. The Commission should opt either for article 1 as it stood or for the Singaporean wording, bearing in mind the decision of the Working Group to limit the application of the Model Law to messages transmitted in a commercial context.

27. Mr. ABASCAL ZAMORA (Mexico) said that the course suggested by the United Kingdom would represent a substantial departure from the consensus reached in the Working Group, in that chapter II of the Law would be of much broader application than the Group had intended.

28. Mr. BONELL (Italy) said that acceptance of the Singaporean proposal for article 1 and the addition of a footnote to the article allowing States to extend the scope of the law to non-commercial matters, as suggested by the Chairman, would meet

what he believed was the wish of the majority of the Commission: to have a Model Law the text of which restricted its scope to the commercial sphere.

29. The CHAIRMAN asked whether the Commission wished to replace the text of article 1, as approved by the Working Group, by the wording proposed by Singapore in document A/CN.9/409, together with the footnote he himself had suggested earlier.

30. *It was so agreed.*

*The meeting was suspended at 3.15 p.m.  
and resumed at 3.45 p.m.*

## Article 2

31. The CHAIRMAN said that article 2 was likely to prove controversial. The Commission might think it advisable to consider the remaining articles of the draft first.

32. *It was so agreed.*

## Article 3

33. Mr. SORIEUL (Secretariat) said that article 3 was based on an analogous provision in the United Nations Convention on Contracts for the International Sale of Goods and had been the subject of limited discussion in the Working Group. He drew the Commission's attention to the comments made on the draft article by Singapore and the Banking Federation of the European Union (A/CN.9/409) and by France and the United Nations Environment Programme (UNEP) (A/CN.9/409/Add.3 and A/CN.9/409/Add.4, respectively).

34. The CHAIRMAN invited the Commission to consider article 3(1).

35. Mr. BONELL (Italy) expressed the view that article 3(1) should be retained as it stood. The addition to the text contained in the proposal of Singapore (A/CN.9/409) was in line with the basic philosophy of the draft Model Law, but its inclusion in an article dealing with interpretation could create difficulties and might not necessarily further the purpose of facilitating the use of electronic means—for instance, if a less sophisticated trade partner were involved.

36. Mr. SORIEUL (Secretariat) said he wished to mention that the last words of the Singaporean proposal corresponded roughly to one of the preambular paragraphs of a text that the Secretariat had prepared for the draft resolution to be submitted to the General Assembly together with the text of the Model Law.

37. Mr. CHOUKRI SBAI (Observer for Morocco) suggested that the words "international source" be amended to read "international character".

38. Ms. BOSS (United States of America) said that the word "source" had been chosen because, once the Model Law was incorporated in domestic law, it would not itself be international in character. Secondly, it would be appropriate for the purpose of the Model Law to be stated in the Model Law itself because the provision would thus become part of domestic law, whereas the Commission's resolution would not. Tribunals would then be directed by article 3 to facilitate rather than obstruct EDI.

39. The CHAIRMAN suggested that, as there seemed to be no support for changing the word "source" to "character", the Commission might wish to retain "source".

40. *It was so agreed.*

41. Mr. ABASCAL ZAMORA (Mexico) supported the inclusion of the text proposed by Singapore. It was important to emphasize the purpose of the Model Law in the text itself, since there was a tendency in the legal profession to regard paper-based documents as safer than EDI.

42. The CHAIRMAN, after inviting delegations to indicate whether they were for or against the change proposed by Singapore, noted that there was insufficient support for the change. He therefore took it that the text would be retained as in the annex to document A/CN.9/406.

43. Mr. ABASCAL ZAMORA (Mexico) asked whether delegations that were against the change could state their reasons.

44. The CHAIRMAN said that the representative of Italy had indicated some reasons.

45. Ms. BAZAROVA (Russian Federation) said that she did not support the proposed amendment. It was not clear why the purpose of the Model Law should be mentioned in an article on interpretation. Furthermore, the purpose of the Model Law was not so much to develop and promote EDI as to assist countries already using EDI to regulate matters arising from its use.

46. Mr. BURMAN (United States of America), referring to paragraph (2), proposed the insertion at the end of the paragraph of a semicolon followed by the words: "there may also be taken into account rules formulated by international organizations for use in an electronic environment, and, where appropriate, usages of trade and system rules."

47. The proposed provision was not mandatory but represented recognition of the work of international bodies that focused on electronic commerce and represented a step forward. The Organization of American States had adopted a convention in the previous year at Mexico City that included similar language.

48. Mr. BONELL (Italy) supported the United States proposal. Apart from "hard" law there was a growing development of "soft" law consisting of rules elaborated by different international or supranational bodies. It was desirable to recognize the increasing importance of such developments at least for the purpose of supplementing "strict" legal rules, for the benefit of both. He recalled that a similar provision had been adopted by the Commission the previous week and thought that a valuable precedent was being established for the future.

49. Mr. SCHNEIDER (Germany) said that the proposal of the United States was interesting but that he was not sure what rules and what international bodies were referred to. There were many very different types of international bodies, intergovernmental bodies such as UNCITRAL and private international bodies and associations. The term "rules" was open to various interpretations: there were private rules such as gentlemen's agreements, rules on how to draft contracts etc. Furthermore, private international bodies often represented only special interests and it would not be clear to the reader of the proposed text who had set up the bodies in question and whose interests they really protected.

50. Mr. PELICHET (Observer for The Hague Conference on Private International Law) noted that the Commission was now discussing a draft model law, not a convention. If the legislator who took over the proposed Model Law found gaps he would fill them in according to national law on the basis of general principles that might take into account the work of international organizations, but there would be no need for a paragraph in the law referring to international organizations. The amendment proposed by the United States was out of place.



51. Mr. ABASCAL ZAMORA (Mexico) supported the inclusion of the amendment proposed by the delegation of the United States. Mexican legislation regulating the action of banks and documentary credit in particular had a similar provision that was related directly to the Uniform Customs and Practice for Documentary Credits (UCP). The proposed amendment could assist the task of creating a culture facilitating recourse to EDI and similar communication systems.

52. Mr. MADRID (Spain) said that he supported the text proposed by the United States delegation, but thought it should be made clear what international organizations were referred to, in the light of the point made by the representative of Germany. Furthermore, the drafting might be crisper.

53. Mr. BROQVIST (Observer for Sweden) supported the remarks of the representative of Germany and shared the doubts he had expressed.

54. Ms. BOSS (United States of America) said she would like to clarify her delegation's proposal, particularly in the light of the concerns expressed by the representatives of Germany, Spain and Sweden. The proposal did not require tribunals to give weight to the rules of an international organization, but rather provided that they might, if they wished, take them into account. In so doing, tribunals would obviously have regard to the nature of the rule-making body, and notably as to whether it was public or private in character. Other considerations were also important: some private international bodies had achieved such status that most jurisdictions would be likely to take their rules into account.

55. The United States proposal was not limited to international bodies, but also dealt with system rules, recognizing that there might at times be an appropriate role for what might be termed private rule-makers.

56. To sum up, the proposal was not mandatory but discretionary. The kind of concerns raised by the representative of Germany would be taken into account at the time the particular rules, or rule-making body, came to be considered.

57. Ms. de LA PRESLE (France) said that, if the "rules" laid down by international organizations, whether public or private, were of unequal value, the usages of commercial partners and of intermediaries of value-added networks, which imposed system rules, were even more so. The majority view in the past had been that intermediaries did not fall within the sphere of application of the Model Law, and that EDI partners had always had bilateral relations without intermediaries. Was it the intention to give legitimacy through article 3 of the Model Law to rules defined by intermediaries? Paragraph (2) of article 3 as now worded could take into account a wide range of provisions. The United States proposal would introduce a great deal of additional legal uncertainty.

58. Mr. CHOUKRI SBAI (Observer for Morocco) said that, as the observer for the Hague Conference on Private International Law had pointed out, the Model Law would become part of the domestic law of countries that adopted it. Domestic law covered a number of subjects closely connected with the Model Law, such as contractual communications through intermediaries by telephone or by correspondence. A whole body of jurisprudence on the matter was already in existence. Paragraph (2) had been drafted in general terms, which could include not only domestic laws but also international law. He believed that the existing wording should be retained.

59. Mr. UCHIDA (Japan) said that in his view the objective of the United States proposal did not require adding any new wording to paragraph (2). He shared the concerns expressed

by the representative of Germany, and preferred to retain the existing text.

60. The CHAIRMAN noted that the United States proposal was not supported. He took it that the Commission wished to retain the existing text.

#### Article 4

61. Mr. SORIEUL (Secretariat) said that article 4 contained what was regarded by some as the fundamental principle of the whole Model Law, and there had been fairly wide agreement on it in the Working Group. He drew attention to comments on the article in documents A/CN.9/409 and A/CN.9/409/Add.4.

62. Mr. ALLEN (United Kingdom) said that his delegation had a point to raise regarding drafting, which could perhaps be entrusted to the drafting group. In his view, information as such had no legal effectiveness, validity or enforceability: it was simply data. To say that information "shall not be denied legal effectiveness . . .", was meaningless.

63. Secondly, the article as drafted conflicted with the provisions of articles 5 and 7, which referred to existing rules of national law requiring information to be in writing or in an original document. As he saw it, article 4 would have the effect of invalidating requirements for information in writing or in a document, because it would effectively preclude any objection under national law relating to information being incorporated in a data message.

64. There was thus a need for another look at the text of the article, to ensure that it fulfilled its purpose without invalidating articles 5 and 7.

65. Mr. MÄKELÄ (Finland) supported Singapore's proposal (A/CN.9/409) to delete article 4. Alternatively, he could support the United Kingdom representative's approach.

66. Mr. CHAY (Singapore) said that his delegation had proposed deletion of article 4 principally because it felt that the existing wording merely stated the obvious. The very fact of introducing the Model Law would confer legal validity on data messages.

67. Mr. BURMAN (United States of America) said that article 4 had been considered by many during the long deliberations in the Working Group as a fundamental provision. While it might seem to some who worked in the field of electronic communications and their commercial application that the article merely stated the obvious, the world at large was not aware of the legal validity of data messages, as was clear from court proceedings that had taken place on the matter in a number of countries.

68. A basic text for article 4 had been agreed in the Working Group which he believed was of great importance, and could be seen as the *raison d'être* of the entire Model Law. In his view, articles 5 to 8 did not cover all possible issues that might arise, and it was essential to give a clear direction to courts and arbitrators in order to overcome their reluctance to implement EDI. Retention of article 4 was essential in order to enable the Model Law to carry the message it was intended to convey.

69. Mr. ABASCAL ZAMORA (Mexico) said article 4 was not a statement of the obvious, but rather a provision of a general character establishing the legal validity of messages delivered via a certain means of communication. He agreed that it embodied a fundamental principle of the Model Law, and should be retained.



70. Ms. de LA PRESLE (France) endorsed the views of the two previous speakers. Article 4 had, at the very least, an educational value, and as such should be retained. She agreed that the language of the article could be improved.

71. Ms. BAZAROVA (Russian Federation) favoured retention of article 4, and agreed with the explanations given by other speakers in that regard.

72. Mr. CHOUKRI SBAI (Observer for Morocco) agreed that article 4 was useful in that it embodied a general rule. However, he did not think the wording was appropriate. He would prefer a formulation along the lines: "The exchange of information in the form of a data message shall have legal validity . . .".

73. Mr. GRIFFITH (Australia) said his delegation had no difficulty with article 4, since the word "solely" made quite clear how the scope of application of the article related to that of subsequent articles. He therefore favoured retention of the existing text.

74. Mr. RAUSCHER (Austria) endorsed the views of the representatives of Finland and Singapore. Austria felt that it was not necessary to have a general statement on the validity of data messages in addition to the specific provisions in articles 5 to 8. However, it appeared that some legal systems would require such a general statement. He suggested as a compromise solution that article 4 be retained, and that a strongly worded statement be included in the Guide to Enactment to the effect that article 4 enunciated only the basic principle of non-discrimination, and was not intended to overrule the more specific requirements of articles 5 to 9.

75. Ms. REMSU (Observer for Canada) agreed that article 4 should be retained, and that the word "solely" was sufficient to establish the general character of the article as compared to the specific requirements of subsequent ones. She supported the suggestion for a commentary to make the point clear.

76. Ms. EKEMEZIE (Nigeria) also supported retention of article 4.

77. Ms. ZHANG Yuejiao (China) said that, since electronic data messages were a new form of business transaction, they had not yet been given recognition in many legal systems. It was thus important to retain a provision granting such legal recognition.

78. Mr. BROQVIST (Observer for Sweden) supported the Austrian proposal.

79. Mr. ANDERSEN (Observer for Denmark) also endorsed that proposal. The argument by the United Kingdom representative that information did not in itself have legal effectiveness did not take into account the fact that article 4 was concerned with a specific type of information, namely information in the form of a data message. At any rate, a provision containing such an important principle should not be deleted.

80. Mr. BURMAN (United States of America) said that the language of article 4 had given rise to some difficulty, and had been laboured over extensively; the wording that had emerged

had been the best that could be found. He endorsed the Austrian proposal for clarification in a commentary.

81. Mr. VRELLIS (Observer for Greece) said it was clear that article 4 was very important and should be retained. However, the drafting could be improved, and he supported the United Kingdom proposal in that regard.

82. The CHAIRMAN noted that there was overwhelming support for retention of article 4. There seemed also to be support for the Austrian suggestion that a commentary on that article be included in the Guide. He took it that there were no objections to the United Kingdom proposal.

83. Mr. GRIFFITH (Australia) said that the United Kingdom proposal seemed unnecessary.

84. Mr. BURMAN (United States of America) said that the United Kingdom proposal had certainly not received overwhelming support.

85. Mr. ALLEN (United Kingdom) said he had not proposed any specific amendment to article 4, but had proposed that the text should be reviewed by the drafting group. The fact that an earlier drafting group had already worked on the text did not mean that another group would not succeed in finding a better solution.

86. Ms. de LA PRESLE (France) supported the United Kingdom proposal. If the article was to have an educational value for jurists not familiar with modern means of communication, it was important to ensure that it was properly worded.

87. Mr. GRIFFITH (Australia) said that it was clearly the majority view that the text produced by the Working Group on Electronic Data Interchange was fully satisfactory. The idea that article 4 needed improvement had received only minimal support. As a matter of principle, the Commission should support texts approved by the Working Group, unless a clear majority favoured a specific alternative. He urged the Commission to endorse the existing text of article 4.

88. The CHAIRMAN said the debate had shown that article 4 as it stood was acceptable. Since the text would in any case be referred to the drafting group for finalization, further drafting refinements would not be ruled out, but he took it the Commission's position was that the basic concept of the article was satisfactory and that the debate on it should not be reopened.

#### ELECTION OF OFFICERS (*continued*)

89. Mr. GRIFFITH (Australia) nominated Mr. Bossa (Uganda) for the office of Rapporteur.

90. Mr. Bossa (Uganda) was elected Rapporteur by acclamation.

*The meeting rose at 5 p.m.*

## Summary record of the 567th meeting

Tuesday, 16 May 1995, at 9.30 a.m.

[A/CN.9/SR.567]

Chairman: Mr. GOH (Singapore)

*The meeting was called to order at 9.40 a.m.*

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW (continued) (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-Add.4)

### Article 5

1. Mr. SORIEUL (Secretariat), introducing article 5 (A/CN.9/406, annex), said that paragraph (1) expressed what the Working Group had agreed upon as an objective definition of the minimum functional equivalent of a paper-based writing, based on the concepts of accessibility and subsequent reference. Paragraph (2) was intended to indicate to implementing States that they should ascertain whether exceptions were required and, if so, state them.

2. Mr. BONELL (Italy) said that he felt that the wording of article 5 was too technical and not readily understandable to a non-expert. Article 1.10 of the UNIDROIT Principles for International Commercial Contracts defined the term "writing" as "any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form". He realized that the Working Group had considered but rejected similar formulations. He nevertheless thought that simpler, more analytical and more descriptive language as in the UNIDROIT definition should be used. In the drafting of those Principles, account had been taken not only of the Working Group's previous drafts but also of existing international instruments, such as the Model Law on International Commercial Arbitration, the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, the UNIDROIT Convention on International Factoring and the Convention on International Financial Leasing.

3. Mr. ABASCAL ZAMORA (Mexico) said that his delegation could partly go along with the suggestion made by the representative of Italy. The concept of a writing as a mode of communication that "preserves a record of the information contained therein" had a certain tradition and could be found in several international instruments. Such a formula could be adopted, but he was not in favour of deleting the reference to accessibility for subsequent reference.

4. Mr. ANDERSEN (Observer for Denmark), agreeing with the remarks made by the representative of Mexico, said that it was unreasonable to expect that a provision which related to a complex technical area should be easily understandable to an outsider. The concept of accessibility had a definite meaning in the technical world, which was where any legal problems arising from the provision in paragraph (1) would come up. The paragraph should therefore be left as it stood.

5. Mr. ALLEN (United Kingdom) said that the problem of the precise meaning of "accessibility" in article 5(1) might be solved by including a definition of the term "accessible" in article 2, on the following lines: "'Accessible' means available in a form in which it is capable of being displayed", retaining the term in article 5, and substituting it for the word "displayed" in article 7, paragraph (1)(a). That would also meet the wishes of those

delegations that thought it would be useful to have the same language in both articles 5 and 7.

6. His delegation felt it was essential that the requirement for writing should be satisfied only as from the date when the relevant data message was generated. As currently drafted, article 5 meant that a subsequent data message could satisfy the requirement retrospectively, which was not the intention. One possible remedy could be to insert after the words "data message" the phrase "generated at the relevant time".

7. Ms. BOSS (United States of America) said that the Commission should guard against taking decisions in the guise of clarifying language when they might adversely affect policy decisions taken earlier. The question of what was meant by accessibility had been much debated in the Working Group, which had, for example, rejected the notion of a display requirement, on the ground that, in an electronic context, information was not displayed to humans but was processed by machines. That was why the formulation adopted referred to accessibility for future use, but without specifying any limitation as to the type of use. She would be reluctant to pursue the attempt to define "accessibility", because of the difficulty of reintroducing requirements that had earlier been rejected.

8. Unlike the United Kingdom representative, she did not consider that article 5 involved a timing requirement. If there was a requirement that a writing be produced contemporaneously with a given transaction and the data message was recorded after the time of that transaction, the writing requirement would be satisfied by the data message, but the contemporaneity requirement would not. Perhaps the matter could be made clear in the draft Guide to Enactment.

9. Her delegation felt that the notion of "a rule of law" was possibly too restrictive. In some legal systems, it meant statutory rules, as opposed to judicially created rules or rules of court or of procedure. Therefore, the phrase "Where a rule of law requires . . .", appearing at the beginning of articles 5, 6 and 7, might be replaced by the words "Where there is a requirement that . . .". That was simply a drafting issue, which she wished to raise for purposes of clarification.

10. Ms. de LA PRESLE (France) said that in her delegation's view the concepts of accessibility and subsequent reference were clear, even to a non-specialist, and should therefore be retained. If further clarification was necessary, it should be explained in the draft Guide that accessibility could be assessed either in relation to a human operator or to a machine.

11. She agreed with the United States representative's remarks concerning the United Kingdom proposal for the establishment of a link between the data message and the time of its creation. The concern expressed was nevertheless a legitimate one. A possible solution might be to employ a formulation which referred to the faithful reproduction of what the parties had exchanged, as in the proposal submitted by France (A/CN.9/409/Add.3). Such a reference would make it possible to avoid the concepts of conformity

and identity, which had presented problems in connection with the requirement of an original.

12. Regarding the view that the term "a rule of law" might be too restrictive, she would suggest that a reference be added to "usage"; that would broaden the concept, while at the same time make it possible to determine the origin of the requirement. A requirement should not be able to come in an arbitrary fashion from any party to the transaction. The text of article 5(1) might then read: "Where a law or usage requires a writing, the message shall be considered to have legal validity provided that it faithfully reproduces what the parties exchanged and that it is recorded in an intelligible and reproducible form".

13. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that the current text of paragraph (1), which was the result of lengthy discussions in the Working Group, clearly reflected the two notions of a legal requirement and accessibility for subsequent reference, which should be maintained.

14. Mr. GRIFFITH (Australia) said that his delegation felt that there was an inconsistency between articles 5 and 7 on the question of presentation, since article 7 contained a display requirement, while article 5 did not. Perhaps the Commission should take up the matter when discussing article 7.

15. With regard to the proposed inclusion of a definition of "accessibility", he supported the view expressed by the representative of the United States of America. It would be better to leave the text as it was.

16. Concerning the United Kingdom representative's proposal for the addition of a reference to "relevant time", he shared the opinion of the United States representative that the text was not concerned with a timing requirement. He also believed that, at least in common-law systems, the writing requirement would be satisfied for statute-of-fraud provisions if the writing was created subsequently. For those two reasons, he felt that a reference to timing should not be included in the text.

17. Mr. MADRID (Spain), agreeing with the representative of the Islamic Republic of Iran, said that the current formulation of paragraph (1) adequately described the concept of a writing. The requirement, as expressed, could apply to a paper-based writing, or to a writing in electronic or any other form. The text should consequently remain as it stood.

18. With regard to the notion of "a rule of law", that concept was sufficiently broad in the Spanish legal system and no modification would be required.

19. Mr. ANDERSEN (Observer for Denmark) said that he supported the view that article 5 should remain unchanged. The phrase "capable of being displayed" in the United Kingdom representative's proposed definition would call for further clarifications and create additional problems. The display requirement contained in article 7 dealt not with whether information was capable of being displayed, but rather with the time when it was displayed. The time of display was not a matter of doubt. Any necessary explanations should be included in the draft Guide rather than in the draft Model Law.

20. Mr. UCHIDA (Japan) said that the amendment of "a rule of law" proposed by the United States representative implied that the writing requirement could be imposed by agreement between the parties. He felt that the intention of article 5 was to remove legal obstacles. Therefore the phrase "a rule of law" should be retained, or possibly amended to just "a law".

21. Ms. REMSU (Observer for Canada) also favoured retaining article 5. In her view, the notions of accessibility and subsequent

reference could be adequately interpreted with supplementary explanations in the draft Guide. The notions of timing and faithfulness were not part of the concept of the functional equivalent of a writing and should not be included. She also agreed with the remarks just made by the representative of Japan. The text was concerned with the removal of legal impediments.

22. Mr. BONELL (Italy) said that he agreed with the remarks of the representatives of Japan and Canada. The term "rule of law" should be retained. The text before the Commission was that of a model law; the precise meaning of terms therefore had to be left to national legislators.

23. Mr. ALLEN (United Kingdom) said that he had not intended that article 5(1) should include a timing requirement. The text simply required a drafting amendment so that it would not allow any data message, whenever generated, to satisfy the requirement of a writing. As an alternative to his earlier proposal, he would suggest that the words "a data message satisfies" be replaced by "a data message can satisfy". That would be neutral as to the time of creation of the message.

24. Mr. GRANDINO RODAS (Brazil) said that he favoured keeping article 5 as drafted and including explanations in the Guide.

25. Mr. SCHNEIDER (Germany) agreed with the representative of Italy. The article needed redrafting, as it was grossly misleading. There were many different interpretations of the rule, as was evident both from the discussion in the Commission and from the comments made by the Banking Federation of the European Union (A/CN.9/409). There were two functions for which the law required writing: for purposes of evidence, and as a "red flag", giving a warning to the parties to the contract. As now drafted, it was not clear whether the article dealt with both types of functions, or only the first. In his opinion, it dealt only with the first, in view of the last phrase of paragraph (1); the Banking Federation, on the other hand, interpreted it as referring to the second. The article should be redrafted to limit it only to those legal requirements where writing was necessary for evidential reasons. Something could be added to that effect in the title, or the idea could be expressly stated in the Guide.

26. Mr. SORIEUL (Secretariat) said that none of the functions of a writing was excluded for the functional equivalent of a writing. The article was not intended to make a distinction between whether the writing was required for evidential reasons or as a warning, or even "*ad solemnitatem*", for a legal transfer. Rather, it was designed to provide for an equivalent for writing in general, while in paragraph (2) giving States the possibility of excluding the implementation of paragraph (1) in all cases where a paper-based writing, and not a functional equivalent, was required.

27. Mr. CHAY (Singapore) said that he did not support the notion of including a display requirement in the concept of accessibility, but favoured keeping the article as it stood. As to the proposal by the United Kingdom to use the phrase "can satisfy" with regard to data messages, the Model Law was intended to give EDI messages the same basis and standing as paper documents, and therefore definite rules were needed to say that they would be equally admissible. If uncertain terms such as "can satisfy", were introduced, then the intention of the Model Law would be defeated.

28. Mr. ABASCAL ZAMORA (Mexico) said that according to the interpretation given by the representatives of Japan and Canada, the notion of "a rule of law" did not include situations in which the parties to a contract had stipulated that there must be a writing, e.g. in order to amend or terminate a contract. Such a stipulation was not, in their view, binding under a rule of law and

was not covered by article 5. If that were so, what would happen if there was electronic communication between the parties to a contract containing no definition of writing? The parties would not be able to avail themselves of the definition of writing under article 5 and would consequently not be protected by the Model Law. In his interpretation, however, the requirement to fulfil a contract was a universal rule of law, and hence in cases where the parties had agreed to communicate or to perform certain acts in writing, they were also bound by a rule of law.

29. The CHAIRMAN said that the representative of Mexico had raised a new issue and that the Commission might wish to consider whether the Model Law ought to deal with it. As he understood it, if the parties to a contract stipulated, say, that notice must be given in writing, they could also add a provision stating that notice could be given by a computer-generated message, which would solve the problem.

30. Mr. ABASCAL ZAMORA (Mexico) said there were many cases in which the parties required writing but did not specify anything about electronic communication. If no reference was made to such forms of communication, the Model Law would not be protecting the parties to such contracts, nor would it be promoting the use of electronic means of communication.

31. Mr. CHOUKRI SBAI (Observer for Morocco) said that as pointed out by the representative of Germany, there were two functions of writing. Paragraph (1) of article 5 covered both of those functions, as it was couched in general terms. The use of the phrase "can satisfy", as proposed by the representative of the United Kingdom, might cast doubts on the status of a data message: either the message was a substitute for writing, or it was not. Article 5 spoke only of writing requirements and had nothing to do with the ability to consider whether other conditions were fulfilled, such as in cases of error or fraud. For those reasons, article 5 should be kept as it stood.

32. Mr. BURMAN (United States of America) said that he could go along with the consensus on retaining article 5 as it stood, but would like the interpretation of the phrase "a rule of law" to be put into the Guide. In his country's jurisprudence, which was based not just on codes of law but also on judicial decisions, that phrase would be interpreted very narrowly, much more so than in other countries. Accordingly, the Guide should indicate that, where appropriate, a rule of law included judicial requirements. Perhaps a reference could also be included to party autonomy with respect to the term "writing". In the existing draft, party autonomy applied to chapter III but not to the body of law at present under discussion. In practice, however, many contracts were drawn up without close attention to the provisions of the law. Thus, the parties, having included a requirement about presentation in writing, might in fact have no objection to a subsequent communication in some other mode, but might find acceptance of such communication arbitrarily excluded under the Model Law. Adding an appropriate reference in the Guide would enable the Model Law to cover a broader range of actual commercial practice.

33. Ms. ZHANG Yuejiao (China) said that the article should be retained in its present form but a specific explanation given in the Guide to ensure uniform interpretation, application and acceptance of the Model Law. As to the term "a rule of law", its scope should be defined to cover cases where the judicial system required evidence to be in writing as well as cases where the writing requirement was that agreed to by the parties concerned. Furthermore, an explanation was also needed as to whether the Model Law should have a retroactive effect. Some legal systems might have no such requirements with regard to a data message, and contracts drawn up prior to the introduction of data messages which had required presentation in writing would then not include

EDI messages. If parties wished to commit themselves to including EDI messages, they should so stipulate in their agreement. Regarding the explanation to be added on the word "accessible", the Commission should consider the Working Group's proposal and emphasize that the information had to be accessible in tangible form in order to be consistent with the rules of UNCITRAL.

34. Mr. SHIMIZU (Japan) said that the word "accessibility" would be difficult to translate into Japanese. It would thus be helpful if a definition were included, either in the text itself or in the Guide.

35. Mr. MADRID (Spain) said that the Guide should explicitly state that the reference to a rule of law in article 5 also covered those cases where the obligation of a party derived directly and immediately from a contractual relationship. It might also derive indirectly from a law, but whatever the more remote source of the obligation, if it originated in a contractual relationship, article 5 would also apply. Where there was not a relationship between commercial parties but where, rather, the obligation derived from an access contract—such as one which set forth the conditions applying to intermediaries providing services through their communication networks—if a writing was required, the provisions of article 5 should also apply. Regarding the question raised by the representative of China as to whether the Model Law would have a retroactive effect, he considered that, as in the case of a pre-existing rule of law, if the obligation arose from a pre-existing contractual relationship, the Model Law would also apply.

36. The CHAIRMAN said that he took it that the consensus was to retain article 5 as drafted. As to the question raised by the representative of the United States of America about whether the reference to "a rule of law" covered case law, perhaps it could be made clear in the Guide that it did. A new problem which had been raised was whether a contractual stipulation for a writing could be satisfied by a data message. To include such a provision in article 5 would extend its scope. He asked whether there was support for the proposal made by the representative of Mexico to that effect.

37. Mr. BONELL (Italy) said that if the parties required a writing without specifying what that meant, it would be necessary to refer to the existing legal definition of writing. He asked whether it could be assumed that as soon as the Model Law was adopted, parties all over the world would immediately wish to be bound by it. They might already have drawn up contracts stipulating that a writing must be in paper form, and might not wish to accept substitution of a data message. If EDI was to be recognized as a valid means of communication equivalent to writing, it would have to be expressly accepted by the parties.

38. He pointed out that there was one definition of "writing" in article 5 of the draft Model Law and another of "form" of document in article 7 of the draft Convention on Independent Guarantees and Stand-by Letters of Credit (A/CN.9/408). The language used throughout the Commission's work should be consistent.

39. The CHAIRMAN pointed out that the Model Law dealt with an entirely different subject from letters of credit.

40. Mr. ABASCAL ZAMORA (Mexico) said that, in commercial law, the writing requirement was not necessary as a rule. The simple agreement of the parties created commercial obligations, in which the writing requirement usually arose from contractual stipulations. To exclude such stipulations from the definition of writing was to neglect a very important part of the Commission's mandate, namely, to facilitate the use of EDI and related means of communication in trade.

41. Mr. CHOUKRI SBAI (Observer for Morocco) said the article was concerned with the case where the requirement derived

from a rule of law. Contractual stipulations were a matter for the parties to decide; obviously, the parties which had agreed to undertake their transactions through the use of computers could not reject data messages. There was therefore no need to refer to contractual stipulations in the draft text.

*The meeting was suspended at 11.10 a.m.  
and resumed at 11.45 a.m.*

42. The CHAIRMAN said that he felt the consensus of the Commission to be in favour of retaining article 5. Though some changes had been proposed, they had not in his opinion elicited sufficient support. However, one particularly interesting problem had been raised as to whether article 5 should cover situations where the parties to an agreement stipulated in their agreement that something must be in writing. It was a new issue that had not been addressed by the Working Group. He proposed that the Commission return to the question after its consideration of articles 6 and 7, and possibly 10 and 11, in order to decide whether or not it wished to include a provision on that subject. On that understanding, he took it that article 5 was acceptable as it stood.

#### Article 6

43. Mr. SORIEUL (Secretariat) said that article 6 had a similar structure to article 5. After many discussions, the Working Group had decided that article 6 should concentrate on the essential elements of the signature, which served to identify the originator and to indicate the agreement of the originator regarding the information contained in the message. Those two functions had been expressed in paragraph (1)(a). The use of a functional equivalent of the signature presupposed a method to determine the identity of the originator and that originator's approval of the information contained in the message. The Working Group had decided that paragraph (1)(b) should contain a general provision rather than specific criteria of reliability, considering it preferable to incorporate such criteria in the Guide rather than in article 6 itself.

44. Mr. CHAY (Singapore) said that the signature requirement in article 6 was satisfactory so long as there existed a reliable method of identifying the originator of the message. Singapore therefore proposed that the criteria set out in document A/CN.9/409 and numbered (i)-(v) should be incorporated into the draft Guide. Singapore had originally wanted them to be included in article 6 itself but had noted that certain other criteria had been listed in paragraph 71 of the Guide after adoption by the Working Group at its twenty-ninth session, which Singapore had unfortunately been unable to attend.

45. Mr. BURMAN (United States of America) considered that, in the proposal by Singapore, factors (ii), (iii) and (iv) were highly appropriate, but factors (i) and (v) should not be included, because they would create problems in commercial law. The question of "relative bargaining positions"—the subject of (i)—was best left to other aspects of the legal system if adjustments were felt to be necessary; modern economic and legal thinking was tending to move away regarding such considerations as belonging to the context of commercial law. As for factor (v), use of the best available technology was always encouraged, but such technology was often expensive, or required special training or new equipment. Even where better technical methods were available, commercial parties sometimes consciously decided not to use certain advanced technologies. In other cases, where extremely high security was the priority, more advanced technology might be required. Such decisions must be left to the parties concerned in a transaction. In his view, it was important to exclude factors (i) and (v).

46. Mr. ANDERSEN (Observer for Denmark), Mr. ABASCAL ZAMORA (Mexico), Ms. EKEMEZIE (Nigeria) and Mr.

SCHNEIDER (Germany) also thought that factors (ii), (iii) and (iv), but not (i) and (v), should be included in the Guide.

47. The CHAIRMAN said he took it that the Commission accepted the Singapore proposal as amended by the representative of the United States.

48. Mr. ALLEN (United Kingdom), referring to the concept of "agency", said that difficulties might arise because the definition of an "originator" given in article 2, paragraph (c), appeared to mean that in the case of a message generated on behalf of another person, the originator was the principal rather than the agent through whom the message was sent. Hence in article 6, paragraph (1)(a), the method used should identify the principal rather than the agent. If, for example, the relevant requirement in law was for the signature of a company director or secretary, it was important that it be the signature of the person concerned; it was not enough to say that the document was signed on behalf of the company. In his view, all that was needed was a minor drafting change that would not alter the intention behind the text. He proposed that the beginning of the article should read as follows:

"(1) Where a rule of law requires the signature of any person, or provides for certain consequences in the absence of a signature, that rule shall be satisfied in relation to a data message if:

(a) A method is used to identify that person in the data message as the originator or as a person acting on its behalf and to indicate that person's approval of the information contained therein; ..."

The suggested text would make it possible to use an electronic signature that identified the agent to satisfy the requirement to identify the signature of an agent, e.g. a company director, and show that agent's approval of the information contained in the message. From then on, ordinary agency principles would apply: the approval of the agent would automatically represent approval of the principal and would enable the electronic signature of a company to meet the signature requirement in cases where the national law concerned recognized the concept of signature by a corporate person. That was not the situation in the United Kingdom, where a signature had to be by an individual.

49. Mr. BURMAN (United States of America) said that his delegation would need more time to consider the United Kingdom proposal.

50. Mr. CHOUKRI SBAI (Observer for Morocco) considered that the United Kingdom proposal was extremely useful, since it would help to solve a practical problem. Under the Moroccan legal system, as under that of the United Kingdom, a signature had to be handwritten. Banks in Morocco did use electronic signatures as well, but they were not accepted by the courts. It was therefore important in article 6 to deal with the idea of agency.

51. Mr. SCHNEIDER (Germany) said that a clear distinction must be drawn between the policy of the rule in article 6 and the problems created in an agency situation. With regard to the policy of the rule, it was important to distinguish why the law required a signature. There were two possibilities: the law might require a signature for evidential purposes, or for other reasons, e.g. to fulfil the "red flag" function. In his view, article 6 dealt only with a situation in which the rule required a signature for evidential reasons. If, as at the moment, the interpretation as to whether the approval had to be given in written form or orally was left open, his delegation could accept article 6 as it stood.

52. In German law there was no question of agency when an employee, e.g. in the computer department, acted on behalf of the director of a company. He considered that such cases should be left to the relevant domestic law.

53. Ms. EKEMEZIE (Nigeria) said she found the United Kingdom proposal interesting, but in view of its possible impact on other articles would like to have time to think about it.

54. Ms. BOSS (United States of America) noted that the representative of Germany had raised questions as to the application of article 6 (1)(a) and mentioned some problems that might be dealt with by minor redrafting. The first was the concept in paragraph (1)(a) of a method used to identify the originator. One significant point about a signature in most jurisdictions was that it was affixed by the person who did the signing. The person signing a letter undertook the identification, or adopted a machine signature or a letterhead as his signature. There might therefore be a need to change the phrase "a method is used to identify the originator" to "a method is used by the originator" or "a method is adopted by the originator", to make it clear that it was the originator who used or adopted the method.

55. The concept of approval might be elusive, since it might give rise to an inquiry as to whether the originator considered and then approved the content of the message. Some of her delegation's correspondents had in fact suggested a slightly different wording, namely, "is used to associate the originator with the information contained therein" instead of "indicating the originator's approval".

56. Mr. MADRID (Spain) was in favour of maintaining the present wording of article 6(1)(a), perhaps with minor drafting

changes. The question of agency should not be introduced into the wording, as proposed by the United Kingdom representative, since complex issues might arise because of differences between legal systems. There was no need to make the question of signature more complicated.

57. Moreover, although he was not familiar with the use of electronic signatures, he understood that what was important in such signatures was not the person who physically operated the computer, but the person identified by the electronic signature, who might be a legal entity.

58. Mr. CHOUKRI SBAI (Observer for Morocco) still considered the United Kingdom proposal very useful, precisely because persons signing were executives or managers and the relationship between a manager and his company was that of an agent.

59. However, the term "person" in the United Kingdom proposal could be misleading and would have to be defined. It would replace the term "originator", which was defined in article 2. He therefore proposed that the wording in paragraph (1) should be maintained, since a signature by definition had to be made by a person, and to amend subparagraph (a) to read: "a method is used to identify the originator of the data message or whoever represents him and to indicate the approval of the originator or whoever represents him of the information contained therein".

*The meeting rose at 12.35 p.m.*

### Summary record of the 568th meeting

Tuesday, 16 May 1995, at 2 p.m.

[A/CN.9/SR.568]

Chairman: Mr. GOH (Singapore)

*The meeting was called to order at 2.10 p.m.*

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW (continued) (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4)

#### Article 6 (continued)

1. The CHAIRMAN invited the Commission to continue consideration of paragraph (1). The proposal made by the United Kingdom at the previous meeting concerned agency. It might therefore be regarded as a drafting matter, since substantively the issue of agency had been addressed earlier in the draft by the words "or on whose behalf" in the definition of the term "originator" in article 2. Admittedly the Commission had not yet approved the definition.

2. Mr. ABASCAL ZAMORA (Mexico) said that the signature referred to in draft article 6 might be that of the individual who actually signed the message and not that of the originator. The United Kingdom proposal was therefore pertinent and deserved consideration. He suggested as an alternative that, in the introductory wording, the words "of any person" should be inserted after the word "signature" and that subparagraph (a) should read: "a method is used to identify that person in the data message as the person signing it and to indicate that person's approval of the information contained therein; and".

3. Mr. UCHIDA (Japan), supported by Mrs. ZHANG Yuejiao (China), endorsed the Chairman's comments and favoured the retention of the text approved by the Working Group.

4. Mr. CHOUKRI SBAI (Observer for Morocco) regarded the United Kingdom proposal as a matter of substance, not of drafting. Since draft article 6 dealt with the individual who actually signed the message, that individual, whether the originator or the originator's agent, should be identified.

5. Mr. AL-ZEID (Observer for Kuwait) said that, bearing in mind the observations made by Germany and Spain at the previous meeting, he too favoured the retention of the Working Group's text. The question of agency should be kept out of the Model Law and left for determination in accordance with relevant domestic law.

6. The CHAIRMAN said there seemed to be little support for the United Kingdom proposal. He therefore took it that the Commission approved draft article 6(1) as worded by the Working Group.

7. *It was so agreed.*



## Article 7

8. Mr. SORIEUL (Secretariat) said that the Commission would probably wish to focus its attention on the questions of display of information contained in a data message and the criteria used to assess the integrity of the information, dealt with in subparagraph (a) of paragraph (1) and in paragraph (2) respectively.

9. Mr. CHAY (Singapore) said that article 7 went to the very foundations of the idea of the reliability of a paper document. In its written comments (A/CN.9/409), Singapore had observed that the requirement in paragraph (1)(a) for display of the information in a data message to the person to whom it was to be presented ignored reality, in that in many electronic data interchange systems data messages were processed automatically and thus were never displayed to anyone. The display requirement also raised the question of the kind of data to be displayed—would it be the raw alphanumeric data, usually unintelligible, or the final message, rendered intelligible by processing?

10. In regard to the integrity of the information contained in a message, his Government's written comments also criticized the use of the notion of reliable assurance in paragraph (1)(b) as being unclear. The essential point was to establish that a message had remained unaltered from start to finish, and was therefore an original document. In order to deal with those two points, his delegation proposed the replacement of paragraphs (1) and (2), as drafted by the Working Group, by the texts reproduced in Singapore's comments (A/CN.9/409).

11. Ms. BOSS (United States of America) said that, while her delegation could accept article 7 as it stood, the considerations raised by Singapore called for a response, particularly its point that information transmitted by an EDI system was meant primarily to be usable rather than displayable intelligibly throughout. There were jurisdictions in which information was required to be presented in its original form, for example to a judicial body, and others in which it was required merely to be retained. The Model Law should distinguish between those two situations. She therefore proposed the insertion of the words "retained or" before the word "presented" in the introductory wording of paragraph (1).

12. She believed that Singapore's main concern—the display problem—might be met if the matters dealt with in the present subparagraphs (a) and (b) were handled in reverse order. She therefore proposed that the present subparagraph (b) should become subparagraph (a), with a drafting change consisting in the replacement of the words "between the time when it was first composed in its final form, as a data message or otherwise, and the time when it is displayed" by the words "from the time when it was first composed in its final form, as a data message or otherwise".

13. The principal requirement—the existence of reliable assurance—having thus been put first, it should be followed, after the conjunction "and", by a provision about display, a question which became important only if the information in the message was required to be presented to an individual. Accordingly, for the second subparagraph, she proposed the replacement of the wording at present forming subparagraph (a) by the following subparagraph (b): "where it is required that the information be presented, that information is displayed to the person to whom it is to be presented".

14. In reply to a question from Mr. MADRID (Spain), Ms. BOSS (United States of America) said that the new subparagraphs should be linked by the conjunction "and" because the integrity condition had to be met regardless of whether a display requirement existed.

15. Mr. CHAY (Singapore) said that his delegation's concerns were met by the proposals of the United States representative.

16. Mr. ALLEN (United Kingdom) found the United States proposal sensible and a helpful way of dealing with the issues raised by Singapore. However, in order to meet fully the Singaporean delegation's concern that information required to be presented should be intelligible, he suggested replacing the words "is displayed" in the subparagraph (b) proposed by the United States by the words "is capable of being displayed".

17. Ms. CLIFT (Australia) endorsed the United Kingdom representative's suggestion. It would bring article 7 into line with article 5, which spoke of accessibility of the information contained in a data message.

18. Ms. BOSS (United States of America) accepted the United Kingdom representatives's suggestion.

19. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission approved article 7(1) as proposed by the United States with the change suggested by the United Kingdom representative.

20. *It was so agreed.*

21. Mr. CHOUKRI SBAI (Observer for Morocco) said that, as a consequence of the Commission's decision with regard to paragraph (1), the words "subparagraph (b)" in paragraph (2) should be amended to read "subparagraph (a)".

22. *It was so agreed.*

23. Ms. CLIFT (Australia) noted the decision of the Working Group, reflected in paragraph 162 of document A/CN.9/406, that, for reasons of consistency in terminology, the word "generated" should replace the word "composed". She asked why the word "composed" appeared in paragraphs (1) and (2) of the text of article 7 now under consideration.

24. After a discussion in which Mr. ALLEN (United Kingdom), Ms. BOSS (United States of America), Mr. GRIFFITH (Australia) and Mr. SCHNEIDER (Germany) took part, Mr. SORIEUL (Secretariat) said that the wording as it appeared in the annex to document A/CN.9/406 was that proposed by the drafting group at the Working Group's twenty-eighth session. On revising the report of the drafting group, the Working Group had decided to change "composed" to "generated" for reasons of consistency, but that change had accidentally not been taken into account in the final version annexed to the report. The two terms were perhaps synonymous but, unless the Commission wished to change the text as adopted by the Working Group, the word "generated" should be used throughout the article.

25. Mr. UCHIDA (Japan) said that, when dealing with the requirement of integrity of the information contained in a data message, the Guide should explain how the words "from the time when it was first generated in its final form" would apply in practice. His delegation had raised that point in its written comments (A/CN.9/409/Add.1).

26. The CHAIRMAN said that the Secretariat would address that point in the draft Guide.

27. Mr. BISCHOFF (Observer for Switzerland) said that it was difficult to know what was understood by the term "displayed" ("exposée"). Did it refer to the time a message was received on a person's computer or the time at which it was received on a central computer, even if addressed to a particular person? He asked for clarification in the Guide.



28. Mr. SORIEUL (Secretariat) said that the word "displayed" had caused translation difficulties. The question was related not so much to the time of reception as to the circumstances under which a computerized message could be shown in an acceptable way, specifically for someone who had no computerized system, for instance a judge. That point could be addressed in the Guide.

29. The CHAIRMAN said that paragraph (3) did not seem to require discussion. He took it that the text of article 7 was acceptable as amended.

#### Article 8

30. Ms. BOSS (United States of America) noted that Singapore had proposed a number of changes to article 8, presented in document A/CN.9/409. The proposals in subparagraphs (a), (b), (e) and (f) were drafting suggestions that should be considered by the drafting group. She supported the amendment proposed in subparagraph (g), which was substantive in nature.

31. Mr. ALLEN (United Kingdom) said that he supported the amendment suggested by Singapore in subparagraph (a) and had no difficulty with the change proposed in subparagraph (e). Depending on changes made elsewhere in the draft, the amendment proposed in subparagraph (f) deserved consideration.

32. Mr. GRIFFITH (Australia) pointed out that a firm mandate had to be given to the drafting group by the Commission. It was the drafting group's duty to ensure that the language chosen expressed what was intended by the Commission, but decisions rested with the Commission. He proposed that the first sentence of paragraph (2) be deleted as unnecessary.

33. The CHAIRMAN said that, when matters were referred to the drafting group, the understanding was that the drafting group would not make any policy changes but merely clarify the language.

34. Ms. BOSS (United States of America) said that her delegation had no problems with article 8 as it stood. She did not support the deletion of the first sentence of paragraph (2) as proposed by Australia, because that sentence instructed tribunals to give due weight to electronic data messages. That would be valuable in some jurisdictions, even if not in all.

35. Mr. FARADI ARAGHI (Islamic Republic of Iran) said that it would be best to delete the first sentence of paragraph (2). Directions to courts would not be accepted in all legal systems. The remainder of paragraph (2) should be kept.

36. Mr. SHANG Ming (China) suggested that the word "processed" be inserted in the third line of paragraph (2), after "stored".

37. The CHAIRMAN, after inviting members to indicate whether they were for or against the proposals just made, noted that the majority wished to retain the first sentence of paragraph (2) and that the proposal to insert the word "processed" in the second sentence was not supported.

38. Mr. GRIFFITH (Australia) said that he supported amendments (a), (b), (c), (e), and (f) proposed by Singapore in document A/CN.9/409; however, he did not support amendments (d) and (g).

39. The CHAIRMAN, after inviting members to indicate their attitude to the changes originally recommended by the Government of Singapore (A/CN.9/409) and now supported by the representative of Australia, noted that there was general support for replacing "value" by "weight" in the title, for replacing "admission" by "admissibility" in the *chapeau* of paragraph (1), for

replacing "grounds" by "sole ground" in paragraph (1)(a) and for deleting "presented" after "information" in the first sentence of paragraph (2). The majority seemed to be against the proposal to replace "stored" in the third line of paragraph (2) by "retained".

40. Mr. GRIFFITH (Australia) said that that proposal to use the word "retained" would make the text more consistent. Thus, the word "retention" was used in the title of article 9, and the word "retained" in the body of that article. The use of different terms in different articles of the Model Law could lead to confusion. If the Commission considered that there was no material difference between the words "stored" and "retained", he would prefer that the latter be used throughout for the sake of consistency.

41. Mr. ALLEN (United Kingdom) said that it would be difficult to replace "storage" by "retention" in paragraph (2)(a) of article 7, which referred to "any change which arises in the normal course of communication, storage and display".

42. Ms. BOSS (United States of America) said her delegation did not object to using the word "retention" rather than "storage" where appropriate, but inconsistencies in the use of the two terms occurred throughout the text. She did not think the Commission should spend time trying to ensure consistency, but should simply instruct the Secretariat to bear the need for consistency in mind when drafting the final version.

43. Mr. ANDERSEN (Observer for Denmark) said that, since in his country the Model Law would have to be translated, it would be useful to know whether the Commission regarded "storage" and "retaining" as synonymous. It should be borne in mind that in computer technology the word "storage" was more commonly used.

44. Mr. GRIFFITH (Australia) supported that view, and added that the word "storage" was frequently used in article 2 ("Definitions").

45. Mr. MADRID (Spain) said that the drafting group had discussed the two terms and had decided to use both, on the grounds that some parts of the Model Law referred simply to retention in the general sense, and others to the specific process of storage. He would support the suggestion that the text be reviewed to ensure that the right word was used in the right context. If it was decided to use only one term, his delegation would prefer "storage".

46. Ms. BOSS (United States of America) supported that view.

47. Mr. CHAY (Singapore) thought that the consensus in the Working Group had been that there was no substantive difference between the two terms, but that it would be preferable to use only one for the sake of consistency.

48. Mr. CHOUKRI SBAI (Observer for Morocco) said that he also preferred the term "storage".

49. Mr. HOWLAND (United Kingdom) said that the two words carried marginally different meanings in different contexts; he thought it would be best to leave it to the Secretariat to decide which was the most appropriate. His delegation would prefer both words to be used in the Model Law.

50. The CHAIRMAN said he took it that the Commission wished to entrust the Secretariat with the task of choosing the most appropriate word according to the context.

51. *It was so agreed.*

52. The CHAIRMAN drew attention to an error in paragraph (3) of article 8, "article 8" should be replaced by "article 7".

53. Mr. CHOUKRI SBAI (Observer for Morocco) said that the reference should now be to subparagraph (a) rather than subparagraph (b) of paragraph (1) of article 7.

54. Mr. GRIFFITH (Australia) said the text as it stood did not read well. The intent of the provision was to ensure that, where subparagraph (a) of paragraph (1) of article 7 was satisfied, information that was not in its original form should be accorded the same weight in legal proceedings as information that was in its original form. The phrase "Subject to any other rule of law" would destroy the provision's effect, since there might well exist another rule of law providing the exact contrary. In addition, it was not clear what comparison was being made by the use of the phrase "shall not be accorded any less weight".

55. He proposed that paragraph (3) should be amended to read: "Where subparagraph (a) of paragraph (1) of article 7 is satisfied in relation to information in the form of a data message, in any legal proceedings information not presented in its original form shall be accorded the same weight as information presented in its original form".

56. Mr. UCHIDA (Japan) said he understood that the need for paragraph (3) had been extensively discussed in the Working Group. However, his delegation still considered the paragraph unnecessary, since its intent was already covered by paragraph (2) of article 8, even where custom or practice required that information be presented in its original form. He therefore proposed that paragraph (3) be deleted.

57. Ms. BOSS (United States of America) said her delegation favoured retention of paragraph (3), with the two amendments proposed by the Australian delegation.

58. Mr. ALLEN (United Kingdom) supported the first Australian amendment, but objected to the second. It was important to refer back to information which satisfied subparagraph (a) of paragraph (1) of article 7 by using the words "the information" rather than "information". More importantly, it was not the intention of the Model Law to require the courts to accord particular weight to particular information.

59. Mr. FARIDI ARAGHI (Islamic Republic of Iran) shared that view.

60. Mr. BROQVIST (Observer for Sweden), Mr. SCHNEIDER (Germany), Mr. MÄKELÄ (Finland), Ms. ZHANG Yuejiao (China), Mr. BOSSA (Uganda), Mr. MADRID (Spain), Ms. REMSU (Observer for Canada) and Mr. RAUSCHER (Austria) supported the Japanese proposal for deletion of paragraph (3).

61. The CHAIRMAN, after inviting members to indicate their attitude to the proposal, noted that there was majority support for deletion of paragraph (3).

*The meeting was suspended at 3.55 p.m.  
and resumed at 4.25 p.m.*

#### Article 9

62. Mr. SORIEUL (Secretariat), introducing article 9, said that apart from paragraph (1)(c), which specified the type of transmittal information that could be omitted without affecting the integrity of the stored record, article 9 had presented few difficulties for the Working Group.

63. Mr. BURMAN (United States of America) suggested that the words "date and time of transmission" in paragraph (1)(c) should be replaced by the words "accompanying transmittal information". Different systems provided different kinds of transmittal

information. The retention of transmittal information was a reasonable requirement but the retention of specific information which might not be retained by the system should not be required.

64. Mr. GRIFFITH (Australia) noted that paragraph (1)(c) began with a reference to "transmittal information associated with the data message". The suggestion of the United States representative would mean referring to "transmittal information" twice. Perhaps the reference to date and time of transmission could be deleted?

65. Mr. CHOUKRI SBAI (Observer for Morocco) was in favour of maintaining paragraph (1)(c) as it stood. It was very important to mention the date and time of a data message. In some countries, including his own, it was a legal requirement that documents should be dated. He suggested that the end of paragraph (1)(c) should read: "... date and time of transmission, and any other accompanying information, is retained".

66. Mr. BURMAN (United States of America), responding to the observation by the representative of Australia, proposed that the subparagraph should be abridged to read "transmittal information associated with the data message is retained".

67. One of his problems with the present text was that it could be interpreted more restrictively than intended. It was important to avoid setting an unduly high standard.

68. Mr. ALLEN (United Kingdom) suggested that the words "including, but not limited to, originator, addressee(s)", should be replaced by the words "including, but not limited to, the identity of the originator and the addressee(s)".

69. Mr. MADRID (Spain) said that he wished to return to the question of the use of the terms "retention" and "storage". It would be useful if, particularly in relation to article 9, the Commission could give guidance to the drafting group on the matter.

70. Mr. CHOUKRI SBAI (Observer for Morocco) said that he preferred the term "storage" to "retention".

71. Mr. GRIFFITH (Australia) said that he agreed with the proposal of the representative of the United States of America to abridge paragraph (1)(c); the shorter version seemed to cover all eventualities.

72. With regard to the terms "retention" and "storage", although he was anxious to ensure consistency and was generally in favour of using the term "storage", he felt that article 9 really was concerned with retention rather than storage, as stated in its heading "Retention of data messages".

73. Mr. ALLEN (United Kingdom) and Mr. CHAY (Singapore) agreed with the proposal to abridge paragraph (1)(c).

74. The CHAIRMAN, after inviting delegations to indicate whether they were for or against the proposal by the representative of the United States of America to abridge paragraph (1)(c), noted that a majority seemed to support the proposal.

75. Mr. RAUSCHER (Austria) said that, in his view, the abridgement of paragraph (1)(c) would have implications for the commentary on article 9 in the draft Guide (A/CN.9/407). In particular, additional examples of the type of transmittal information referred to in the subparagraph would have to be provided.

76. Mr. ABASCAL ZAMORA (Mexico) said that the transmittal information accompanying data messages was sometimes very detailed and the Working Group had decided that it was not necessary to retain it all. In his view, the shorter version of the

subparagraph was unduly vague. A considerable amount of compensatory clarification would have to be included in the Guide, which was not, however, a binding instrument of law.

77. Mr. MADRID (Spain) said that the abridgement of the subparagraph would impede rather than facilitate the use of electronic media, since a data message would be admissible in evidence only if all transmittal information had been retained. He therefore supported the proposal to include a detailed explanation of the retention requirement in the Guide.

78. Mr. CHOUKRI SBAI (Observer for Morocco) said that he fully agreed with the representatives of Austria and Mexico on the need to expand the commentary in the Guide. The information specified in the Working Group's version—originator, addressee, date and time—was extremely important and the abridged version of paragraph (1)(c) was general and ambiguous.

79. The CHAIRMAN said that the draft Guide could be amended to reflect the concerns expressed by the previous speakers.

80. Ms. EKEMEZIE (Nigeria) said that it might be helpful to insert the word "all" before "transmittal" in the abridged version of paragraph (1)(c).

81. Mr. ABASCAL ZAMORA (Mexico) said that the Working Group's version of the subparagraph had allowed for the elimination of superfluous information that occupied a large amount of storage space. It had furthermore established the minimum requirement for a data message to be admissible in evidence. He noted, for example, that some systems did not retain the time and date of transmission. Compliance with the requirement laid down in the new version might be insufficient for the purpose of legal proceedings.

*The meeting rose at 5.05 p.m.*

### Summary record of the 569th meeting

Wednesday, 17 May 1995, at 9.30 a.m.

[A/CN.9/SR.569]

*Chairman:* Mr. GOH (Singapore)

*The meeting was called to order at 9.35 a.m.*

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW (*continued*) (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4)

#### *Article 9 (continued)*

1. The CHAIRMAN said that although there had been overwhelming support for the new version of article 9(1)(c), there seemed to have been some misunderstanding as to the decision taken on it. He understood that when the Working Group had drafted subparagraph (c), it had intended that only essential transmittal information should be retained, but that was not clear from the present drafting, in which the words "including, but not limited to, originator, addressee(s), and date and time of transmission" had been added merely as examples.

2. Mr. MADRID (Spain) said that he understood it had been agreed to amend subparagraph (c), but that it had not been made clear exactly how. He wished to be sure that subparagraph (c) would be amended so as not to require the retention of all additional transmittal information, since otherwise the question would have to be reopened.

3. The CHAIRMAN asked whether the members of the Commission considered it necessary that all the transmittal information associated with the data message should be retained, and if not, what was the minimum transmittal information that should be kept.

4. Mr. SORIEUL (Secretariat) observed that the question had been discussed at length in the Working Group. The main problem was to find a formulation that would not oblige the parties to retain all the transmittal information. There had been consensus in the Working Group that the problem in electronic transmission was that too much information was generated and that information to which no legal significance was attached did not need to be retained. The formulation adopted was intended to ensure that

the essential information—originator, addressee, date and time of transmission—was kept, but it had now been pointed out that some systems did not contain all that information. If the Commission did decide that all the information attached to the message had to be kept, that would be a major departure from the decision of the Working Group.

5. Mr. CHOUKRI SBAI (Observer for Morocco) asked whether the indications "including, but not limited to, originator, addressee(s), and date and time of transmission" would be included in the Guide.

6. Mr. ABASCAL ZAMORA (Mexico) reiterated his previous position and drew attention to paragraph 69 of document A/CN.9/406, the third sentence of which read:

"In addition, it was stated that a clear distinction should be drawn between those elements of transmittal information that were important for the identification of the message and the very few elements of transmittal information (e.g. communication protocols) which were of no value with regard to the data record and which, typically, would automatically be stripped out of an incoming EDI message by the receiving computer before the data record actually entered the information system of the addressee."

It would be quite contrary to the reasoning which had led to the proposed wording of subparagraph (c) if it were now decided to make it obligatory to retain all the information.

7. Mr. GRIFFITH (Australia) considered that article 9(2) covered the point just made by the Mexican representative.

8. As to the point made by Mr. Sorieul about the Working Group's intention, the present drafting did in fact require the retention of all transmittal information, since the Working Group had been unable to identify the particular information that should be retained: the date and time might or might not be in the

transmission, and an absolute obligation to keep date and time could therefore not be imposed. However, it seemed excessive to require the retention of all information even if it was immaterial. He therefore suggested that the information be qualified as "material", with an explanatory footnote in the Guide indicating that "material information" meant details of the originator, addressee, date and time of transmission, if that information was included.

9. Mr. SORIEUL (Secretariat) said that the statement by the Australian representative demonstrated that the present drafting of subparagraph (c) was not satisfactory. Because the wording was "transmittal information" and not "the transmittal information" it was possible to interpret the provision as not creating the obligation to retain all the information. However, it was probably unsatisfactory to base the interpretation on such an obscure distinction.

10. One solution would be to adopt the Australian representative's suggestion. The Working Group had in fact considered the possibility of qualifying the information as "material" or "relevant". Another solution would be to maintain the text and, in response to the United States objection, make it clear that there was an obligation to retain the details of originator, addressee, date and time of transmission only if the message contained that information.

11. Mr. BURMAN (United States of America) suggested that since there seemed to be consensus as to what was intended, the drafting group should be asked to produce a text for the provision and that some of the necessary information might be given in the Guide.

12. The drafting group might also consider a further slight modification to article 9(2), to change "does not enter the information system of, or designated by, the addressee" to "is not normally retained" or "is not normally retained in processing". Normally, a system edited out certain transmittal information, so that the user did not see it. In e-mail, for instance, more information than normally accompanied paper-based transmissions was provided and, as the representative of Mexico had rightly pointed out, an obligation to keep it all might not be desirable. On the other hand, many users had adopted the practice of automatically keeping that information, because it allowed an audit mechanism well beyond what was possible in paper or fax transmissions. However, paragraph (2) was intended to provide a safeguard against having to keep unnecessary information. A reference to "material" information might perhaps be included in the Guide.

13. The CHAIRMAN suggested that the drafting group be requested to redraft the text to make it clear that only material information such as originator, addressee, time and date of transmission should be retained, with an explanation or a footnote that whatever items appeared in the system should be included.

14. Mr. ABASCAL ZAMORA (Mexico) agreed with that suggestion, but stressed that the fact that there was no obligation to keep any information that was not in the system should be made clear in the Model Law itself and not in a footnote.

15. Mr. GRIFFITH (Australia) wondered if the drafting group had the authority to deal with what was in fact a policy issue. It might be more appropriate to set up an ad hoc group of interested delegations to consider the matter.

16. In connection with the Chairman's suggestion, he proposed the following formulation for subparagraph (c): "material transmittal information associated with the data message is retained", with a footnote or another sentence on the following lines: "Material information is constituted by information as to originator, addressee, date and time of transmission and the like which is included in the message."

17. Mr. ANDERSEN (Observer for Denmark) agreed with the Mexican representative that the provision should be made clear in the Law itself, not in a footnote.

18. It would be unwise to settle precisely what the transmittal information associated with the data message was, because it would vary as new systems developed. He therefore proposed that the words "transmittal information associated with the data message" should be replaced by "information necessary to reproduce how the message was transmitted".

19. The CHAIRMAN suggested that an ad hoc group should be set up under the coordination of the representative of Australia to produce a revised subparagraph (c) which would require retention of the necessary information to identify the data message transmitted.

20. Mr. SORIEUL (Secretariat), replying to a question from Mr. Griffith (Australia), confirmed that the Danish proposal was not radically different from the Working Group's concept.

21. Mr. MADRID (Spain) suggested that a minimum requirement be established in order to identify the form in which the message was sent. Any restrictions leaving the door open to new technology should be dealt with as far as possible in a footnote.

22. His delegation would prefer article 9(2) to be redrafted by replacing "... information which is transmitted for communication control purposes but which does not enter the information system" by "information which cannot be stored in the information system", since the information might well enter the system but not be retained there. In that connection the proposal made by the United States representative might be worth considering.

23. Mr. CHOUKRI SBAL (Observer for Morocco) considered that a word such as "basic", "essential", "substantial" or "fundamental" should be used rather than the word "material", which in some languages was not very clear.

24. The CHAIRMAN suggested that the observer for Morocco should join the ad hoc group to work out a suitable text.

25. Mr. BOSSA (Uganda) suggested that since paragraph (2) was closely linked to paragraph (1)(c), the ad hoc group should consider paragraph (2) as well.

26. Mr. BURMAN (United States of America), replying to a question from the Chairman, agreed that his proposal on paragraph (2) should be referred to the ad hoc working group.

27. Mr. SORIEUL (Secretariat) drew attention to a point that should be taken up by the drafting group. The reference in article 9(3) to "the above conditions" was not really satisfactory in a legal text and a more explicit reference to the conditions should be formulated.

#### Article 10

28. Mr. SORIEUL (Secretariat), introducing the article (A/CN.9/406, annex), said that it would be useful if the Commission differentiated in its deliberations between the principle of contractual freedom, namely the extent to which parties could agree derogations to the Model Law, and the question which had been raised previously in connection with article 5, namely whether the Model Law should contain a rule of interpretation indicating how a contract was to be interpreted in cases where the parties had not specifically decided whether to use electronic data interchange (EDI) or a writing or other paper-based technique. They were two quite separate issues.

29. Mr. ABASCAL ZAMORA (Mexico) said that his Government had submitted a proposal (A/CN.9/409/Add.1) to the effect that article 10 be moved from chapter III to its original position in chapter I, so that the principle of party autonomy would apply to any provisions of the Model Law that dealt with situations involving agreements concluded between parties. When the earlier decision to move article 10 to chapter III had been taken, it had not been known whether the sphere of application of the Model Law would be confined to commercial matters. Now that such a limitation had been agreed upon, it was essential, in the interests of removing barriers to trade, that the Model Law should recognize parties' contractual freedom, which was the premise of all commercial law. Otherwise any clauses appearing in EDI communication agreements and defining terms such as writing would be automatically invalidated if they differed from the definitions contained in the Model Law. Concerns had been voiced regarding protection of the rights of third parties. As he saw it, those rights would not be infringed, since the contractual agreement would be binding solely upon the parties to it.

30. Ms. BOSS (United States of America), agreeing with the remarks of the representative of Mexico, said that, according to prevailing practice in her country, interchange agreements contained provisions that dealt with such concepts as writing, original and evidential value within the context of the parties' relationship; those parties alone were bound by their agreement and the rights of third parties were not involved at any stage. If article 10 remained in chapter III, parties' freedom to interpret those concepts would be restricted and a situation of uncertainty would be created in the field of electronic communications.

31. Mr. SCHNEIDER (Germany) said that his delegation strongly supported the idea of moving article 10 back to chapter I, for the reasons given by the representatives of Mexico and the United States of America.

32. Mr. UCHIDA (Japan) said that, as he understood it, the provisions of chapter II were not concerned with the effects of agreements concluded between parties, but with the application of existing legal requirements in a paper-based environment that could be obstacles to trade. The purpose of chapter II was to facilitate the use of EDI, and its provisions did not constitute default rules. It was completely impossible for parties to exclude certain legal requirements from their trade by their own agreement. Article 10 should therefore remain as it stood.

33. Mr. BONELL (Italy) said that his delegation felt that article 10 should be moved back to form part of the General Provisions. That would broaden its scope, but would not allow parties to derogate from well-established rules relating to certain legal acts. That was outside the scope of party autonomy. It would, however, enable parties to avail themselves of the Model Law while allowing them the option of excluding the EDI-equivalent approach and applying the traditional paper-based approach. The original draft wording of article 10, when appearing as article 5 in chapter I, had allowed for the possibility of exceptions.

34. Mr. ALLEN (United Kingdom), agreeing with the view expressed by the representative of Japan, said that the effect of chapter II had not been altered by the limitation of the sphere of application of the draft Model Law to the commercial field. Mandatory requirements, which were intended for the protection of third parties, particularly rules of evidence, applied also in that field. The principle of contractual freedom had not been affected, however. Parties were still fully at liberty within their own contractual relationship to state whether or not a writing meant the use of a data message, but they should not be permitted to alter provisions of national law adopted for reasons of public policy. The provisions contained in chapter II should consequently not be subject to variation by agreement.

35. Mr. GRIFFITH (Australia), agreeing with the representatives of Japan and the United Kingdom, said that if the provisions of article 10 were made to apply to the entire Model Law, parties might mistakenly assume that they had freedom to agree to derogate from rules of law. That was not possible. Parties could, however, by reference to the provisions of chapter II, rely on the terms of the Model Law as altering what would otherwise be the applicable rules of law, since a model law could override rules of law. Moreover, allowing variations to the legal requirements contained in chapter II could affect the rights of third parties. If, at the current stage of consideration of the text, the Commission adopted the approach now being suggested, that would fundamentally change the whole concept of the Model Law. His delegation therefore strongly opposed the proposal made by the representative of Mexico.

36. Mr. MADRID (Spain) said that if the representative of Mexico intended that article 10 should be moved to chapter I without any textual amendment, there could be no objection, since it constituted a general provision. If, however, the intention was to extend its applicability to chapter II, problems could arise, e.g. in cases where a State amended the scope of application of the Model Law to include other fields, as provided for in article 1. Extending the applicability of article 10 to chapter II would also allow parties to modify the concepts of a writing, original, signature, etc., despite the existence of a rule of law. That could not be contemplated. The principle of party autonomy would nevertheless be applicable within the framework of the parties' own contractual relationship, provided that third parties were not involved. The parties to the contract would then have complete freedom to decide how they understood such concepts.

37. Ms. REMSU (Observer for Canada) said that she agreed with the view that the principle of party autonomy should not apply to chapter II. That would enable parties to evade provisions relating to minimum requirements laid down in order to ensure compliance with rules of law. It could create a situation where parties would be able to derogate from certain rules of law in a paper-based environment, but not in an electronic environment. Also, the fact that the scope of application of the draft Model Law had been confined to the commercial sphere did not alter the purpose of the provisions contained in chapter II.

38. Mr. MÄKELÄ (Finland) said that his delegation wished to maintain the principle of media neutrality in order not to allow parties to circumvent the mandatory rules of law contained in chapter II by electing to use electronic forms of communication. He therefore supported the view of those delegations that wished to retain article 10 as it stood.

39. Mr. BROQVIST (Observer for Sweden) said that his delegation fully agreed with what the representative of Finland had just said.

40. Mr. BISCHOFF (Observer for Switzerland) said that his delegation supported the proposal made by the representative of Mexico. Party autonomy should be established as a fundamental principle, as in the Model Law on International Credit Transfers. No rule should be excluded from the benefit of contractual freedom, and the Model Law should allow parties to vary its provisions by agreement. He did not feel it necessary to establish a rule of interpretation for contracts, even for those concluded under the Model Law. That should be left to the national law governing the underlying relationship.

41. Mr. CAPRIOLI (France) said that he also opposed changing the scope of application of article 10 to chapter II. The article should be kept in chapter III, even though the principle of autonomy of will was a basic principle. However, the purpose of chapter II was to eliminate obstacles in terms of validity, admissibility,

writing, evidence, original, signature or storage. To provide for derogation from rules of law would inevitably reduce the substantive scope of such rules, which was why his delegation opposed making any changes to the article.

42. Mr. ABASCAL ZAMORA (Mexico) said that it was not the case, at least in his country, that parties in commercial relations could not make agreements on such matters as evidential weight and value. In matters of trade, that procedure was preferred in Mexico, and parties could come to an agreement on evidential weight that applied exclusively in the commercial area. Placing restrictions on agreements as to evidence might cause problems in international commercial arbitration. With regard to signature, contractual freedom was very important in the banking industry; there were many instances where what had traditionally been required to be done by means of a signature was now being done by other means. The same phenomenon was occurring on the stock exchange.

43. Although the Commission was saying that it wanted to make electronic communication more accessible and to facilitate and promote it, it was actually seeking to place restrictions on electronic communications which did not at present apply to paper communications. Article 10 was very clear: agreements were valid "as between parties". As such, they could not affect the rights of third parties. An example might be the granting of credit, where it was the general rule that the transaction had to be effected in writing. The parties involved might agree, however, that they considered an electronic transfer to constitute a writing, and that agreement would then be valid between them. But obviously, if a third party wanted to bar that credit, because the operation traditionally had to be carried out in writing, its position would not be affected by the agreement between the parties, and accordingly the credit would not have been granted for that third party. While the principle of the autonomy of will was recognized, the rule of commerce was that agreements between the parties could never affect the rights of third parties.

44. The representative of Spain had mentioned the possibility that a State might wish to extend the scope of application to non-commercial areas. That would be easy enough to do if the Guide pointed out that such a State would have to take account of the fact that it would probably be necessary to restrict in some way the principle of autonomy of will.

45. Ms. BOSS (United States of America) said that the main problem raised by those who opposed moving article 10 was that the requirements, particularly of chapter II, were seen as mandatory under their domestic law, and to the extent that they were mandatory under that law, there was quite understandably an objection to allowing the parties to vary them by agreement. On the other hand, there were countries such as the United States and Switzerland in which the requirements of chapter II were not mandatory but could be varied by agreement under the existing law.

46. The dilemma was that if article 10 applied solely to the provisions of chapter III, the result in some countries would be that the parties would lose their present ability to vary certain requirements by agreement. That was why her delegation had supported moving the article, which would have the effect of recognizing that the provisions of chapter II in many jurisdictions were non-mandatory and that therefore the ability to vary them by agreement should be recognized. At the same time, however, she was not suggesting that in those jurisdictions where such requirements were mandatory, they should now be variable by the agreement of the parties. A compromise was possible. If the main concern was the mandatory nature of those provisions under some countries' domestic law, the matter could be dealt with by an exception—for example, article 10 could say that, except to the

extent that the requirements of chapter II were mandatory under domestic law, they might be varied by agreement. That would produce the desired result whether or not article 10 was left where it was.

47. Mr. CHOUKRI SBAI (Observer for Morocco) said he supported previous speakers as to the desirability of retaining article 10 in its present position, since it governed contractual relationships between the originator and the addressee. If it were moved to chapter II, on the other hand, that might nullify the effect of the Model Law. The representative of Mexico had been discussing general principles of commercial law which applied in all countries, but the subject under discussion was a different matter. Under the Model Law, information presented in a data message should be given due evidential weight. Could parties amend a rule of law which governed a writing, signature or original? The purpose of the Model Law was precisely to confer upon a data message a value or weight, and to move article 10 would create both a void and an ambiguity.

48. Mr. ANDERSEN (Observer for Denmark) said he also wished article 10 to be kept in its present position. The representative of the United States had proposed that special exceptions be made in chapter II to make its provisions subject to variation by agreement, but that was not necessary, because articles 5, 6 and 7 were already structured in such a way that legal systems wishing to make exceptions could do so. Legal systems such as those of the United States could bracket those provisions which could be varied by agreement, while others could confine the possibility to chapter III. Even if, under the rules of chapter II, a legal system did not bracket certain provisions as exceptions, the main provisions of the chapter already took into account the fact that there might be specific contractual arrangements between parties: article 6(1)(b) referred to "any agreement", article 7(2)(b) to "all the relevant circumstances" and article 7(2) to "any other relevant factor". As to article 9, however, his delegation was afraid of making it subject to variation by agreement, because it dealt with an individual's obligation towards the public to retain data messages. If it were to be possible to make exceptions to that provision by agreement, it would not be clear whether the parties should be allowed to set aside a legal obligation under administrative law.

49. Ms. ZHANG Yuejiao (China) said that she was in favour of keeping article 10 in its present position, as that would not affect agreement between contractual parties. The draft under discussion was a Model Law, not a mandatory law, and therefore nations could make their own arrangements in accordance with their own national legal systems. Many countries had their own mandatory regulations regarding signatures on paper documents, and keeping chapter II as now drafted would enable the application of the Model Law to be as broad as possible.

50. Mr. SCHNEIDER (Germany) said that if article 10 was left in its present position, it could be read as a rule which stressed, but did not restrict, party autonomy. It was not at all clear whether it applied only to the provisions of chapter III. In supporting the proposals by Mexico and the United States of America, his delegation's intention was not to make domestic rules of law open to variation by party autonomy, but rather to open the principle of equivalence or media neutrality to party autonomy. That would mean that a domestic mandatory rule of law requiring a writing, signature or original would stand and that it would be only from the principle of media neutrality that the parties could agree to depart. For example, parties could state that the contract could be revoked only in writing and not by other means, such as e-mail, fax or EDI. There was no reason why they should not be able to do so. If article 10 were left where it stood, the parties would not be able to depart from the provisions of articles 5 and 9.



51. Mr. VRELLIS (Observer for Greece) said he had difficulty in understanding why the representative of Mexico was proposing to move article 10. Chapter II made a data message equivalent to writing, if a writing was required by a rule of national law. It was not a question of the mandatory nature of chapter II itself, but rather of the mandatory nature of the national law which required a writing. Where such national law existed, party autonomy was already limited; for example, parties could not decide to conclude their contract orally. What, then, did party autonomy mean? Perhaps the parties might say that if they used an electronic communication, they did not want their data messages to be made equivalent to a writing. They could choose not to use electronic communication, but if they did, he did not think their autonomy would really be restricted if they were told that in certain circumstances it would be regarded as equivalent to a writing.

52. Mr. GRANDINO RODAS (Brazil) said that for the reasons given by other speakers, his delegation favoured keeping article 10 in its present position.

53. Mr. GRIFFITH (Australia) said there was another reason beyond that cited by the observer for Denmark as to why there was no difficulty with respect to chapter II in those States where it was possible to derogate by agreement from a rule of law. References in chapter II themselves began with the phrase "Where a rule of law requires . . .". If the rule of law was such that it could be derogated from by agreement of the parties, leaving the article in its present position would not affect the operation of the rule of law in those States, and those few States where there was such capacity for derogation would continue to be able to exercise that capacity and would not be affected by the mandatory operation of chapter II. The principle of derogation should be left where it stood in chapter III.

54. The CHAIRMAN said that the majority of the Commission's members seemed to favour keeping article 10 in its present position. However, a compromise could be considered, by adding a provision to the effect that in those States where a rule of law made it possible for the parties to derogate from the provisions in question, they would be able to do so.

55. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that his delegation thought the article should be kept in its present position but could support the proposal made by the representative of the United States of America.

56. Mr. BONELL (Italy) said that he had difficulty in understanding the position of those in favour of keeping article 10 where it was, since the opponents of the Mexican proposal had themselves stressed that parties were free to agree between themselves whatever they wished. The freedom to vary by agreement only applied "as between the parties", and the provisions in chapter II expressly allowed the possibility of derogation. As the representative of Germany had pointed out, the issue was not the rules of law referred to in articles 5, 6, 7 and 8, which were unaffected by the Model Law, but the use of an electronic form of writing, signature and so forth, in addition to a paper form. He could not see why parties should not be allowed to recognize their equivalence except in specific circumstances.

57. Mr. BURMAN (United States of America) agreed with the representative of Italy. The reason he had brought the question up was that to place article 10 in chapter III could be interpreted as limiting the power of the State to allow the flexibility built into articles 5, 6, 7 and possibly 8, in regard to party autonomy. It might be possible to incorporate a footnote to the effect that "States may extend the right of parties as between themselves to vary the provisions of chapter II".

58. Mr. ALLEN (United Kingdom) said that a provision along the lines suggested by the representative of the United States was

entirely unnecessary, since it could not be said that the Model Law would affect the freedom of countries to allow parties to vary existing requirements of law. Articles 5-8 stated that requirements must be satisfied in a particular way. If articles 5-7 were not applicable because they had been lawfully disapplied, they would then become irrelevant.

59. Mr. ABASCAL ZAMORA (Mexico) considered that it would be unwise to bring out a Model Law concerning which there had not been enough time for thorough discussion. As UNCITRAL always tried to achieve a consensus through compromise, it might be necessary to spend more time on the drafting in order to avoid ending up with an unsatisfactory text that would not attract sufficient support in the various countries. The representative of Italy had correctly summed up his own attitude that the freedom between the parties had to be preserved. The Mexican delegation had never suggested that the parties should be able to derogate from mandatory provisions. In his view, it was simply a question of finding the most suitable wording.

60. Mr. CHAY (Singapore) agreed with the observations made by the representative of Italy. As he understood the matter, those opposing the proposal to move article 10 did so because they thought it would allow parties to contract out of established rules of domestic law. However, he failed to see how that could happen. If, for example, the parties contracted out of article 6, they would still need to satisfy domestic law requirements in regard to the signature.

61. Mr. HERRMANN (Secretary of the Commission) said that the views expressed regarding the interpretation of article 10 were much closer than would appear. The main problem seemed to concern the question of mandatory rules. As he understood it, the mandatory element referred to the minimum requirement. Parties could agree on stricter rules if they wished. On the subject of evidential value, in some countries the relevant provisions were non-mandatory, in others a matter of public policy, and in still others somewhere between. At all events, the Model Law could not change the mandatory character of domestic rules. In his view, the term "rule of law" would include non-mandatory provisions that had not been derogated from and thus became mandatory. The Model Law offered a positive interpretation by allowing other means, providing certain conditions were met. Party autonomy must be subject to certain safeguards: an oral agreement could not be allowed, for example, but an agreement between the parties regarding certain details relating to EDI messages could be accepted. If delegates had different interpretations of what was intended, it might be necessary to clarify article 10 by means of a footnote or a comment in the Guide, but he thought that UNCITRAL should not get into the habit of using footnotes too often.

*The meeting was suspended at 11.50 a.m.  
and resumed at 12.15 p.m.*

62. The CHAIRMAN said that most representatives seemed to take the view that article 10 should remain where it was. He reminded the Commission that it had agreed not to alter decisions arrived at in the Working Group unless there was overwhelming support for a change. It appeared that those opposing the Mexican proposal were not against domestic legislation allowing party autonomy in regard to the provisions contained in chapter II. In response to the concern expressed by the representative of the United States that leaving article 10 where it was might be interpreted as meaning that the parties could not by agreement vary articles 6, 7 and 8, he suggested that a possible solution might be to add a new paragraph (2) to article 10 formulated as follows: "Nothing in this article shall be construed as preventing any variation of other rules as permitted under national law", or other wording to that effect.



63. Mr. BONELL (Italy) said he was entirely in agreement with the Secretary. He would accordingly suggest that article 10 be deleted as being unnecessary. In substance, both chapter II and chapter III already contained the possibility, where appropriate, of a different agreement between the parties, and where no such provision existed, it could be assumed that the parties could not derogate from the article concerned unless domestic law provided otherwise. In his view, whether article 10 were included or excluded, placed in its present position or elsewhere, would not change the situation in substance.

64. Mr. ANDERSEN (Observer for Denmark) proposed that it should be left to the Secretariat to reflect the consensus in the Commission in the Guide to the Model Law. As he understood it, the consensus reached was to the effect that variation by agreement could apply to certain aspects of certain provisions in chapter II. Regarding the proposal put forward by the representative of Italy, it was true that article 10 was redundant in relation to chapter III as well as to certain provisions of chapter II. But, from a structural point of view, such redundancy had become the style of the Model Law. It could, for example, be found also in article 4, in which a principle was stated that was subsequently established in following provisions. In his view, however, it was important to tell the reader of the Model Law that interchange agreements were needed when dealing with EDI.

65. Mr. ABASCAL ZAMORA (Mexico) said that there was a basic consensus in the Commission to the effect that party autonomy could be permitted so long as the contractual agreements did not infringe mandatory provisions. He suggested that the drafting group be asked to give effect, either by relocating the article or adding some new text, to that consensus, which should be clearly expressed in the law itself, not in the Guide or in a footnote.

66. Mr. BURMAN (United States of America) expressed his support for the Danish proposal and his opposition to the deletion of article 10, which would amount to a fundamental change.

67. The CHAIRMAN said that there were three proposals before the Commission. The first, by the representative of Italy, was to delete article 10 entirely, it being understood that, if that proposal was adopted, some consequential changes might be necessary to other articles in chapter III. The second, by the observer for Denmark, was to state in the Guide the consensus reached by the Commission in regard to article 10, which would remain as it was. The third, suggested by the representative of Mexico, was to ask the drafting group to see that article 10 reflected the consensus reached during the present discussion.

68. Mr. ALLEN (United Kingdom) said that the implications of the Danish proposal were unclear. The observer for Denmark had not explained what he thought the consensus reached by the Commission actually was.

69. The CHAIRMAN said that, according to the Danish proposal, article 10 would remain as it was and that the Guide would state that the parties to an agreement had autonomy to change the provisions in chapter II in so far as domestic legislation allowed them to do so.

70. Mr. GRIFFITH (Australia) considered the third option to be impossible. The drafting group could not be asked to resolve issues that the Commission had been unable to resolve itself. The Commission itself would have to deal with them.

71. Mr. BONELL (Italy) said he still found it difficult to understand the second option. In his view, the consensus in the Commission was that parties could derogate here and there from what was stated in the Model Law, which was intended to allow electronic means to be used for certain documents traditionally in paper-based forms. The Secretary had been right to assert that the differences in substance were not great, but if everything were referred to domestic law, the parties might even be allowed to exclude a rule of law imposing an agreement in writing. That would be unacceptable. As he saw it, the Commission was trying to come up with a uniform law in the form of a Model Law.

*The meeting rose at 12.35 p.m.*

### Summary record of the 570th meeting

Wednesday, 17 May 1995, at 2 p.m.

[A/CN.9/SR.570]

*Chairman:* Mr. GOH (Singapore)

*The meeting was called to order at 2.10 p.m.*

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW (*continued*) (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4; A/CN.9/XXVIII/CRP.6, A/CN.9/XXVIII/CRP.7)

#### *Article 10 (continued)*

1. The CHAIRMAN reminded the Commission of the Italian proposal made at the previous meeting to delete article 10, which would require consequential changes in other articles in chapter III, and the proposal by Denmark to insert a provision in the Guide to the effect that the members of the Commission agreed that article 10 did not require States whose domestic legislation allowed parties to exclude the operation of any of the rules in chapter II to change their existing practice. There was also a proposal from Mexico, which he asked the representative of that country to clarify further.

2. Mr. ABASCAL ZAMORA (Mexico) said that there seemed to be general agreement that party autonomy should be permitted but that the right of parties to vary provisions by agreement could not extend to mandatory provisions of domestic law. Rather than the existing drafting group, perhaps a small ad hoc drafting group could be set up and asked to seek a form of words making it possible to implement that agreement.

3. Mr. BONELL (Italy) said he did not believe that deletion of article 10 would require any consequential changes.

4. Regarding the Danish proposal, what was being adopted was a Model Law and he saw little sense in stating in a separate document that States were free to adopt arrangements different from the provisions of article 10.

5. Mr. SORIEUL (Secretariat) said that, without wishing to prejudice any decision of an ad hoc drafting group, he would like to suggest that a second paragraph might be added to article 10 on the following lines: "Paragraph (1) of this article is not intended to deal with any rights of the parties to vary any rule outside the provisions of this chapter".

6. Mr. BURMAN (United States of America) and Mr. ANDERSEN (Observer for Denmark) welcomed that suggestion.

7. The CHAIRMAN suggested that the matter be referred to a small ad hoc group led by the United States delegation, to work out a new text along the lines just proposed.

8. *It was so agreed.*

#### Article 11

9. Mr. SORIEUL (Secretariat) said that the text of article 11 in the annex to document A/CN.9/406 had raised problems. The delegations of Australia, the United Kingdom and the United States had prepared a new draft of the article, appearing in document A/CN.9/XXVIII/CRP.7, which was now before the Commission. He wished only to mention in that regard that the term "reasonable notice" in the original English version of paragraph (4) of the proposal posed translation difficulties.

10. Mr. GRIFFITH (Australia) said that it might be slightly overstating the case to say that his delegation was one of the authors of the proposal, but he supported the text, which stated more positively and openly what had been the intention of the Working Group's text. However, paragraph (3)(a)(ii) of the new draft, which enabled the addressee absolutely to regard a message as that of the originator if that were reasonable in the circumstances, did raise the policy question whether it was appropriate to enable an addressee to regard a data message as being that of the originator as against an originator who might in fact have absolutely no connection with the message. It was true that paragraph (3)(b) provided for the liability of an originator in enabling a person to gain access to a method used to identify the message, which seemed to be a perfectly appropriate basis for the assignment of responsibility. But he would be interested to hear the views of other delegations on whether it was appropriate that a person be regarded as originator merely because the addressee could in the circumstances say that it was reasonable for him to apply a particular procedure.

11. Ms. BOSS (United States of America) agreed that that was an important policy issue. However, paragraph (3)(a)(ii) of the new draft had been included because there was a similar provision in the draft approved by the Working Group.

12. The purpose of the draft presented in document A/CN.9/XXVIII/CRP.7 was mainly to reorganize the substance of the former article 11. Paragraphs (1) and (2) were taken from the former paragraph (1) and merely restated what would be the outcome in nearly all jurisdictions—namely, that an originator was bound by the messages that he sent, and by the actions of his agents. Paragraph (3) consolidated what was said in two paragraphs of the Working Group's text. It dealt with three situations; the first was that in which an agreed security procedure was followed, and in that circumstance the addressee could regard the data message as being that of the originator. The phrase "an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption" attempted to clarify the intention of the phrase in paragraph (3) of the Working Group's text containing the alternative "[deemed] [presumed]". The second situation was that where a message came from a person who had gained access to the system by reason of a relationship with the originator. The basic principle was that the sender of a

message was responsible for adequate security regarding its system, so that the addressee of any message generated by such other person would be entitled to regard that message as being that of the originator. The third situation, which involved the point raised by the Australian delegation, was that in which the addressee used security procedures that were reasonable under the circumstances.

13. Paragraph (4) and its two subparagraphs stated that the addressee must not regard a message as coming from the originator if he knew or should have known that it came from elsewhere or had received reasonable notice to that effect. "Reasonable notice" meant that the addressee must have sufficient time to respond to such notification.

14. Paragraphs (5), (6) and (7) dealt with two situations, one in which there was an error in the message and one in which there was an erroneous duplicate message. Those paragraphs merely restated what had already been decided by the Working Group.

15. Mr. ABASCAL ZAMORA (Mexico) welcomed the proposed amendment submitted by the delegations of Australia, the United States and the United Kingdom and thanked the representative of the United States for her explanation.

16. He noted that it was customary procedure, especially in EDI, for there to be a prior agreement between the parties about the manner in which the authenticity of a message could be verified, which was covered by paragraph (3)(a)(i). However, it had been noted in the Working Group that there were open EDI systems and it was increasingly common that messages could be received from persons with whom there had been no previous agreement on identification procedures. It was therefore necessary to find a solution to that problem. The procedure followed in his country was to take as a basis the Model Law on International Credit Transfers, in which the assumption was accepted that messages could well come from persons with whom no communication protocol had been previously agreed. He therefore favoured the retention of paragraph (3)(a)(ii).

17. Mr. CHOUKRI SBAI (Observer for Morocco) welcomed the proposed amendment of article 11 as being clearer than the original text. He agreed with the remark of the Secretariat regarding the term "reasonable notice". Perhaps the wording "received notice within a reasonable time period" or "... reasonably timely notice" could be used.

18. Mr. SCHNEIDER (Germany) welcomed the proposed amendment to article 11 but thought that the policy behind paragraph (3)(a)(ii) was not at all convincing. To take an example, if a person's name was used as that of the originator, it would be very difficult to prove the facts if an addressee received a falsified data message. He opposed acceptance of paragraph (3)(a)(ii).

19. Mr. BONELL (Italy) said he took it, on the basis of the definition in article 2(a) of the Working Group's draft, that data messages also included telegrams and telexes. If that was the case, what were the implications of paragraph (3) of the proposed new text for article 11 in respect of telegrams? Was the receiver of a telegram entitled to consider it as emanating from the apparent sender only if he had applied a procedure previously agreed between him and that sender?

20. With respect to EDI, he found it difficult to understand paragraphs (4)-(7) of the proposed new text. They dealt basically with errors in transmission of messages, and that involved contract law. In the new text, there were really three similar situations that were dealt with differently: the case in which there was some question as to whether the message was to be regarded as from the originator; the case of an error in the content of the message; and the case of duplication. In the first of those cases,

the proposal would entitle an originator at any time to give notice in order to disown and nullify a message. That was a new concept that caused him concern. He would welcome clarification.

21. Mr. ANDERSEN (Observer for Denmark) said that one of the reasons why a new law was needed was that electronic communications, unlike telegrams which were delivered by a single postal service, had no fixed framework: they could be transmitted between two individuals with computers. There was thus need to rewrite many of the assumptions underlying the law governing traditional communications, and that was not an easy process. He found the proposed new text of article 11 well drafted, but was concerned that the revised paragraph (6) seemed to have moved away from the original provision that the recipient would be entitled to act on an erroneous message only if he had no reasonable knowledge of the error.

22. Mr. MADRID (Spain) shared the view of the Mexican representative that the concept of using a reasonable procedure to determine whether a message originated from a given person should be retained, since it reflected existing practice. Paragraph (3)(a)(ii) should be considered in conjunction with paragraph (4)(b), which provided that if the addressee knew, or should have known, that the message was not that of the originator, paragraph (3)(a)(ii) did not apply.

23. He suggested that a further limitation should be introduced in paragraph (4)(a) by an addition along the following lines: "unless the addressee proves the contrary". The issue should be seen as linked to article 12 concerning acknowledgement of receipt.

24. Mr. BURMAN (United States of America) said the issue now under consideration had been discussed at great length in the Working Group, and the Group's conclusions had been made known to successive plenary sessions of the Commission. In his view, it was inappropriate at the present stage to try to return to basic issues, such as why the Model Law should be covering areas that might be considered as coming within the field of contract law. The Commission should limit itself essentially to making drafting improvements.

25. Ms. BOSS (United States of America), on the question of the relationship between article 11 and contract law in general, pointed out that not all data messages led to the creation of contracts. Article 11 was applicable far beyond the bounds of contract law. However, every effort had been made to avoid conflict between the Model Law and contract law.

26. A question had been raised regarding the possibility for a purported originator to deny a message under paragraph (4)(a). She wished to point out that article 11(1) made it clear that a data message was that of the originator if it was sent by the originator, implying that, once sent, the originator could not disown it. Paragraph (4) did not affect paragraph (1) or paragraph (2). Thus, if an originator, or his agent, sent a message, no disavowal was possible under article 11. Disavowal was limited to the situation provided for under paragraph (3), which in that regard was unique.

27. A further question had been whether the three types of error listed, relating respectively to the originator, to content, and to transmission, were in fact parallel. Where distinctions were made, it was for a good reason; thus, should it occur that one firm notified another that there had been a breach of security, and that in fact it was no longer the originator of data messages purporting to come from it, paragraph (4)(a) was crucial, since it provided that, once notification had been received, the addressee must disregard future data messages. The reason notification had been treated separately was that it related primarily to agreed security procedures, which were part of common practice in electronic commerce.

28. Mr. UCHIDA (Japan) said he considered paragraph (1) unnecessary, since it was already covered by the definition of "originator" in article 2. Since the text would have to be translated into Japanese, he would appreciate an explanation of the difference between "deemed" and "is entitled to regard".

29. The original text of article 11 and the new draft text presented the same difficulty, in that an addressee who had applied an agreed identification procedure could be protected even when he knew, or should have known, that the message was not from the originator. He therefore suggested that the case provided for under paragraph (3)(a)(i) of the new proposal should also be covered by paragraph (4)(b).

30. Mr. GRANDINO RODAS (Brazil) supported the proposed text.

31. Ms. REMSU (Observer for Canada) said she was concerned as to the possible impact of article 11 on third parties, who might be held liable even if they had no connection with the addressee or the originator. She suggested that in paragraph (3)(a)(i) the phrase "bearing in mind the relationship between the addressee and the originator" might be added.

32. Mr. BONELL (Italy) said it had not been his intention to reopen the debate on basic issues: he had simply been concerned to ensure that the Commission was clear as to the meaning of provisions before adopting them. As he saw it, the proposed new text was fundamentally different from the original article 11, which had come within the framework of contract law in that an addressee could challenge the authenticity of a message only if he was in a position to discover the error. The original text of article 11 made no provision for the originator to notify an error, and thereby nullify his original message. In addition, the proposed paragraph (6) provided that paragraph (5) should not apply "at any time" in the circumstances set out. He wondered why that was proposed, and whether the Commission was aware of the implications of the new provision for telegrams, telexes and faxes.

33. The CHAIRMAN said the Italian representative's concern might perhaps be met if, when the Commission came to consider the definition of a data message, it excluded telexes or telegrams transmitted via the postal services.

34. Mr. ABASCAL ZAMORA (Mexico) supported the Japanese proposal that paragraph (4)(b) should be extended to cover paragraph (3)(a)(i).

35. Mr. ALLEN (United Kingdom), referring to the representative of Italy's argument that the notice mentioned under paragraph (4) could nullify the right of the addressee to rely retrospectively on a data message, said that that was not the authors' intention, nor was it, he thought, the effect of the language. The words "at any time when" had been deliberately chosen rather than words such as "in a case where". The intended purport was that the addressee's entitlement to rely on the data message as being that of the originator would cease on receipt of the notice but that his entitlement to rely on it up to that point would be unaffected. Paragraphs (4) and (6) referred back to previous paragraphs entitling the addressee to rely on the message up to the point in question.

36. In response to the suggestion by the representatives of Japan and Mexico that paragraph (4)(b) should apply to the circumstances referred to in paragraph (3)(a)(i), he said that such a provision seemed unnecessary inasmuch as paragraph (4)(b) would not be applicable if the addressee had properly applied an agreed procedure, thus exercising reasonable care.

37. As to why paragraph (1) had been separated from paragraph (2) and the word "deemed" changed to "is", it was felt that "deemed" did not make sense in the case of a data message actually communicated by the originator. Paragraph (1) could perhaps be deleted but it seemed to have some value as a definition of what was meant by a data message being that of the originator.

38. He felt that the suggestion of the representative of Spain to insert the words "unless the addressee proves the contrary" in paragraph (4)(a) was unnecessary because, if the addressee could prove independently that the data message was that of the originator, the case would fall under paragraph (1).

39. Paragraph (3)(a)(ii) had been included in deference to what appeared to be the desire of the Working Group. He felt that the flexibility embodied in the words "reasonable in the circumstances" might well be sufficient to justify the retention of the subparagraph. However, an alternative would be to have a new paragraph dealing with the case in question and perhaps enact a presumption to apply as between the originator and the addressee in those circumstances.

40. The difference between saying that a data message was "deemed to be that of the originator" and saying that an addressee was "entitled to regard it as that of the originator and to act on that assumption" related essentially to the time problem. In the former case, it might mean that the message was deemed for all time to be that of the originator; in the latter case, the addressee's actions were protected until such time as he received notice or should have known that the message was not that of the originator.

41. Ms. BOSS (United States of America) said that two crucial policy issues had been raised. The first related to the proposal by the representatives of Japan and Mexico to make paragraph (4)(b) applicable to instances in which an agreed security procedure was followed. That would amount to a policy change with respect to article 11 as approved by the Working Group and one which she viewed as quite inappropriate. Paragraph (4)(b) dealt in part with situations where an addressee should have known that a message was not that of the originator if it had applied an agreed security procedure, and paragraph (3)(a)(i) came into play only where the agreed security procedure had been used. On the other hand, the imposition of an additional standard ("knew or should have known had it exercised reasonable care") would render the security procedures negotiated by the parties meaningless.

42. The second policy issue concerned paragraph (3)(a)(ii), which provided for the application by the addressee of a security procedure that was "reasonable in the circumstances". That was a problematic provision, because if there was no agreed security procedure a "hacker", for example, might send a message purporting to come from someone else. In her view, the alternatives were either to delete paragraph (3)(a)(ii) or to deal with the situation in a separate paragraph setting out the circumstances in which an originator could overturn reliance on a data message by an addressee. The latter option would certainly require a lengthy discussion of the wording of the paragraph. She would therefore favour deleting paragraph (3)(a)(ii).

43. Mr. UCHIDA (Japan) said that he still felt it was reasonable to apply paragraph (4)(b) to paragraph (3)(a)(i) because, if the addressee knew that a data message was not that of the originator, it would be unfair to insist that the originator should be bound by the message. Such a consequence would be unavoidable if the text were left as it stood.

44. Mr. AL-ZEID (Observer for Kuwait) asked why the heading "Attribution of data messages" had been omitted from the proposed new version of article 11.

45. He suggested that the words "to act on that assumption" in paragraph (3) should be amended to read "to act accordingly".

46. The wording of paragraph (6)(b) was unclear, at least in the Arabic version, and should be revised in the interest of clarity.

47. The CHAIRMAN said that, if he heard no objection, he would take it that delegations wished to base the discussion on the version of article 11 contained in paper A/CN.9/XXVIII/CRP.7. The discussion would proceed on a paragraph-by-paragraph basis.

*The meeting was suspended at 3.50 p.m.  
and resumed at 4.15 p.m.*

48. Mr. GRIFFITH (Australia) proposed that the heading "Attribution of data messages" used in the Working Group's version of article 11 should be retained.

49. *It was so agreed.*

50. *Paragraphs (1) and (2) were adopted.*

51. The CHAIRMAN drew attention to paragraph (3) and asked whether delegations wished to delete paragraph (3)(a)(ii).

52. Mr. BONELL (Italy) said that his decision would depend on whether the scope of article 2(a) of the draft Model Law remained unchanged. If it still covered such means of communication as telegrams and telexes, paragraph (3)(a)(ii) of article 11 would have to be retained, as there was no previously agreed procedure for dealing with those two means.

53. The CHAIRMAN said that for the time being the assumption was that article 2(a) remained unchanged. An amendment thereto could subsequently be proposed.

54. Mr. ABASCAL ZAMORA (Mexico) observed that the content of paragraph (3)(a)(ii) had been approved by the Working Group.

55. The CHAIRMAN, after inviting delegations to indicate their attitude, noted that there was insufficient support for the deletion of paragraph (3)(a)(ii).

56. *Paragraph (3) was adopted.*

57. The CHAIRMAN invited comments on paragraph (4).

58. Mr. ANDERSEN (Observer for Denmark) asked for clarification of the words "reasonable notice" in paragraph (4)(a). Could such notice be given at any time? If that were the case, the subparagraph implied the existence of a *negotium claudicans*, an agreement that was binding on one party but not on the other.

59. Mr. MADRID (Spain) said that, in the light of the explanation given by the representative of the United Kingdom, he was withdrawing his proposal to add the words "unless the addressee proves the contrary" to paragraph (4)(a). However, he felt that some clarification of what was a very complex provision should be included in the Guide. The United Kingdom representative had also explained that the addressee would be entitled to act on the assumption that a data message was that of the originator until such time as the originator had given notice to the contrary. That clarification might also be included in the Guide.

60. Mr. CHOUKRI SBAI (Observer for Morocco) said that, at least in the Arabic version, it was important that the notion of time should be incorporated in the expression "reasonable notice".

61. Ms. BOSS (United States of America) said there were two aspects to the notion of reasonable time embodied in

paragraph (4)(a). First, as the United Kingdom representative had pointed out, notice had to reach the addressee before the latter relied on the message, otherwise it would be ineffective. Secondly, in many cases where EDI was used, computers were programmed to respond to a data message immediately it was received. Where a message had been transmitted in breach of the originator's security system, a telephone call made by the originator to the addressee to warn the latter of the fact might not—assuming the addressee to be a large company whose switchboard had to pass the call on to a member of its staff—reach the appropriate person in time for the addressee's system to be shut down or reprogrammed. For that reason, trading partner agreements involving the use of EDI invariably provided that the originator should give the addressee notice of a spurious message in sufficient time for the latter to alter its programmes. That situation might be catered for in the text of paragraph (4)(a) by the use of the expression "timely notice", "sufficient notice" or "sufficient and timely notice" and it should be dealt with in the Guide as well.

62. Mr. ANDERSEN (Observer for Denmark) said that, for him, "reasonable notice" meant "fair notice". He would prefer the text to speak of "immediate notice" or "prompt notice", so as to emphasize the temporal aspect of the situation rather than fairness.

63. Mr. BONELL (Italy) agreed with the United States representative that the matter should be explained in the Guide.

64. Mr. GRIFFITH (Australia) endorsed the comment made by the Danish representative. He suggested that the expression "reasonable notice" should be replaced by "reasonable and prompt notice".

65. Mr. ALLEN (United Kingdom) opposed the suggestion to use a word such as "prompt" or "timely", because the originator might be unaware that a message purporting to be its own had been sent to the addressee. The relevant time was that which elapsed after receipt of notice by the addressee.

66. Mr. SCHNEIDER (Germany) said that the originator could not be expected to give the addressee notice of a spurious message unless and until it knew that such a message had been sent. His delegation favoured the use of the words "prompt notice".

67. Mr. CHOUKRI SBAI (Observer for Morocco) proposed the deletion of the word "reasonable".

68. Ms. BOSS (United States of America) said that her delegation believed that by and large the Commission understood "reasonable notice" to mean notice given in time sufficient to allow the addressee to act. She therefore proposed the deletion of the word "reasonable" and the insertion, at the end of paragraph (4)(a), of the words ", in time sufficient to allow the addressee to act" after the words "of the originator".

69. Mr. BONELL (Italy) said that he found the language of the suggested insertion unsuitable for a statutory text. The matter should be dealt with in the Guide.

70. Mr. ABASCAL ZAMORA (Mexico) welcomed the United States proposal. It had the advantage of being couched in language which occurred in the Model Law on International Credit Transfers in regard to notice of revocation of a payment order.

71. The CHAIRMAN said that, if he heard no further objection, he would take it that the Commission approved paragraph (4)(a) of the three-nation proposal (A/CN.9/XXVIII/CRP.7) as amended by the United States.

72. *It was so agreed.*

73. The CHAIRMAN invited comments on paragraph (4)(b).

74. Mr. MADRID (Spain) recommended a careful scrutiny of the text from the drafting aspect.

75. The CHAIRMAN drew the Commission's attention to the proposal made by Japan, that the scope of paragraph (4)(b) should be extended to cover paragraph (3)(a)(i). After inviting delegations to indicate their attitude, he noted that there was no broad support for that proposal and therefore took it that the Commission approved paragraph (4)(b) as it appeared in document A/CN.9/XXVIII/CRP.7.

76. *It was so agreed.*

77. *Paragraph (4) as a whole was approved.*

78. The CHAIRMAN said that paragraph (5) seemed to be acceptable. He invited comments on paragraph (6).

79. Mr. BONELL (Italy) said that, bearing in mind the qualification relating to time for notice which the Commission had included in paragraph (4)(a), it would be logical to insert a similar qualification in paragraph (6). However, his delegation would prefer instead to delete the words "at any time" from the introductory wording, as well as the words "has been notified by the originator or" in subparagraph (a); and then to combine the two subparagraphs to read: "knew or should have known that there were any errors in the process of transmission, had it exercised reasonable care or used any agreed procedure to ascertain the presence of any errors in transmission".

80. Mr. ANDERSEN (Observer for Denmark) said that the text should make clear the need for prompt notice. He therefore suggested either that the words "immediately after receipt of the data message" should be inserted in paragraph (6)(a) after the word "transmission", or that the paragraph should be modified along the lines of the wording approved for paragraph (4)(a).

81. Mr. CHOUKRI SBAI (Observer for Morocco) said that the words "at any time" did not appear in the French version of the three-nation proposal and perhaps had no substantive import.

82. Ms. BOSS (United States of America) said that she could not speak for the other sponsors of the three-nation proposal, but that her delegation would not object to the changes suggested by the representative of Italy. The question of notice was less important in relation to paragraph (6) than it had been in paragraph (4), and in any case the idea of notice was subsumed in the words "knew or should have known that there were any errors"; moreover, the text proposed by Italy would be consistent with paragraph (7). If the Italian proposal was adopted, the words "at any time" should be removed from paragraph (4)(b) as well.

83. Mr. ALLEN (United Kingdom) said that the words "at any time" had been included in paragraph (6) because it was important to make clear that paragraph (5) would cease to apply only from the time when the addressee was notified of the error or knew or should have known of it. An alternative way of dealing with the point would be for the text to say "after the addressee has been notified or it has or should have come to his knowledge that there were any errors".

*The meeting rose at 5.05 p.m.*

## Summary record of the 571st meeting

Thursday, 18 May 1995, at 9.30 a.m.

[A/CN.9/SR.571]

Chairman: Mr. GOH (Singapore)

*The meeting was called to order at 9.40 a.m.*

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW (*continued*) (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4; A/CN.9/XXVIII/CRP.6, A/CN.XXVIII/CRP.7)

Article 11 (*continued*)

1. The CHAIRMAN reminded participants that, with respect to article 11, paragraph (6), in the version to be found in document A/CN.9/XXVIII/CRP.7, there had been a suggestion that the words "at any time" in the *chapeau* be deleted and another proposal that the paragraph be amended to read "Paragraph (5) shall not apply when the addressee knew that there were any errors in the process of transmission immediately after receipt of the data message".
2. Mr. ALLEN (United Kingdom) said that the representatives of Australia and the United States of America had joined him in trying to find a form of words that would obviate the need for the phrase "at any time", about which certain representatives had expressed concern. The purpose of the paragraph was to make clear that the addressee could rely on the data message up to the time of notification or knowledge, but not thereafter. They proposed the following text for paragraph (6): "The addressee is not so entitled when it knows or should know, by exercising reasonable care or using any agreed procedure, that the transmission resulted in any error in the content of the data message as received". That wording was intended to replace the whole of the existing paragraph (6). Similar amendments would be needed to paragraphs (4)(b) and (7). For paragraph (4)(b) he suggested the following wording: "In a case within paragraph (3)(a)(ii) or (3)(b), when the addressee knows or should know, by exercising reasonable care or using any agreed procedure, that the data message is not that of the originator". A corresponding formulation would be needed for paragraph (7).
3. The CHAIRMAN asked what the words "not so entitled" referred to in the new wording for paragraph (6).
4. Mr. BONELL (Italy) said that the new text, which his delegation had helped to prepare, was intended to form a second sentence of paragraph (5) rather than a separate paragraph.
5. Mr. CHOUKRI SBAI (Observer for Morocco) observed, firstly, that the former wording of paragraph (6) provided that "paragraph (5) shall not apply . . .", a reference that had been deleted in the new text. He asked whether it was intended to eliminate paragraph (5). Secondly, paragraph (6)(a) raised an important point regarding notification by the originator of an error in transmission, a point which appeared to be absent from the new text.
6. Mr. RENGGER (Germany) noted that the United Kingdom's amendment to paragraph (4)(b) referred to paragraph (3)(a)(ii). However, it was his impression that no decision had yet been taken in regard to paragraph (3)(a)(ii).
7. The CHAIRMAN said that it had been decided at the previous meeting to retain paragraph (3)(a)(ii) because there had not been enough support for its deletion.

8. Mr. RENGGER (Germany) said that that had not been his understanding. There had been a split in opinion, and it had been his understanding that the final decision in regard to paragraph (3)(a)(ii) had been deferred. He agreed with the observations made on the subject by the representative of the United States. The paragraph in question was the most revolutionary in the entire Model Law and needed to be further discussed. His country was deeply concerned about the paragraph, which had nothing to do with EDI and modified the basic principles of German contract law.

9. The CHAIRMAN said that, although his own notes showed that a decision had in fact been taken on paragraph (3)(a)(ii), it would be possible, after consideration of article 11 and the definitions in article 2, to reconsider the decision in respect of paragraph (3)(a)(ii).

10. Mr. BONELL (Italy) said that he had understood that it would be possible to reverse the decision on paragraph (3)(a)(ii) in the light of any new decision regarding the scope of the Model Law. It would therefore be necessary to return to that subparagraph after "data message" had been defined in article 2. As far as the suggested amendments to paragraphs (4)(b), (5), (6) and (7) were concerned, the new language was not intended as a substantive change. The new wording for paragraphs (5) and (7) was simply to bring them more into line with paragraph (4)(b). Paragraph (5) would have two sentences instead of only one as at present and paragraph (6) would disappear. The reference to notification by the originator would be deleted, firstly, because there was no reason why the originator should be able to give such notification "at any time", when paragraph (4) was much more restrictive, and secondly, because it was preferable to adopt uniform criteria for the three situations covered by paragraphs (4)(b), (5) and (7), in conformity with the United Nations Convention on the Contracts for the International Sale of Goods and certain other instruments that dealt with problems such as errors in transmission.

11. Mr. BURMAN (United States of America) agreed with the representative of Italy that the same approach should be taken in the three provisions. He would not want the text to inadvertently give the impression that a difference in treatment was intended.

12. Mr. ALLEN (United Kingdom) proposed the following text for paragraph (7): "The addressee may regard each data message received as a separate data message and may act on that assumption unless it repeats the content of another data message and the addressee knows or should know, by exercising reasonable care or using any agreed procedure, that the repetition was a duplication, and not the transmission of a separate data message."

13. Mr. PELICHET (Observer for The Hague Conference on Private International Law), referring to article 11, paragraph (8), in document A/CN.9/XXVIII/CRP.7, said that the last five words of that paragraph, "and any other applicable law", caused a major problem for his organization. The Model Law would apply when in a conflict of law the ruling of the judge designated a State that had incorporated the Law into its national system. But that system



would then be fully applicable. There could be no question of "other applicable laws". In his view, the last five words should be deleted. Indeed, he thought that paragraph (8) as a whole was superfluous.

14. Mr. BONELL (Italy) agreed with the previous speaker. There were other potential problems. If, for example, a State were to make use of the second footnote at the very beginning of the Model Law and limit its application to data messages relating to international commerce, the question might arise as to what law was applicable and whether States might not wish to include special conflict-of-law rules, one of which might be implicitly envisaged in paragraph (8). If the Commission wished to explore that question, it should perhaps do so in a footnote. Attention would then also have to be paid to article 3, paragraph (2), which requested judges and arbitrators to try to solve problems not settled by the Model Law itself by applying the general principles on which it was based before resorting to another law in the same legal system or to a foreign law. That was a complicated area which, in his view, the Commission should not enter. It would be preferable to delete paragraph (8) altogether.

15. Mr. ABASCAL ZAMORA (Mexico), referring to the policy position underlying paragraph (8), said that when the Model Law had been drafted, it had been decided to produce a law that would be limited to regulating data messages and associated problems. It had subsequently been realized that the Model Law would need a provision setting out the conditions under which a data message could be considered as issued by the originator so that the addressee would be able to consider it as having the value of a signed document. The Model Law did not deal with the legal effect that such a message might have in the context of the law of obligations and contracts. It was possible that it might be necessary to adjust the wording in order to bring out the original intention and avoid unwanted interpretations.

16. Mr. BURMAN (United States of America) agreed with the representative of Mexico as to the reasons for the inclusion of paragraph (8). He did not consider any further amendments necessary and disagreed with the representative of Italy and the observer for the Hague Conference, who were raising problems of conflict of law with which the Law was not directly concerned. He saw no inconsistency with article 3 or with the second footnote. Paragraph (8) served its purpose and was appropriate.

17. Mr. CHOUKRI SBAI (Observer for Morocco) endorsed the point made by the observer for the Hague Conference. He proposed that paragraph (8) should be reworded as follows: "Any further legal effect of the data message shall be determined in accordance with the provisions of this Law and any other general rule or standard".

18. Mr. VRELLIS (Observer for Greece) also supported the point made by the observer for the Hague Conference. Paragraph (8) solved no problems, was hard to interpret and could be deleted without difficulty. Moreover, it would be difficult to deal with the question of conflict of law at the present stage of the Commission's deliberations, even in a footnote, since it was a difficult subject and would involve lengthy discussion.

19. Mr. RENGGER (Germany) asked whether the words "may regard" in the text proposed by the United Kingdom representative for paragraph (7) could be interpreted as meaning that the addressee had a choice.

20. Mr. ALLEN (United Kingdom) explained that the meaning was that "the addressee is entitled to regard", and suggested that that wording should be adopted.

21. Mr. SORIEUL (Secretariat) explained that paragraph (8) had been included merely to reaffirm that the purpose of the

Model Law was to deal with the transmission of information in the form of a data message, and not with the substance of a contract or order contained in that message, which might be covered by contract law or other provisions of commercial law.

22. Mr. ALLEN (United Kingdom) agreed with the observer for the Hague Conference and the representative of Italy that paragraph (8) could be deleted. It was unnecessary and confusing, since it implied that article 11 was intended to deal with the legal effect of a data message, whereas it was not. The data message might have no legal effect at all and might simply be an enquiry about goods. The sole purpose of article 11 was to decide the circumstances in which a message was directed to the originator and the circumstances in which the addressee could safely rely on that assumption.

23. Mr. SHIMIZU (Japan) agreed that paragraph (8) had been included to make it clear that article 11 was not intended to interfere with the laws of contract or agency. However, his impression was that the text adopted the previous day had the effect of doing so when it applied to the contractual relationship between originator and addressee. It might be helpful to make it clear in the Guide that although article 11 was not intended to interfere with the law of agency or the law of contract, it might have such an effect in certain jurisdictions.

24. Mr. MADRID (Spain) said that article 11 was solely concerned with establishing the fact of a link between the originator of a message and the addressee. It did not deal with the legal consequences of any message that might pass between them. That would be determined by the relevant legal system. His delegation was therefore in favour of maintaining paragraph (8) to make that point clear, but of redrafting it to avoid any erroneous interpretation that it might be concerned with a conflict of law. In that connection, he drew attention to paragraph 131 of document A/CN.9/406, which recorded the discussion in the Working Group that had led to the adoption of the paragraph.

25. Ms. ZHANG Yuejiao (China) endorsed the explanations given by the Secretariat and considered that articles 3 and 11 should be maintained. To ensure uniform implementation of the Model Law, the Guide should contain an explanation of article 3(2) and of the words "any other applicable law" in article 11(8).

26. Mr. CAPRIOLI (France) was in favour either of deleting article 11(8) altogether or of deleting from it the words "any other applicable law".

27. Mr. BONELL (Italy) said he was grateful for the explanation of the rationale behind article 11(8), but considered that it had not been conveyed in the wording. According to paragraph 131 of document A/CN.9/406, the Working Group had approved and referred to the drafting group language along the following lines: "Once a data record is deemed or presumed to be that of the originator, any further legal effect will be determined by this law and other appropriate laws". That was a much clearer formulation.

28. If it was quite certain that the Model Law did not affect general rules of agency and contract law, he suggested that that should be made clear at the outset in the following terms: "Nothing in this Law shall affect ...".

29. Mr. FARIDI ARAGHI (Islamic Republic of Iran) considered that the last phrase of paragraph (8) was ambiguous and that the rest of the paragraph repeated the provisions of article 3(2). It should be deleted.

30. Mr. MAHASARANOND (Thailand) agreed that paragraph (8) should be deleted, because it caused confusion. In any case, legal recognition of data messages was already dealt with in article 4.



31. Mr. ALLEN (United Kingdom) said that his delegation would prefer to delete paragraph (8) altogether, but if the Commission did wish to maintain it, he suggested that it should be redrafted as follows: "This article does not determine whether the data message has any legal effect, except in so far as may result from the attribution of the data message to the originator".

32. Mr. BURMAN (United States of America) considered that either that wording or the original formulation agreed by the Working Group would accomplish the same result.

33. Mr. BOSSA (Uganda) said that paragraph (8), which seemed to be trying to relate the Model Law to domestic law, should either be deleted or transferred to article 1.

34. Mr. SZURSKI (Poland) was in favour of deleting paragraph (8).

35. Mr. RENGGER (Germany) also wished to delete paragraph (8) and considered that rules of international interpretation should be included in the Guide, not in the Law itself.

36. Mr. CHOUKRI SBAI (Observer for Morocco) said he could not support the wording just suggested by the United Kingdom and would prefer to delete paragraph (8).

37. Mr. ABASCAL ZAMORA (Mexico) said that although he had tried to explain why paragraph (8) had been adopted by the Working Group, he too would have no problems in deleting it.

38. Mr. UCHIDA (Japan) was in favour of deleting paragraph (8), in order to avoid any confusion.

39. Mr. BURMAN (United States of America) said that his delegation too had no objection to deleting the paragraph.

40. Mr. BONELL (Italy) said that, even if paragraph (8) was deleted, article 11 could still contain a provision on the lines of the earlier draft text.

41. Mr. VRELLIS (Observer for Greece) said that other effects of the data message not specifically provided for could also be governed by the Model Law.

42. Mr. ABASCAL ZAMORA (Mexico) said that two further aspects that might be of relevance were contained in articles 12 and 13 and involved the expression of intent by electronic means.

43. The CHAIRMAN, summing up the debate, said that there appeared to be general agreement that the new paragraph (8) should be neither retained nor replaced.

44. *It was so decided.*

45. The CHAIRMAN invited the Commission to return to its consideration of the proposed revised wording to replace paragraphs (5), (6) and (7), the text of which was as follows:

"(5) (a) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the content of the data message as received as being what the originator intended to transmit, and to act on that assumption.

"(b) The addressee is not so entitled when it knows or should know by exercising reasonable care or using any agreed procedure that the transmission resulted in any error in the content of the data message as received.

"(6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption

unless it repeats the content of another data message and the addressee knows or should know by exercising reasonable care or using any agreed procedure that the repetition was a duplication and not the transmission of a separate data message."

46. Ms. ZHANG Yuejiao (China) said that the replacement of "knew" and "should have known" by "knows" and "should know" in paragraph (5)(b) could imply that the addressee might act on the assumption that the data message was that of the originator before becoming aware of an error or duplication and would then be solely responsible. That would not be fair.

47. Mr. ALLEN (United Kingdom) said that the use of the present tense in the revised wording was intended to make it clear that the addressee was entitled to rely on the data message until it became known to him that the message was not that of the originator, but not once he had such knowledge.

48. Mr. SZURSKI (Poland) said that he questioned the need for new paragraph (6), which defined what was regarded as a separate message. If such a provision was necessary, it would be better to say that the addressee was entitled to regard a duplication of a data message as a separate message.

49. Mr. SHIMIZU (Japan) noted that the words "as between the originator and the addressee" in paragraph (5) of the text in document A/CN.9/XXVIII/CRP.7 did not appear in paragraph (6) of the revised text. Did that have any significance?

50. Mr. CHAY (Singapore) wondered whether the time element in paragraph (5)(b) could be expressed more clearly by replacing the words "The addressee is not so entitled" by "The addressee shall cease to be so entitled".

51. Mr. RENGGER (Germany) said that his delegation could go along with new paragraph (5) if paragraph (3)(a)(ii) was deleted.

52. The CHAIRMAN said that he took it that the Commission wished to adopt the revised text of paragraph (5) on the understanding that it would re-examine paragraph (3)(a) at a later stage.

53. *It was so decided.*

54. Mr. RENGGER (Germany), referring to new paragraph (6), said that, whereas the text as previously drafted had constituted a rule of evidence and provided for a presumption on the part of the addressee, the revised text gave a right to the addressee. He would like to know the reason for such a major change of policy. In new paragraph (6) it would be preferable to say that the addressee "has to regard" each data message received as a separate data message.

55. Mr. ALLEN (United Kingdom) said that the phrase "is entitled to regard" had been used in new paragraph (6) for reasons of consistency with the rest of article 11. The revised text of the article attempted to reflect the Working Group's intention of delimiting the extent of the protection afforded to the addressee rather than enact an evidential presumption. At the time of drafting of the earlier text, the question whether the presumption should be rebuttable or not had not been settled, the word "deemed" having been left in square brackets. If it was a rebuttable presumption and the presumption was rebutted, the addressee would no longer have protection and would be exposed to claims from the originator as from receipt of the message, and even before the addressee had had knowledge that the message was not that of the originator. In the case of a non-rebuttable presumption, the addressee would be afforded protection for all time, and even after having had such knowledge. The Working Group's intention was that protection should cease upon such knowledge being acquired, and the revised wording thus provided for such a cut-off point.

56. Mr. MADRID (Spain) said that, as he understood it, paragraph (3)(a)(i) had been adopted in the belief that it provided for a presumption and not a right, since the message was assumed to be that of the originator and the addressee had applied a previously agreed procedure. If, however, as had been explained by the representative of the United Kingdom, the phrase "is entitled to regard" in paragraph (6) had been employed for reasons of uniformity of language between paragraphs, that same phrase should not appear in paragraph (3), whose substance was different.

57. Mr. SZURSKI (Poland) said that his delegation felt that new paragraph (6) should be deleted, since it could give rise to complications. Indeed, it would be possible in practice for a second message to be a duplication even if one word of its content had changed. In his view, the determination of such matters should not come within the purview of the Model Law.

58. Mr. BURMAN (United States of America) said that he believed that the Working Group had agreed that, since the purpose of the Model Law was to facilitate electronic commerce through the use of new technologies, its provisions should deal with some of the common problems encountered in that environment, and hence with the question of erroneous duplication of messages, in order to provide guidance for users.

59. Mr. SORIEUL (Secretariat), replying to the issue raised by the representative of Poland, said that the question of duplication did in fact arise in practice. The Working Group had agreed that the issue should be dealt with, but had never felt that the application of a procedure for avoiding the duplication of messages in any way affected the content of the message. The procedures usually applied enabled a distinction to be made between the case when the repetition of a message was simply the result of error and should therefore be considered as null, and the case when there was in fact a second message.

60. Mr. AL-NASSER (Saudi Arabia) suggested that paragraph (6) might read: "When the addressee receives a data message, it is entitled to act on the assumption that it is a separate data message, unless the message repeats the content of an earlier data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was a duplication of an earlier data message."

61. Mr. GRIFFITH (Australia) proposed referring to "erroneous" duplication, as had been done in paragraph (4) of article 11 in the report of the Working Group (A/CN.9/406).

62. Mr. RENGGER (Germany) said that he doubted whether the rule was convincing. He cited an example: when a bank received a payment order followed by a duplicate for the same amount and payee, if paragraph (6) were applied, so that the addressee was entitled to regard each data message as a separate payment order, the payee would receive payment twice. He wondered whether it was really a good policy to allow banks the possibility of making the second payment in such cases. As a rule of evidence, the original text had already been a compromise, because if there was duplication, the result should not be a rule of evidence; instead, the addressee should be entitled to damages if the duplicate message caused it damage. The Working Group's proposal had been not to regard the second erroneous message as a separate one—which would mean, in his example, that while nothing could be done if the duplicate payment order had been fulfilled, if it had not, there would be no damage because it could be stopped. What the new paragraph (6) proposed was not a rule of evidence, but a rule of substance, and as such it was not convincing. The policy of the rule should be that where there was duplication of a message, the addressee would be entitled to damages caused by such duplication, and that policy was very different from what had been discussed hitherto.

63. Mr. ABASCAL ZAMORA (Mexico) said that paragraph (7) in document A/CN.9/XXVIII/CRP.7 did not differ in substance from the Working Group's proposals. Paragraph (4) of article 11 as submitted to the Commission also referred to the detection of duplicates. The same issue had arisen in the Model Law on International Credit Transfers, where the problem of verifying whether the message came from the originator had been resolved. As a separate matter, it had been deemed necessary in article 5 of that Model Law to establish a procedure for verifying the contents of the message, in which duplication was a frequently encountered error.

64. The proposal for a redrafted article 11 was intended to identify more clearly those two issues, the substance of which could be combined. If there was an error, and if the addressee was able to detect it through procedures of verification, then the addressee was not entitled to act on the message in question.

65. Mr. MADRID (Spain) asked how an erroneous duplication could be detected. That could never be done solely on the basis of the contents of the message, because there might be a case of two identical orders that were both genuine. Perhaps it was the identification of the message and not the contents, which should be stressed.

66. Mr. ALLEN (United Kingdom) agreed with the representative of Germany that the question at issue was one of policy, not of drafting. The text embodied the policy of the Working Group, but the Commission could still change that policy. The issue was where the risk should be allocated when two identical messages were sent—who should properly incur the loss. The Commission was not at present discussing cases where there was doubt as to the source of the message, which was dealt with quite separately, but, rather, cases of duplication where both data messages were known to be those of the originator, or where the addressee was entitled to assume they were. In such instances, the addressee might incur a loss, by virtue of the fact that two messages in identical form had been sent. The addressee might, for example, act on an order for goods and dispatch them to a third party, and if the originator was then entitled to resile from the second order, the addressee would incur a loss.

67. Given that both messages came from the originator, it was in the originator's power to set the matter right, which was why the draft gave the protection to the addressee that it did. If two messages were sent, it was up to the originator to alert the addressee to the fact that the second message should not be relied upon. Unless the originator did so, the addressee should be entitled to rely on the second message unless it had failed to use an agreed procedure or had been negligent in assuming that the second message was not a mere duplication. The Commission should not be concerned only with erroneous messages, since a second message might be sent in the belief that the first had not been received. The Commission ought to consider the position of the addressee in those circumstances as well: should it be allowed to rely on the second message, or should it have no protection when it received a second message which appeared to be identical to the first?

68. Mr. RENGGER (Germany) said that the first problem was where the risk should be allocated; the risk of an erroneous duplication lay with the originator. The second problem was what the consequences should be. One option would be to say that the addressee might be allowed to profit from others' errors—for example, to fulfil the second payment order or enter into a second sales contract. As far as credit transfers were concerned, there was the possibility of a revocation. In some legal systems, the originator could revoke a payment order; discussion was at present under way in the European Union as to whether revocation should be excluded or not. The risks should lie with the originator, but

only in limited circumstances: it should only pay damages, and the addressee should not make a profit from the situation. As now drafted, the rule left the matter up to the addressee, which was entitled to regard each data message as a separate one. That was not fair, as it was biased in favour of the addressee. For that reason, he opposed the new text.

69. Mr. BONELL (Italy) asked whether the representative of Germany considered there was a difference in substance between a so-called duplicate situation and a message which was erroneous in content. The Working Group had gone on the assumption that the two situations should be treated in the same manner; paragraph (4) of article 11 addressed them both. He wondered why the representative of Germany was raising the problem of duplication with respect to new paragraph (6) and had not felt it necessary to do so with respect to paragraph (5).

70. Mr. ABASCAL ZAMORA (Mexico) said that the Model Law on International Credit Transfers, unlike the present Model Law, regulated the rights and obligations of the parties with respect to payment orders. It had been established as a general rule in the earlier Model Law that such orders were irrevocable unless revocation was received in sufficient time to be able to act on it. In paragraph 130 of its report, the Working Group had considered whether a similar provision should appear in the present Model Law with respect to revocation of erroneously duplicated messages. The Group had felt that the originator of a duplicate message had the opportunity of sending a separate message to revoke the erroneous message, but that it was not necessary to say so.

71. Mr. RENGGER (Germany) said that that situation needed to be dealt with, as it caused major problems in banking practice and in industry, with banks frequently receiving erroneous duplicate

payment orders. As far as the error in content was concerned, in his country it would be dealt with in domestic law, through the general rule of contracts. There were rules on error which could be applied, or the problem could be easily solved by applying additional rules of error, but such additional rules could not really apply to the second situation of duplication. That was why his delegation was concerned, from its domestic point of view, with the duplication problem. It was a general principle of law in various legal systems that an addressee should never profit from errors made by the originator or other parties; on the other hand, if damage was caused, the addressee should be entitled to damages.

72. Mr. BURMAN (United States of America) said that his delegation continued to support the explanation given by the United Kingdom concerning the proposed language. He was uncomfortable with references to banking law and electronic fund transfers, which were dealt with in the Model Law on International Credit Transfers, because the particular area of EDI use in banking was highly regulated, with a very high degree of assurance owing to reliability of security systems, and it represented a quite different model from general commercial uses. Accordingly, the Commission should focus on examples that occurred in other sectors of commerce.

73. Mr. GRIFFITH (Australia) said that he agreed there was an underlying issue of policy with regard to paragraph (4) of article 11. It was fairly clear that the policy which had been accepted by the Working Group was that the addressee should not be permitted to rely on plainly erroneous information where there was a plainly erroneous duplication. It was a matter of wording; perhaps the original wording of paragraph (4) should be retained.

*The meeting rose at 12.30 p.m.*

### Summary record (partial)\* of the 572nd meeting

Thursday, 18 May 1995, at 2 p.m.

[A/CN.9/572]

Chairman: Mr. GOH (Singapore)

*The meeting was called to order at 2.10 p.m.*

*The discussion covered in the summary record began at 2.55 p.m.*

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW (continued) (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4; A/CN.9/XXVIII/CRP.5/Add.1, A/CN.9/XXVIII/CRP.7)

#### Article 11 (continued)

1. The CHAIRMAN suggested that article 11 should be approved subject to the understanding that the debate was not closed, since a number of issues remained unresolved.

2. Mr. SORIEUL (Secretariat) thought that a distinction could be made in the report between the paragraphs on which agreement had been reached and the proposed new paragraph (6), which had given rise to problems and would have to be further discussed at the next session. The latter paragraph could be enclosed in square brackets.

\*No summary record was prepared for the rest of the meeting.

3. The CHAIRMAN said that he took it that article 11 was approved on that understanding.

4. *It was so decided.*

#### Article 9 (continued)

5. The CHAIRMAN said there had been informal consultations between various groups on the article. He invited the Australian representative to report on the outcome of those consultations.

6. Mr. GRIFFITH (Australia) noted that a revised version of article 9 had been proposed by the drafting group in document A/CN.9/XXVIII/CRP.5/Add.1, prepared the previous evening. That morning further consultations had produced a new revision. It was proposed that paragraph (1)(c) should read: "such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time of its transmission or reception". Paragraph (2) would read: "An obligation

to retain information in accordance with paragraph (1) shall not extend to any information the sole purpose of which is to enable the message to be transmitted or received".

7. Mr. MADRID (Spain) said he was not sure whether the text made sufficiently clear that the information referred to in paragraph (1)(c) was not the same as that referred to in paragraph (2). The information in paragraph (2) was information which, though it entered the addressee's system, was not retained by that system.

8. Mr. GRIFFITH (Australia) said that not all information transmitted would in fact enter the system. It was necessary to identify in paragraph (2) the type of information that need not be retained. Although such information might have entered the system, it was not in practice retained, although it would be technically possible to retain it.

9. Mr. ABASCAL ZAMORA (Mexico) wondered whether article (9)(1)(c) was necessary. He took it that the intent of the provision was to make it possible for addressees not to retain any unnecessary information that might accompany data messages. The requirement in paragraph (1)(c) that information as to the date and time of transmission and reception be retained was comparable to requiring recipients of letters to keep the envelopes. That seemed to be contrary to the purpose of the provision, which was to ensure that legal obligations in regard to the intention of data messages were not more stringent than those in regard to the retention of documents. As he saw it, paragraph (2) was sufficient to fulfil that purpose.

10. Mr. CAPRIOLI (France) endorsed the proposed new text. In response to the criticisms made, he believed it should be sufficient to include in the Guide an explanation of the difference between an envelope and its contents, so as to make clear the distinction between paragraph (2) and the rest of the article. It seemed to him clear that paragraph (1)(c) would not prevent the addressee from retaining more information if his system allowed it.

11. Mr. MADRID (Spain) said that he agreed with the representative of Mexico that paragraph (1)(c) was superfluous. The proposed new wording of paragraph (2) met the concerns of the Working Group and reflected the discussion that had taken place in the Commission. The retention requirement for EDI should not be more onerous than for paper.

12. Mr. GRIFFITH (Australia) said, in response to the representative of Mexico, that an envelope might in some cases be used as an addition to the message itself to determine the origin, destination, date and time. Paragraph (2) made it possible to discard the envelope if that information were contained in the message. It therefore lightened the burden imposed by paragraph (1)(c) and would become inoperable if that subparagraph were to be deleted.

13. Mr. SORIEUL (Secretariat) said that, whether information concerning the origin, destination, date and time of a data message were available outside or inside an "electronic envelope", both the old and the new versions of paragraph (1)(c) required that it should be retained. As he understood it, the Commission had already decided to impose as a minimum requirement the retention of those items of information, if they existed.

14. Mr. ABASCAL ZAMORA (Mexico) noted that the version of paragraph (2) in document A/CN.9/406 referred to "information ... which does not enter the information system of, or designated by, the addressee". That aspect did not seem to have been covered in the new version.

15. Mr. GRIFFITH (Australia) said he understood that the information transmitted for communication control purposes might

well enter the system but be automatically discarded prior to its emergence. It was thought that the Working Group's version of paragraph (2) did not deal adequately, from a technical point of view, with the question of which information could be dispensed with. The proposed new paragraph made it irrelevant whether information had entered the system or not.

16. Mr. MADRID (Spain) asked whether information concerning origin, destination, time and date included in the "electronic envelope" solely for the purpose of enabling the data message to be transmitted or received could be discarded under the terms of paragraph (2).

17. Mr. SORIEUL (Secretariat) said that it was difficult to conceive of a case in which such information fell into the category of data that were automatically destroyed.

18. The CHAIRMAN suggested that the Commission should adopt paragraph (1)(c) and paragraph (2) as read out by the representative of Australia.

19. *It was so decided.*

#### *Article 10 (continued)*

20. Mr. BURMAN (United States of America) said that, as agreed, a group of delegations had met informally to consider the possible addition of a saving clause to article 10. As a result of their work, he proposed the inclusion in the article of a paragraph reading: "This article is not intended to deal with any rights arising under other chapters of this Law". That would be paragraph (2) and the existing wording of the article would become paragraph (1). A suggestion for a further statement, which his delegation found self-evident and therefore neither recommended nor opposed, was to complete the proposed paragraph (2) with the words "or by virtue of other applicable law".

21. Ms. ZHANG Yuejiao (China) supported the United States proposal and the inclusion of the complementary statement. Rights arising under other rules of law should be safeguarded. In regard to chapter II, for example, the requirements for writing and signature were requirements of the kind which in some countries parties could not disapply by agreement between themselves.

22. Mr. PELICHET (Observer for the Hague Conference on Private International Law) disagreed with the idea of including the complementary statement, for the reasons he had given at the previous meeting in regard to paragraph (8) of article 11. It was unnecessary to cater for conflictual issues in articles which did not raise problems of that kind, it being self-evident that the operation of other applicable law was safeguarded. Those dealing with the Model Law in future who had not attended the present meetings would ask themselves why such a confusing statement appeared in it.

23. Mr. SORIEUL (Secretariat) said that the intention was simply not to exclude the possibility that rights and obligations might exist which resulted from rules of law other than those in chapter III.

24. Mr. SCHNEIDER (Germany) said that his delegation neither supported nor opposed the proposed paragraph (2), but considered that the point it dealt with should be addressed in the Guide and not in the text of the Law. His delegation's concern was to ensure that the Model Law, having admitted the principle of equivalency of paper documents and electronic messages, should preserve the possibility for the parties to require as between themselves that "writing" should mean writing in the traditional sense.

25. Mr. SORIEUL (Secretariat) explained that the proposal for paragraph (2) merely sought to avoid an *a contrario* interpretation of the existing paragraph, to the effect that the Model Law deprived parties of a right previously available to them under domestic law to agree between themselves what constituted writing, signature or the evidential value of a paper document by comparison with an electronic message. If under applicable German law parties had such a right, paragraph (2) would confirm it and make clear the fact that paragraph (1) did not circumscribe the autonomy of the parties.

26. Mr. UCHIDA (Japan) found the proposed paragraph (2) misleading and preferred the single paragraph approved by the Working Group, which should remain where it was.

27. Mr. GRIFFITH (Australia) suggested placing the proposed paragraph (2) in square brackets.

28. Mr. RAUSCHER (Austria) believed that the problem faced by the German delegation turned on the meaning of the term "rule of law" in articles 5, 6 and 7. Was the expression confined to statutory and jurisdictional rules or did it include contractual stipulations as well? If not, he believed that the concern of Germany was met by the text already before the Commission.

29. Mr. SORIEUL (Secretariat) said that the view of the Secretariat was that a contractual stipulation was not a rule of law. He thought that that should be stated in the Guide.

30. Mr. ALLEN (United Kingdom) endorsed the observations made by the German representative. The proposed paragraph (2) was obscure and did not achieve its purpose. It seemed simply to say that article 10 did not apply to any rights contemplated in chapter II; that was unnecessary, because otherwise the provision in article 10 would be in chapter I. He suggested that paragraph (2) should be worded along the following lines: "Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law referred to in articles 5, 6 or 7."

31. Mr. ABASCAL ZAMORA (Mexico) favoured the inclusion in the proposed paragraph (2) of the complementary statement read out by the United States representative. However, in order to meet the concerns expressed by other delegations, the word "applicable" might be deleted. He needed more time to consider the implications of the United Kingdom suggestion.

32. Mr. CHOUKRI SBAI (Observer for Morocco) agreed with the representatives of Japan and the United Kingdom that the proposed paragraph (2) was misleading. The paragraph was unnecessary. Article 10 should remain as it was and where it was, expressing clearly the fact that the Model Law applied to chapter III only and did not affect the operation of chapter II.

33. Mr. BURMAN (United States of America) said that the Commission should not at that stage reopen policy issues already decided on but should concentrate on drafting matters. He would support the formulation proposed by the United Kingdom representative.

34. Mr. ABASCAL ZAMORA (Mexico) said that after consideration he could agree to the United Kingdom proposal if it also referred to article 8 on the admissibility and evidential value of data messages.

35. Mr. MADRID (Spain) said that though the provision under discussion was unnecessary for his country, in the spirit of consensus he would not oppose it. He could also support the United Kingdom proposal, but thought that reference should also be

made to article 8, as proposed by the representative of Mexico. However, the paragraph should be located in chapter I, with the necessary consequential drafting changes.

36. The CHAIRMAN, after inviting delegations to indicate their attitude to the United Kingdom proposal and the Mexican proposal, noted that there was support for the United Kingdom proposal but not for the Mexican proposal.

37. Mr. PELICHET (Observer for The Hague Conference on International Private Law) asked whether discussion of the problem could be continued at the next session of the Commission and whether written comments still could be submitted.

38. Mr. GRIFFITH (Australia) suggested that the question should be considered further at the next session and that the text of the United Kingdom proposal should be included in the text in square brackets.

39. The CHAIRMAN wondered whether both the United States and the United Kingdom proposals might be inserted in square brackets, as alternatives.

40. Mr. BURMAN (United States of America) noted with concern the remarks of the observer for the Hague Conference on Private International Law and the suggestion that the alternative proposals should be included in square brackets. The precise wording might be left open, but he would not want the implication to be that the decision to have such a paragraph was not final. He thought that it was essential for the Commission's work that decisions already taken should be respected.

41. Mr. SORIEUL (Secretariat) asked the representative of the United Kingdom if he could explain why there was a reference to articles 5, 6 and 7 but not to articles 8 and 9 in his proposal.

42. Mr. ABASCAL ZAMORA (Mexico) said that adopting the United Kingdom proposal without a reference to article 8 would be tantamount to changing an agreement that had already been reached. The omission of a reference to article 8 would create serious problems for his country's legislation, because the preferred procedure was that of contract law, where, provided that the rights of the parties were not affected, the parties could go before a court and specify the rules of evidential procedure that they wished to follow. If a reference to article 8 was not included, he would prefer the version read out by the United States representative.

43. Mr. ALLEN (United Kingdom) said that he was not sure why a reference to article 8 would be necessary in practice, but would suggest that Mexico's concern could be accommodated by replacing the reference to articles 5, 6 and 7 by a reference to chapter II.

44. Mr. ABASCAL ZAMORA (Mexico) thanked the representative of the United Kingdom for his suggestion. The reason for his concern was that in some situations parties wishing to prevent dilatory action might agree that a data message would not be admissible as evidence, whereas article 8 seemed to rule that out.

45. The CHAIRMAN suggested that the Commission might wish to adopt the following text for paragraph (2) of article 10:

"Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law referred to in chapter II."

46. *It was so decided.*

*The meeting rose at 5.05 p.m.*

## Summary record (partial)\* of the 573rd meeting

Friday, 19 May 1995, at 9.30 a.m.

[A/CN.9/573]

Chairman: Mr. GOH (Singapore)

*The meeting was called to order at 9.45 a.m.*

*The discussion covered in the summary record began at 10.05 a.m.*

### INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (A/CN.9/410)

1. Mr. SEKOLEC (Secretariat), introducing the report of the Secretary-General on draft Notes on Organizing Arbitral Proceedings (A/CN.9/410), said that arbitration laws and rules typically allowed arbitrators broad discretion in the conduct of proceedings. Unlike court proceedings, which had fairly well-developed procedures and usages, arbitral proceedings differed not only from one arbitral institution to another, but also from one arbitrator to another. As a result, the parties, panel members, advocates and others involved in a given arbitration might have different expectations as to the conduct of the proceedings. If they did not receive timely guidance on how to proceed, there might be misunderstandings and delays, and in extreme cases a party might even feel it had not been given sufficient opportunity to present its case.

2. Those considerations had led the Commission to decide to prepare a text in order to explain to practitioners, in a non-binding fashion, matters concerning the organization of arbitral proceedings. For the first such text, entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings" (A/CN.9/396/Add.1), the Secretariat had sought information and views from all types of practitioners, as well as from national arbitral bodies, groups of experts and the International Council for Commercial Arbitration (ICCA).

3. Three guiding principles had been adopted in preparing the present draft Notes. First, the text should not in any way limit the beneficial flexibility of arbitration. Secondly, it should not establish any requirement beyond the existing rules, laws and practices, and should be limited to reminding practitioners of the procedural topics on which procedural rules might be useful, in the form of a check-list that offered broad hints about possible approaches or types of decisions the arbitral tribunals might wish to adopt. Thirdly, the text should not attempt to harmonize or unify existing arbitral practices.

4. Another consideration which had affected the drafting was the fear that if the Commission suggested solutions, they might, because of UNCITRAL's prestige, be given much more weight than the authors had intended. Accordingly, views on solutions were expressed with some reserve, and the title had been changed from "Guidelines", which was felt to be too strong, to "Notes".

5. Mr. GRIFFITH (Australia) said that the text, which took into account points made at the previous session, was now very tight and useful, providing a check-list of matters for possible consideration. Rather than listing all those various matters under the table of contents, however, he wondered whether it would not be more useful to give them in paragraph 11, in the form of a check-list as such.

6. Mr. BROQVIST (Observer for Sweden) said that the draft text had been favourably received in his country as being very useful for arbitration practitioners. One possible effect would be to harmonize arbitration practice between different jurisdictions. Although that might be contrary to the authors' intentions, the response to the idea had been very positive in Sweden. The Notes would help less experienced arbitrators to understand what was expected by other parties.

7. Questions had been raised about the legal status of the Notes—whether they were to be regarded as binding, or at least as putting pressure on practitioners—and fears had been expressed that they might be used for the purpose of delaying proceedings or as an argument in an action against an award. However, there was no reason for such misgivings. The title, the introduction and the individual notes themselves all made it clear that the text was not binding.

8. The authors seemed to have had in mind primarily proceedings which involved a number of different procedural systems. It might be made clearer that purely national proceedings might be expected to be governed by domestic procedural rules to a greater extent than the Notes suggested.

9. Mr. FOUCHARD (France) said that while the draft Notes represented a considerable improvement over the previous version, particularly through the dropping of items that could have caused problems, they could perhaps be shortened further. He welcomed the fact that the title had been changed from "Guidelines" to "Notes" and that there was no longer any great emphasis on the need for preparatory conferences, which had once been the main purpose of the document. The overall structure was much more suited to the objective of assisting practitioners with concrete questions arising in arbitral procedures. The chronological organization was much more appealing.

10. None the less, his delegation still had great reservations about the whole project. It would serve no useful purpose, in so far as for experienced arbitrators it would be quite superfluous, while among inexperienced arbitrators it would cause anxiety and give rise to errors in practice by confronting them with the difficulty of their task at the very start. The check-list would be alarming for most arbitrators, although many of the matters in question would not ever come up, or would do so only later, gradually and in a manner not foreseeable at the outset. The text was above all dangerous, despite its non-binding character, because it was wrong for UNCITRAL to give advice which was not purely legal, but rather concerned practical matters completely unrelated to its mandate. Despite the modesty of the text as it now stood, the prestige enjoyed by UNCITRAL and the success of its earlier work on arbitration were such that it would be impossible to prevent lawyers from treating it, whether in good or bad faith, as a source of arguments for complicating procedures or contesting awards.

11. Mr. SZURSKI (Poland) said that, in general, it was important to have a clear idea about the purpose of the Notes and to

\*No summary record was prepared for the rest of the meeting.



choose a title that properly reflected the substance of the document. The present text constituted a wide-ranging analysis of practice in the conduct of arbitral proceedings which would be very helpful to practitioners. It could hardly, however, be called "suggestions for consideration", as in paragraph (2) of the document, since it covered such a wide variety of approaches. He wondered whether UNCITRAL should not in fact offer suggestions or views on how, taking into account the wide range of existing practices, arbitrators could solve problems arising in international commercial arbitration and give guidance as to what was or was not compatible with a properly conducted arbitration process. Such views and suggestions would be of great help to inexperienced arbitrators throughout the world, but they would be by no means binding. The title of the document might then be amended to "UNCITRAL views or suggestions".

12. Mr. GONZALEZ SORIA (Observer for the Inter-American Commercial Arbitration Commission) emphasized his agreement with the policy underlying the document. It was right to stress that its effect should not be to undermine the flexibility and freedom of arbitrators and arbitration tribunals. He welcomed the emphasis in the first three paragraphs on the non-binding character of the Notes, whose function was to assist arbitrators and provide a description of problems encountered in practice. A more ambitious text might raise problems like those mentioned by the representatives of France and Sweden. So long as the Notes did no more than provide assistance in the form of a check-list, it would be of great technical value. He would be glad to submit the document, with any amendments that might be made, to his organization's Conference, to be held in November 1995, at Asunción, Paraguay, so that it could be disseminated in the Americas.

13. Mr. HODEL (Observer for Switzerland) said that his country had been sceptical from the start regarding the idea of adding a preliminary stage to the arbitration proceedings. He questioned the usefulness in principle of such an exercise, which might in many cases prove counter-productive. There was the danger that such a preliminary stage might be given excessive importance and thus influence the main proceedings. It might make the proceedings more cumbersome and costly. Parties and arbitrators might be encouraged to use such preliminary procedures even when they were not appropriate. It should not be forgotten that an extra stage in an arbitration process would benefit a party that wanted to hold up the process. The Notes would probably lead to greater formality in the conduct of proceedings and were unlikely to simplify the tasks of deciding and judging, especially when used by an inexperienced arbitrator.

14. Mr. CHOUKRI SBAI (Observer for Morocco) regarded the document as an excellently prepared contribution, which had succeeded in avoiding several thorny problems that had given rise to heated discussion in the past. Its importance lay precisely in its non-binding character, as expressed in paragraphs 2 and 3. It provided a set of guidelines which arbitrators could use if they wanted to, but it would also be useful for the parties concerned because it set out the general principles and objectives of arbitration.

15. Mr. ABASCAL ZAMORA (Mexico) said that the Notes provided a legal guide that would be of great use all over the world, but especially in areas where arbitral proceedings were less developed than in Europe. International commercial arbitration was expanding quickly throughout the world, and it was clearly appropriate to help to resolve international commercial disputes and apply uniform international trade law to relations between commercial entities in all countries. Some people, however, saw the Notes as dangerous, fearing that they might establish a minimum standard that would then be used as a reason not to accept arbitration. That danger was met by the non-binding character of the rules, as stated in paragraphs 2 and 3 of the Notes, and even

more clearly in paragraph 10. Since the check-list of issues did not set up minimum standards, but simply pinpointed the most important factors with a view to assisting inexperienced arbitrators, it was hard to believe that parties would be able to use it to delay proceedings.

16. Mr. LEBEDEV (Russian Federation) said that the document as a whole was an excellent reflection of the functions and objectives of UNCITRAL. It dealt with the practice of commercial arbitration and promoted the application of international instruments, including a number produced by UNCITRAL. He did not view the Notes as a set of rules or recommendations, but as a document intended to draw attention to organizational and technical problems that might arise in international commercial arbitration. It was perfectly logical to concentrate on such procedural issues in arbitration processes. The document prepared by the Secretariat had taken account of comments made at the twenty-seventh session of the Commission as well as at the XIIth International Arbitration Congress (Vienna, November 1994) and elsewhere. It was more sharply focused and concise than the previous version. Such concision was not necessarily an advantage: a more specific and detailed document might have been more useful. He found it difficult to understand the concerns expressed by certain experts, which were perhaps connected with the fact that some countries already had well-established procedures set out in normative texts. There did not seem to be any real risks in the present text that had not existed in the previous version. Indeed, the present document could help to reduce the costs involved in arbitration. Its main importance, however, was that it directed attention to typical problems that arose in arbitration proceedings and covered a wide range of highly relevant issues. The present text allowed more flexibility than the previous version and was certainly not binding. Jurists and commercial and business circles throughout the world would be able to use it or not as they wished.

17. Mr. MADRID (Spain) said that the Secretariat had taken great care to make it clear that the text did not even contain recommendations, but was simply intended to be a useful tool for those having recourse to arbitral proceedings. In his view, there was no risk of a negative impact, as had been suggested by certain speakers, since its only purpose was to help those who might wish to make use of it in all kinds of arbitration proceedings, not just in the field of international commercial arbitration. It contained many references to applicable arbitral rules and even a reference in paragraph 91 to national laws. Whatever the kind of arbitration involved, a guide such as the present text would be of great assistance. It might be a good idea to bring out its purpose more sharply in the opening paragraphs so as to alleviate the fear that it might reduce the flexibility that was so important in arbitration.

18. Mr. HOLTZMANN (United States of America) expressed his appreciation of the Secretariat's efforts in producing a much-improved document. Perhaps some changes could be made to allay the fears of the French representative. He would in fact be suggesting the deletion of some provisions that might even by inference appear to constitute recommendations; if the Notes were made recommendations, that might affect the flexibility regarded by many as important. On the Spanish representative's point that the Notes might be useful in national arbitration, he thought it might be presumptuous to indicate that a document focusing on the differences of approach that might occur in international arbitration was also addressed to national arbitrators, although parts might indeed be useful to them. As to the form, he could agree to the suggestion of the Australian representative.

19. Mr. RENGGER (Germany) said he could accept the Notes as a very helpful document that met its purpose, since it was not binding and merely constituted an aid to arbitrators and parties to arbitration proceedings.



20. Ms. ZHANG Yuejiao (China) welcomed the document. The Commission should conduct its discussion on the basis of the non-binding nature of the Notes, the need for flexibility and the principle that using the Notes should not result in increased delay or expense in arbitral proceedings. There was room for some improvement to bring the document into line with those criteria.

21. Mr. SWIFT (United Kingdom) endorsed the three guiding principles set out by Mr. Sekolec. The Notes would be particularly helpful in bridging the gap between parties from different legal backgrounds. Practitioners in his country considered that the Notes would be useful, and, far from increasing costs, should, by avoiding uncertainty and delay, reduce them.

22. Mr. AL-ZEID (Observer for Kuwait) thanked the Secretariat for its work in preparing the comprehensive document which would be of considerable assistance in arbitration. He believed that it was unnecessary for the Commission to discuss the document in detail and that only general comments need be made.

23. The CHAIRMAN called for a discussion on the document section by section. To save time, members should avoid trying to rewrite the text.

#### *Paragraphs 1-3*

24. Mr. ABASCAL ZAMORA (Mexico) considered that the Notes laid too much stress on the powers of the arbitral tribunal. It should be made clear that adoption of the procedures discussed in the Notes did not depend exclusively on the arbitral tribunal but was subject to agreement between the parties to the arbitration. It was important, moreover, to indicate that the parties should not adopt procedural agreements binding the arbitral tribunal in such a way as to deprive it of the flexibility that it needed.

25. Mr. GRIFFITH (Australia) suggested that the list of contents on pages 2-4 of the document should be placed after paragraph 11 as a check-list.

26. The CHAIRMAN noted that there were no objections to that proposal and requested the Secretariat to make the necessary change.

*The meeting was suspended at 11.35 a.m.  
and resumed at 11.50 a.m.*

27. Mr. HOLTZMANN (United States of America) suggested that at the end of paragraph 1 it should be made clear that the Notes referred to arbitrations that were administered by an institution as well as those that were not.

28. The description of the Notes in paragraph 2 as "merely suggestions" was unfortunate, since the Commission had been told that they were not recommendations or suggestions. Paragraph 2 should be rewritten in a more affirmative form to indicate that the Notes did not establish any binding legal requirement on parties or arbitrators and that their sole purpose was to remind parties of matters that might be considered at an appropriate stage to facilitate the arbitration process.

29. Mr. SZURSKI (Poland) agreed with the comment of the United States representative on paragraph 1.

30. He suggested that the first sentence of paragraph 2 should be reworded as follows: "The Notes have been prepared for consideration. They do not affect the procedural prerogatives of the arbitral tribunal in conducting the arbitration." The second sentence was unnecessary and should be deleted.

31. The first sentence of paragraph 3 should also be deleted and the paragraph should read: "The use of the Notes cannot imply

any modification of the arbitration rules that the parties may have agreed upon."

32. Mr. GONZALEZ SORIA (Observer for the Inter-American Commercial Arbitration Commission) supported the proposals of the Polish and United States representatives, which would help to emphasize the non-binding character of the Notes.

33. Mr. CHOUKRI SBAI (Observer for Morocco) supported the United States proposal on paragraph 1.

34. Ms. ZHANG Yuejiao (China) said that her delegation shared the view that the Notes could be of assistance not only to arbitration practitioners, but also to arbitration institutions.

35. Mr. LEBEDEV (Russian Federation) said that the second sentence of paragraph 3 should be retained, since it dealt with an important point. Arbitration rules could in fact include regulations on matters not dealt with in the Notes.

36. Mr. MADRID (Spain) said that his delegation could go along with the United States proposal. Perhaps the word "international" should also be inserted.

37. Mr. ABASCAL ZAMORA (Mexico) felt that the term "administered arbitration" was obscure. He would prefer "institutional arbitration".

38. Mr. HOLTZMANN (United States of America) agreed that "administered arbitration" might be ambiguous, but felt that "institutional arbitration" also lacked clarity. A phrase along the lines of "arbitration administered by an institution" might make the function and role clearer. Any necessary redrafting could be left to the Secretariat.

#### *Paragraphs 4 and 5*

39. Mr. SZURSKI (Poland) said that the last two sentences of paragraph 5 were unnecessary and could be deleted.

40. Mr. HOLTZMANN (United States of America) said that, in his view, the words "timely procedural decisions" appearing in the heading should be replaced by a phrase such as "timely decisions on organizing the proceedings", or "timely decisions on the conduct of the case". The term "procedural" where used in the same context elsewhere in the text should be avoided and appropriate drafting changes made. Many "procedural" matters covered by the Notes were regarded in some legal systems as matters of substance.

41. In paragraph 4, the words "the type and complexity of issues of fact and law" could be deleted; they now had little meaning, since the accompanying description contained in an earlier draft no longer appeared in the Notes. Also, the phrase "a cost-efficient resolution" could be expanded to read "a just and cost-efficient resolution".

42. The text should indicate that arbitrators' discretion might be limited by the rules agreed upon by parties as well as by other agreements of the parties and any provisions of applicable procedural law. Perhaps a new paragraph 5 *bis* could be created for that purpose.

43. Mr. FOUCARD (France) said that a simpler alternative wording to "usefulness of timely procedural decisions" in the heading might be "usefulness of organizing the arbitral procedure in a timely fashion". With regard to the discretion of arbitral tribunals, limiting factors included not only the will of the parties and agreements between them, but also the fact that parties were subject to procedural law and had to abide by arbitral procedures

regardless of applicable law. It would therefore be better to say that arbitrators' discretion was limited by the parties themselves and by fundamental principles of law.

44. Mr. HOLTZMANN (United States of America) said that he could partly go along with the French representative's proposals. It was, however, necessary to retain the reference in the heading and in the text to "timely decisions".

45. Mr. ADENSAMER (Austria) agreed with the representative of France that the notion of "decisions" should be avoided. That would make it clear that the text was not designed to encourage appeals or efforts to protract proceedings.

46. Mr. ABASCAL ZAMORA (Mexico), referring to the remarks by the representative of France concerning the law of procedure, said that it would be preferable to speak of the law of arbitration, since some lawyers tended to equate the term "procedure" with judicial proceedings.

47. Mr. HOLTZMANN (United States of America) suggested, with a view to accommodating the concerns of the Austrian and French representatives, that the heading might read "Discretion in conduct of proceedings and usefulness of timely consideration of the organization of proceedings".

48. Mr. LEBEDEV (Russian Federation) said that a suitable alternative to the expression "procedural decisions" might be "procedural orders", which appeared in paragraph 11, since such orders were decisions that the arbitral tribunal had to take. The final drafting could be left to the Secretariat.

49. Mr. SZURSKI (Poland) said that paragraphs 4 and 5 dealt essentially with discretion and flexibility in the conduct of arbitral proceedings. Consequently, the heading should simply read: "Discretion in conduct of proceedings".

50. Mr. CHOUKRI SBAI (Observer for Morocco) proposed that the title be changed to "Discretion in conduct of procedure and usefulness of timely agreements".

51. Ms. ZHANG Yuejiao (China) said that discretion in the conduct of proceedings and timeliness of procedural decisions were both important aspects and should be retained.

52. The CHAIRMAN said that the Secretariat would look into the matter of finding an alternative term for "procedural decisions".

#### *Paragraphs 6-8*

53. Mr. HOLTZMANN (United States of America), referring to paragraph 6, said that it should be emphasized that there were limitations to the independent decision-making capacity of the presiding or sole arbitrator. Perhaps the first five words of the paragraph might therefore be replaced by a phrase along the lines of "While some rules, agreements of parties or determinations by arbitral tribunals provide that various decisions on organizing procedures may be taken".

54. The subject of the advantages and disadvantages of consultations was a sensitive and controversial one, and the text that dealt with it raised questions, but did not and could not provide any answers. He accordingly proposed that the first sentence of paragraph 6 be retained and the rest deleted.

55. In paragraph 7, the phrase "at the place of arbitration or at some other appropriate place" should be deleted, since it might conflict with rules or even laws that required different organizational arrangements. Also, a phrase such as "or by other methods or combinations of methods or by meetings" should be included at the end of the paragraph. That would broaden the scope of the consultations in a manner that was in fact intended and had been provided for in previous drafts.

56. Mr. HERRMANN (Secretary of the Commission) said that the Secretariat's task of implementing the changes requested by delegations would be difficult unless they were accompanied by clearly and fully worded proposals. Such an approach would also assist delegations in adopting positions on proposals made by other delegations. It was therefore necessary for the Commission to decide upon the procedure to be adopted for presenting proposals to the Secretariat.

*The meeting rose at 12.35 p.m.*

### **Summary record of the 574th meeting**

**Friday, 19 May 1995, at 2 p.m.**

[A/CN.9/SR.574]

*Chairman:* Mr. GOH (Singapore)

*The meeting was called to order at 2.10 p.m.*

#### **ELECTION OF OFFICERS (continued)**

1. The CHAIRMAN invited nominations for the remaining post of Vice-Chairman of the Commission.

2. Mr. LEBEDEV (Russian Federation) nominated Mr. Tadeusz Szurski (Poland).

3. *Mr. Szurski (Poland) was elected Vice-Chairman by acclamation.*

#### **INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (continued) (A/CN.9/410)**

#### *Paragraphs 6-8 (continued)*

4. Mr. FOUCHARD (France) questioned the reference in paragraph 6 to the possibility of inviting the parties to enter into a procedural agreement. A discussion of the rules governing procedure with the parties could be time-consuming and needlessly tie the hands of the arbitral tribunal in advance.

5. Commenting on the reference by the representative of the United States of America to the phrase "at the place of arbitration or at some other appropriate place" in paragraph 3, he said that a certain amount of flexibility should be preserved regarding the place where a meeting was to be held. There was a distinction between the official venue of the proceedings, which was that where the award would be delivered, and the place where the arbitral tribunal actually met, which should be left to the discretion of the tribunal.

6. Mr. HOLTZMANN (United States of America) said that he agreed with the representative of France that the arbitral tribunal should be free to meet wherever it wished. However, such flexibility was not permitted under certain rules and laws, and the Notes should take account of those cases.

7. With regard to the consultations envisaged in paragraph 8, he thought that more emphasis should be placed on the fact that they could take place at various times, be held in conjunction with hearings and be conducted by various methods.

8. Footnote 2 relating to paragraph 4 referred to the UNCITRAL Arbitration Rules. He suggested that the Notes would have wider acceptability if that footnote were deleted.

9. Mr. SZURSKI (Poland) said that he agreed with the comments of the representative of the United States of America on paragraphs 6 and 7.

10. The first sentence of paragraph 8 seemed to say that a meeting for consultations could be devoted only to procedure. Consultations were also held in some cases on matters of substance. The sentence could either be deleted or amended to read as follows: "A meeting can be devoted to procedure only or can be held in conjunction with a hearing on the substance of the dispute".

11. Mr. SEKOLEC (Secretariat) said that the sentence had been intended to convey that meaning and could be reworded to improve its clarity.

12. He asked the representative of France whether his objection to paragraph 6 related to the possibility of the parties reaching agreement on a limited procedural point, which was the intended purport, or to the risk of the phrase being misunderstood as an invitation to the parties to enter into a broader agreement on a set of arbitration rules, an eventuality dealt with in paragraph 15.

13. Mr. FOUCHARD (France) said that he had been fearful of the second interpretation. He had no objection to the parties being invited to reach agreement on a limited procedural point.

#### *Paragraphs 9-11*

14. Mr. FOUCHARD (France) expressed concern that the wording of the last sentence of paragraph 11 ("*... liste de contrôle pour l'établissement d'un ordre du jour*" in the French version), might be understood to imply that there would be an agenda and a meeting, whereas it had been agreed that the organization of the proceedings would not necessarily involve such a meeting. He was also unhappy with the idea of a "check-list", which implied that there was a long list of matters to be considered.

#### *Section 1 of "Procedural Matters for Possible Consideration" (paragraphs 12-14)*

15. Mr. HOLTZMANN (United States of America), supported by Mr. GRIFFITH (Australia), suggested that it would be more tactful to place the section dealing with deposits for costs later in the text. Many arbitrators would find it uncomfortable to open

their consultations with the subject of deposits, most of which would go towards covering their own fees. The earlier draft of the Notes had placed the subject much later in the text, an approach consistent with most arbitration rules.

16. Mr. SEKOLEC (Secretariat) said that the item had come at the end of the Notes in the earlier draft, which followed the structure of many sets of arbitration rules. In the new structure, based on a chronological order it could perhaps, in view of its importance, be moved to fourth or fifth place.

17. Mr. FOUCHARD (France) said that in practice arbitrators were concerned about deposits. Tact was all very fine but it would be hypocritical to imply that deposits for costs were not among the early questions to be considered.

18. Mr. ABASCAL ZAMORA (Mexico) suggested combining the section dealing with deposits and that dealing with administrative services.

19. The CHAIRMAN suggested that it should be left to the Secretariat to move the three paragraphs to a more suitable place in the text.

#### *Section 2*

20. Mr. CHOUKRI SBAI (Observer for Morocco) proposed deleting the last sentence of paragraph 15. He did not agree that the consideration of a set of arbitration rules might unduly delay the proceedings or give rise to unnecessary controversy. In his view, it would expedite the proceedings. In the second sentence, the words "the arbitral tribunal might consider it appropriate" could be replaced by the words "it is advisable for the arbitral tribunal".

21. Mr. ABASCAL ZAMORA (Mexico) said that he was in favour of deleting the last sentence, which implied that the parties should not be invited to consider adopting a set of arbitration rules. It was preferable, in his view, to base arbitral proceedings on tried and tested rules.

22. Mr. HOLTZMANN (United States of America) recapitulated certain practical objections raised at the previous session to the idea that arbitrators should invite parties to stipulate a set of arbitration rules where they had not already done so. Those criticisms were reflected in the Commission's report.<sup>1</sup> In support of the idea it had been said that, where parties began such talks and their discussions showed signs of becoming protracted, the arbitrators could discontinue the talks,<sup>2</sup> yet that might prove difficult and create bad feeling. Moreover, where parties had opted to use a set of rules—for example, those of the International Chamber of Commerce (ICC)—and one of them wished, say to challenge an arbitrator, its application would be rejected by ICC on the ground that the party had no standing with that body. Subsequent referral of the issue to a national court might well produce the same response, and not necessarily a rapid one. He believed that the possibility open to arbitrators in paragraph 15 could lead the parties into expense. It could also, by implication, discourage arbitrators from exercising their own discretion about the rules which were to apply to proceedings. Those considerations led his delegation to suggest the deletion of paragraph 15 or, failing that, the addition to it of further cautions.

23. Mr. FOUCHARD (France) broadly endorsed the remarks made by the United States representative. He believed the paragraph should be retained, however, since it usefully indicated that,

<sup>1</sup>Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), para. 138.

<sup>2</sup>Ibid., para. 139.

in one way or another, arbitral proceedings must be organized. Perhaps the paragraph might state that the adoption of a set of rules was not a necessity, but that parties might consider it. At all events the caution expressed in the last sentence of the paragraph should remain.

24. Mr. SZURSKI (Poland) said that article 15 should be seen as dealing with ad hoc arbitrations, not administered ones. If an arbitral tribunal existed, it had to be assumed that it did so by virtue of an agreement between the parties which specified a place of arbitration and thus determined the applicable law. The text should recommend the parties to consider adopting a set of rules; if they did not do so, the applicable law would operate, and in most cases the arbitrators would thus have discretion to decide on the conduct of proceedings in regard to matters which the applicable law did not cover. He considered that paragraph 15 was well drafted and should remain as it stood.

25. Mr. LEBEDEV (Russian Federation) recognized that paragraph 15 raised complex issues, to which the United States had drawn attention. He did not, however, believe that undue delay would necessarily result where the parties, on the recommendation of the arbitrators, decided to agree on a set of rules. The important point was that, on a broad interpretation of the paragraph, arbitrators might suggest to the parties the adoption of a set of institutional rules, a course which could certainly produce unexpected results and huge complications. Paragraph 15 had merit, and in order to preserve it, but eliminate that defect, he suggested it should indicate that the parties might agree on the application of the UNCITRAL Arbitration Rules; after all, the Notes were drafted by UNCITRAL and the UNCITRAL Rules took account of the interests of all countries. Alternatively, the paragraph might indicate that the parties could agree on the application of either the UNCITRAL Rules or another international set of rules for non-administered arbitrations. He had in mind, for example, those of the Economic Commission for Europe. He agreed with the previous speaker that paragraph 15 should be seen as relating to non-administered proceedings only, and with his remarks about the operation of the applicable law. In applying it arbitrators would obviously take account of the international nature of the case.

26. Mr. ABASCAL ZAMORA (Mexico) said that, in proposing the deletion of the last sentence, he had seen the paragraph as directed in particular to the adoption of the UNCITRAL Rules, which were tried and tested; where they were to apply, the caution expressed in that sentence would be unnecessary. However, the considerations put forward by the United States representative were substantial ones. He therefore withdrew his proposal.

27. Mr. GRIFFITH (Australia) supported the course of action proposed by the Russian Federation, for the reasons expressed by its representative.

28. Mr. HOLTZMANN (United States of America) found the Russian suggestions unsatisfactory because, in his delegation's view, paragraph 15 contemplated administered as well as non-administered arbitrations. To limit it to the latter would unduly narrow the scope of the text, the purpose of which was to facilitate both kinds of proceedings.

29. Mr. SEKOLEC (Secretariat) asked the United States representative whether he wished paragraph 15 to include an express reference to institutional rules.

30. Mr. HOELLERLING (United States of America) said that his delegation was opposed to the Russian suggestions; however, it continued to advocate the deletion of the paragraph.

31. Mr. GRIFFITH (Australia) said that the implementation of the Russian idea in a way which made clear the fact that

paragraph 15 applied to non-administered arbitrations would not prevent the rest of the text from applying to administered proceedings.

32. The CHAIRMAN noted the support expressed for modifying paragraph 15 along the lines suggested by the Russian representative. Unless he heard any objection, he would take it that the Commission approved that suggestion.

33. *It was so agreed.*

### Section 3

34. Mr. SZURSKI (Poland) said that the principle in paragraph 17 should be that translation was to be regarded as unnecessary unless the parties or the arbitrators decided otherwise. It could be assumed that, in international commercial arbitrations, arbitrators would be familiar with more than one language.

35. Mr. CHOUKRI SBAI (Observer for Morocco) said that if paragraph 16 was addressed to the parties it should say that the tribunal should urge the parties to determine the language or languages to be used in the proceedings. If the parties did not agree in time, the arbitration tribunal should decide the question.

36. Mr. MADRID (Spain) agreed with the representative of Poland that the initial assumption should be that translation would normally not be needed, which would expedite matters. However, care should be exercised in drafting the Notes in order to avoid a preemptory tone.

37. Mr. HOLTZMANN (United States of America) said he did not believe that it should be assumed that all arbitrators could normally deal with all the languages involved in arbitration. Such a requirement would create very grave problems, especially in developing countries, and would limit the ability to have party-appointed arbitrators from particular countries. If the chairman did not come from either of the countries of the parties, interpretation and translation would be very necessary, particularly when one of the languages involved was not widely understood by persons serving as chairmen. The idea of a normal rule that translation was not required might be valid within a small region but would not apply in an international context. He would not favour any drafting changes and would support the retention of the current text.

38. The CHAIRMAN asked the Commission if it wished to retain the existing text of paragraph 16.

39. *It was so decided.*

40. The CHAIRMAN, after inviting delegations to indicate their attitude to the Polish proposal for the amendment of paragraph 17, noted that there was little support for it. He took it that the Commission could accept the existing text.

*The meeting was suspended at 3.50 p.m.  
and resumed at 4.10 p.m.*

### Section 4

41. Mr. FOUCHARD (France) thought that the first sentence of paragraph 20 was unnecessary, as was the word "typically" in the second sentence.

42. In paragraph 21, he felt strongly that the first two criteria mentioned for the choice of the place of arbitration enumerated should be placed at the end of the list.

43. Mr. SZURSKI (Poland) agreed that the first sentence of paragraph 20 should be deleted. The second sentence should be

amended to read: "If the place of arbitration has not been agreed upon directly by the parties or indirectly, e.g. in the applicable arbitration rules, it is in the power of the arbitral tribunal to determine it."

44. He agreed that the first two criteria listed in paragraph 21 should come at the end.

45. The second sentence of paragraph 22 should be deleted.

46. Mr. GRIFFITH (Australia) supported the deletion of the first sentence of paragraph 20.

47. With regard to paragraph 21, he noted that the text had been modelled on the relevant section of document A/CN.9/396/Add.1, appearing under the heading "Place of arbitration", where paragraph 1 contained the statement: "It is generally accepted that the arbitration is governed by the procedural law governing at the place of arbitration". As that provision would still seem to be apposite, he asked why it had been dropped.

48. Mr. ABASCAL ZAMORA (Mexico) supported the French proposal regarding the order of items in paragraph 21.

49. Mr. HOLTZMANN (United States of America) agreed that the order of items listed in paragraph 21 was inappropriate. Since it was not the purpose of the notes to lay down guidelines for arbitrators, the simplest solution would be to delete the entire paragraph.

50. Mr. LEBEDEV (Russian Federation) said that the formulation "perception of a place as being neutral", listed as (f) in paragraph 21, was unclear. Even if paragraph 21 was retained, that passage should be deleted.

51. Mr. BOSSA (Uganda) said that the Notes would be useful not only when arbitration was being considered but also to those drawing up agreements out of which arbitration might arise. The points listed under paragraph 21 would be useful to legal advisers and the paragraph should be retained.

52. Mr. GRIFFITH (Australia) suggested that paragraph 21 should be redrafted to mention the fact that the procedural law of the place of arbitration ordinarily governed the arbitration and also the relevance of the question whether States were parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York).

53. Mr. SEKOLEC (Secretariat) said that it had been mentioned in document A/CN.9/396/Add.1 that the choice of the place of arbitration largely determined the law governing procedure, but that parties were sometimes permitted to submit the arbitration to the procedural law of a country other than that where arbitration took place. That approach was rarely resorted to and raised many questions of a practical and theoretical nature. It had therefore been thought better not to mention it in the new text. However, item (c) in paragraph 21 made a reference to the law of the place of arbitration.

54. With regard to the New York Convention, it was the primary text but there were regions where other conventions existed and there were also bilateral treaties. A more general reference to treaties on enforcement of arbitral awards had therefore been preferred.

55. Mr. RENGGER (Germany) said that paragraph 21 should be kept. He would not oppose a reordering of the items listed but would object to the deletion of item (f).

56. Mr. HOLTZMANN (United States of America) thought that the key provisions in the paragraph were the legal ones; however, the difficulty lay in drafting them, an example being the problem already mentioned that the law of some countries allowed parties to agree that proceedings would be governed by another law. Finding the right wording would be a sensitive task; even drafting on enforcement raised difficult problems. With regard to subparagraph (f), there were many reasons for choosing a place for arbitration, and he wondered to what extent "neutrality", however it was defined, was relevant. Did it mean that "neutral" countries were to be preferred? The paragraph created more problems than it solved.

57. Mr. VRELLIS (Observer for Greece) said his delegation was in favour of retaining the text in paragraph 21 as formulated by the Secretariat. The paragraph stated clearly that the relative importance of the factors listed varied from case to case. The fact that they had been listed in a particular order was not likely to be considered as of any significance from the legal viewpoint.

58. Ms. ZHANG Yuejiao (China) supported retention of the existing texts of paragraphs 20-22.

59. Mr. GRIFFITH (Australia) said that subparagraph (c) seemed to be an oblique reference to the fact that arbitration was governed (unless some agreement to the contrary existed) by the procedural law in force at the place of arbitration. He found it curious that that factor was not given greater emphasis in the new text. The matter was of importance to his delegation, and he suggested that the point should be dealt with at the beginning of paragraph 21.

60. Mr. CHOUKRI SBAI (Observer for Morocco) considered that paragraph 21 should be retained because of the useful information it contained. Regarding subparagraph (f), what was meant was not political neutrality, but neutrality as far as the parties and their interests were concerned.

61. The CHAIRMAN said there had been a proposal to delete the first sentence of paragraph 20, but that it did not seem to have received support. There had been some proposals for changes in the order of subparagraphs in paragraph 21, but no clear support for deletion of the paragraph as a whole. One representative had proposed the deletion of the second sentence of paragraph 22, but others seemed to support the present text. He took it that it could be left to the Secretariat to take into account the comments made.

#### Section 5

62. Mr. HOLTZMANN (United States of America) said paragraphs 23 and 24 implied that arbitral institutions normally made arrangements for a variety of administrative services; in practice, most did not. The paragraphs should be redrafted to make clear that the services referred to were only those needed in connection with hearings, and not, for instance, photocopying or word processing, which would be taken care of by the parties themselves. He did not know of any arbitral institution which arranged travel or hotel bookings, unless the hearing was to be held in a very remote place. In paragraph 24, the phrase "... the institution will usually provide all or a good part of the required administrative support" should be reworded so as better to reflect the realities of the situation.

63. Mr. FOUCHARD (France) did not think it was UNCITRAL's role to provide guidance on such matters as travel arrangements and hotel bookings, which were completely outside its mandate. The text should not be made unduly complicated, and should not give the impression that arbitration was a large-scale undertaking which was costly, lengthy and required an extensive infrastructure: in fact, many arbitrations took only a few hours. It

was important not to discourage businesses or countries with limited resources from going to arbitration by listing every possible kind of service that might be needed.

64. Ms. ZHANG Yuejiao (China) supported the proposal that paragraphs 23 and 24 should be redrafted.

65. Mr. MADRID (Spain) agreed that, while administrative services were important, there was no need to list them in such detail. A general statement that the need for administrative services should be borne in mind might be sufficient.

66. Mr. LEBEDEV (Russian Federation) agreed that the drafting of paragraphs 23-27 could be improved, but believed they should be retained as reflecting actual arbitration practice. It was important to make clear to those who had no experience of arbitration that there were often considerable costs involved. He supported the draft text in principle, but suggested that towards the end of paragraph 26 a further sentence might be added to the effect that, whereas in an administered arbitration the costs of engaging a secretary would be covered by the institution concerned, in a non-administered arbitration those costs would have to be met by the parties.

67. Mr. CHOUKRI SBAI (Observer for Morocco), in response to the comments made by the representative of France, said that while it was true that arbitration might take less time than normal legal proceedings, it could be costly, since arbitrators demanded high fees, sometimes a percentage of the sum claimed. Reference

should therefore be made to administrative services, but preferably towards the end of the document, after more important items such as confidentiality, witnesses, and evidence.

68. Mr. HERRMANN (Secretary of the Commission) said that, in listing the various items possibly to be considered, the Secretariat had had in mind the order in which the need for them might arise in a typical case of arbitration, not their order of importance.

69. Mr. SZURSKI (Poland) proposed that in paragraph 27 the words in the penultimate sentence "... or if the secretary's tasks imply the presence of the secretary during the deliberations of the arbitral tribunal", together with the following sentence, should be deleted, since the presence of the secretary at deliberations of the tribunal did not violate any arbitration principle.

70. Mr. FOUCHARD (France) supported that proposal: the words were ambiguous and should be deleted.

71. Mr. CHOUKRI SBAI (Observer for Morocco) said the presence of a secretary could raise problems, since in some legal systems arbitrators were required to swear an oath, whereas that requirement did not apply to the secretary. His delegation therefore wished to express its reservations as to the deletion proposed.

72. The CHAIRMAN said that the Secretariat would take due account of the comments made.

*The meeting rose at 5.05 p.m.*

### Summary record (partial)\* of the 575th meeting

Monday, 22 May 1995, at 9.30 a.m.

[A/CN.9/SR.575]

Chairman: Mr. GOH (Singapore)

*The discussion covered in the summary record began at 9.50 a.m.*

#### INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (continued) (A/CN.9/396 and Add.1, A/CN.9/410)

1. The CHAIRMAN invited the Commission to resume its consideration of the draft Notes on Organizing Arbitral Proceedings (A/CN.9/410, annex).

##### Section 6

2. Mr. HOLTZMANN (United States of America) said that his delegation welcomed the addition in the current draft Notes of a section on confidentiality. It was a subject that was receiving increasing attention among arbitration institutions and in court rulings, and was expected to undergo changes and developments over the coming years, particularly in the areas covered by paragraphs 29-31. He accordingly felt that those paragraphs should be reworded to state that parties might wish in appropriate cases to consider entering into agreements relating to confidentiality. He proposed that the revised text should indicate that such agreements might include one or more of the following aspects: identifying what material should be kept confidential; establishing measures to maintain confidentiality of that material and of hearings; clarifying whether the existence of the arbitration or the award should be kept confidential; determining whether any

special procedures should be employed to maintain confidentiality of information transmitted by electronic means; and specifying the circumstances in which confidential material might be disclosed, such as cases where such disclosure was required by law or where information came within the public domain. In the Secretariat's redrafting of the text, it would be preferable to avoid recommending that all those aspects be included; the choice should be left to the discretion of the parties and arbitrators.

3. Mr. FOUCHARD (France) said that he agreed in part with the analysis given by the representative of the United States of America, but not at all with the conclusions he drew from it. Although confidentiality was a new and changing area of attention, he did not feel that the Notes should recommend that an agreement be concluded on the subject. That would be difficult to negotiate and would also encumber the procedure and increase the cost. Paragraph 28 should merely state that, since confidentiality was one of the essential advantages of arbitration, the arbitral tribunal had a duty to recall the principle of confidentiality, seek to ensure that it was respected and draw the parties' attention to their obligations in the matter. In his view, paragraphs 29-31 were too technical and should be deleted.

4. Ms. ZHANG Yuejiao (China) agreed that some redrafting of the text was necessary. Confidentiality had considerable applications and implications. In her view, paragraphs 29-31 could be

\*No summary record was prepared for the first part of the meeting.



simplified. The Notes could state that confidentiality was an important factor in the transmittal of information by electronic means and by means of documents, and that parties should take particular care in their use. In cases where arbitration institutions did not have their own rules, the question of confidentiality should be based on agreements made between the parties, failing which the arbitral tribunal would be able to make its own arrangements.

5. Mr. GRIFFITH (Australia) said that his delegation considered it important for the Notes to make it clear that parties should not assume that obligations of confidentiality existed. He would suggest that the text might mention that the arbitral tribunal could inquire as to what undertakings it should give the parties and what undertakings the parties might wish to give each other with regard to confidentiality. It would be preferable for the arbitral tribunal and the parties to clarify the matter at the preliminary stage of the arbitration by an agreement in principle rather than deal with a particular issue of confidentiality if it arose in the course of the proceedings.

6. Mr. BURMAN (United States of America) felt that paragraph 29, as currently worded, might inadvertently give the impression that communications by electronic means were suspect and could be unsafe. On the contrary, if properly used, computer-based transmissions were much safer than traditional methods of communication. The actual inclusion of such a topic in the Notes was open to question, since it was geared not to the issue of confidentiality, but to particular methods of communication. It would be better to delete the paragraph. If, however, it was retained, it should avoid making any implication about the safety of communication. His comments would also apply to paragraph 33.

7. Mr. OLIVENCIA (Spain) said that his delegation felt that paragraph 28, which merely stated that it might be useful for the arbitral tribunal to record parties' agreements on confidentiality, was possibly insufficient in that the role of the arbitral tribunal was not necessarily one of a passive recorder of an agreement of the parties. Arbitrations were not public, but private proceedings, a fact that offered certain advantages. There would be no problem if parties reached agreements on confidentiality and the arbitral tribunal recorded them, with the parties assuming responsibility for them. It might, however, prove difficult for the arbitral tribunal to take decisions at the outset on confidentiality of the arbitration, although it could draw attention to the principle of confidentiality and its scope.

8. It was also important to point out in the Notes that the arbitral tribunal itself had a duty of confidentiality in its conduct of the proceedings. In cases that attracted public interest, arbitrators were often approached by the media seeking details of the course of the proceedings. Moreover, agreements reached by the parties before the appointment of the arbitrators were also binding on the arbitrators. In his view, the text should be redrafted in order to deal with those additional aspects.

9. Mr. ABASCAL ZAMORA (Mexico) said that his delegation was of the opinion that paragraph 29 was appropriately drafted. The only two electronic means of communication it referred to, telefax and electronic mail, did not at present provide parties with much security in the matter of confidentiality and could easily be intercepted by third parties.

10. Mr. CHOUKRI SBAI (Observer for Morocco) said that arbitration differed from the standard judicial process in that the parties played an important role in arbitral proceedings and in deciding on the manner in which they were conducted. Confidentiality was thus essential: the parties had vital interests and did not wish to disclose the nature of those interests. His delegation accordingly felt that it would be useful if the paragraphs on

confidentiality mentioned agreements between the parties and the importance of adopting measures to ensure confidentiality. Those points were in addition to the role of the arbitral tribunal.

11. Mr. SZURSKI (Poland) said that confidentiality was one of the most attractive advantages of arbitration, and that his delegation therefore welcomed the inclusion of a reference to it in the Notes. In its view, paragraphs 28-31 were not at variance with current arbitration practice world-wide; they should accordingly remain as they stood, or possibly incorporate the changes proposed by the representative of France.

12. Mr. SIKIRIC (Observer for Croatia) agreed with the representative of Spain that the Notes should mention that principles agreed upon by the parties regarding confidentiality should also be binding on the arbitrators, since they enjoyed the parties' trust.

#### Section 7

13. Mr. SZURSKI (Poland), referring to the second sentence of paragraph 32, said that it was rare for the parties, when corresponding with each another, to send copies to the arbitrators. The last seven words of that sentence should therefore be deleted. Since the arbitrators were responsible for directing the proceedings, correspondence in principle took place between them and the parties.

14. The Notes might usefully refer to a problem sometimes encountered in connection with the exchange of writings, in both administered and ad hoc arbitrations, whereby one party, usually the respondent, in an attempt to avoid arbitration refused to acknowledge receipt or to take delivery of communications from the arbitral tribunal. Paragraph 32 might accordingly mention that in certain situations, after the other party had received the request for arbitration and whether or not it had appointed an arbitrator, it would be possible for the applicant's arbitrator to give notice at the outset that writings would be sent directly by the arbitral tribunal and be treated as received regardless of whether there was confirmation of receipt or not, except in the event of a change of address.

15. Mr. HOLTZMANN (United States of America) agreed the section should be redrafted, as it covered only documents exchanged between the parties. It should be expanded to include communications between a party and the arbitral tribunal and vice versa. The redrafted text should also make it clear that the examples given in paragraph 32 were not the only possibilities.

16. Mr. OLIVENCIA (Spain) agreed with the previous speaker. The present text did not exhaust all the possibilities, or even deal with those possibilities which occurred most frequently, but it should do so. The most frequently occurring possibilities were not those in which the parties directly exchanged their writings and sent copies to the arbitrators; rather, it was more usual for the copies to be sent to the arbitral tribunal, and for the original to be submitted to the tribunal as well. That did not exclude the possibility that copies could be exchanged directly between the parties, or that the appropriate number of copies could be submitted to the tribunal for transmittal to all the parties. What was important was to establish the means of communication, the persons responsible for making any communications from the tribunal to the parties, and the recipients of such communications and their addresses.

17. Mr. MELIS (Observer for the International Council for Commercial Arbitration) agreed it should be made very clear that the examples in the text were only examples and that there were other possibilities. In addition, the second part of the first sentence was not strong enough; it was essential for all arbitral tribunals to make it clear from the very start of the proceedings how documents and writings would be routed.



18. Mr. SEKOLEC (Secretariat) asked whether the Commission wished the Notes to deal with the situations described by the representative of Poland, where parties attempted to use dilatory tactics or were passive. If so, he wondered if a general reference should be included and whether, in terms of what to do in such situations, the Notes should follow approximately the wording of article 2, paragraph (1) of the UNCITRAL Arbitration Rules.

19. Mr. HOLTZMANN (United States of America) said that his delegation might welcome wording along the lines suggested by the representative of Poland. He agreed with the Secretariat that the appropriate approach was to follow the spirit, if not necessarily the exact wording, of article 2(1) in the UNCITRAL Rules.

20. Mr. MELIS (Observer for the International Council for Commercial Arbitration) said that the problem raised by the representative of Poland was a real one, but that he would prefer to leave the text as it stood, because to add anything might open up endless further possibilities of amendment.

21. Mr. FOUCHARD (France) agreed with the previous speaker. The Commission was not at present establishing arbitration rules and would face even greater difficulties if it began drafting formulations of the kind contained in the UNCITRAL Rules. It was not the purpose of the Notes to provide solutions, but simply to draw attention to the problems posed by systematic refusal to receive writings.

22. Mr. SEKOLEC (Secretariat) said that, in that case, the Secretariat would simply draft a remark to the effect that arbitrators should be careful to keep all return slips for international postal receipts.

23. Ms. ZHANG Yuejiao (China) said that the first sentence of paragraph 32 should be rewritten to state that, in general practice, parties transmitted copies to the arbitral tribunal, which forwarded them as appropriate, but that in certain cases it was also possible for the parties to exchange writings directly. The Commission should avoid wording which suggested that a party could refuse to accept a communication. It should also be emphasized that, whereas pre-established procedures existed for handling writings in administrative tribunals, major problems arose when it came to ad hoc arbitration procedures.

#### Section 8

24. Mr. CHOUKRI SBAI (Observer for Morocco) said that the last sentence of paragraph 34 should be deleted, as it might be inconsistent with the draft Model Law on Electronic Data Interchange (A/CN.9/406), article 5 of which gave a data message the same value as a writing, and article 8 of which granted the admissibility and evidential value of data messages. As electronic communications were the field of the future, the sentence was superfluous.

25. Mr. BURMAN (United States of America) said that his delegation's comments on paragraph 29 applied equally to paragraph 33, as they were based in part on the developing interrelationship of computerized means of communication, in which telefax was being used increasingly simply as a receipt and printing mechanism for computer transmissions.

26. Mr. LEBEDEV (Russian Federation) said that, as his delegation understood them, paragraphs 34 and 35 concerned only those cases where the parties had agreed that documents would be provided not in paper-based form but through electronic means. It was only when there was such an agreement that any question would arise as to the use of such methods and that, regardless of whatever agreement there might be between the parties, the arbitral tribunal might recognize that documents must none the less be

provided in paper-based form. No provision was being made for the arbitral institution to take an initiative whereby documents would have to be provided not in paper-based form but by electronic means. The use of such means depended on the technical capabilities of both the parties and the arbitrators in different countries.

27. Mr. GRIFFITH (Australia) said that paragraph 33 seemed somewhat old-fashioned and discouraging, as telefax was now an accepted part of life. Rather, language might be used to the effect that "it may be considered whether confirmation of some telefax documents should be required".

28. Mr. ABASCAL ZAMORA (Mexico) said that, with regard to paragraphs 34 and 36, time differences should be taken into account when electronic means were used. For example, when there was a time-limit for submitting a writing, the calendar day might be different for sender and recipient. Or, where both parties were required to submit writings at the same time, a party in an earlier time zone would have to send its writing earlier, and the party in the later time zone would have the advantage of being able to study it before submitting its own. Consideration should also be given to the need for acknowledgments of receipt for electronic communications. That was a very common practice, but it had to be established what the effect was of an acknowledgment or lack of acknowledgment. For example, in cases where a writing had not been received or there was no acknowledgment of receipt by one party, it was necessary to know whether to send another electronic communication or to send the document in writing.

29. Mr. BONELL (Italy) agreed that paragraph 33 was somewhat old-fashioned and perhaps rather exaggerated in stressing the possible shortcomings of communication via telefax. He had some concerns about the last sentence. It was reasonable to envisage that the parties and/or the arbitrator might "decide that certain types of documents should not be sent by telefax". But it hardly then seemed appropriate to suggest that the arbitral tribunal might nevertheless retain discretion to treat a document so sent as received, or even not to inform the other party.

30. Clearer language would also be advisable in paragraph 35. If the arbitral tribunal was not technically equipped for electronic communication, it would be unable to receive documents in that form, and therefore an agreement between the parties to adopt that means would no longer be relevant.

31. Mr. SEKOLEC (Secretariat), explaining the intention of paragraphs 34 and 35, said that, in order to facilitate the practical arrangements, parties often wished to exchange certain types of documents in electronic form, sometimes in addition to paper, sometimes not. Some arbitrators might also wish to have copies of electronic messages. The scope of the paragraphs was much more limited than it might appear, namely, to facilitate the typing of such messages, which might not be as easy to do with the paper-based form.

32. Mr. LEBEDEV (Russian Federation) said that paragraph 34 seemed to concern an agreement between the parties as to the use of electronic means only for communication between themselves, and not in the context of the arbitration. If so, they hardly needed guidance from the Notes. If, however, the paragraph concerned an exchange of documents between the parties in the context of the arbitration, the problem of ensuring that the tribunal received copies would arise.

33. Mr. MELIS (Observer for the International Council for Commercial Arbitration) said that, like previous speakers, he was not happy with the wording of paragraph 33. Telefax had become a fact of life in international arbitration. There was no problem

with a mutilated communication, because in such a case the parties or arbitrators receiving the communication would ask for a new one. Accordingly, he would favour reversing the order of the text, giving the priority to telefax and then perhaps allowing the arbitrators or parties to establish which other communications should be sent in paper-based form, to avoid being flooded with the double forms of communication via telefax and hard copy.

34. As to the point raised by the representative of Italy on paragraph 35, it was perhaps a matter of language. There might be an agreement between the parties, on the one hand, and then a different decision by the arbitrators, on the other. But the essential problem was that there might be a technology gap between the tribunal and the parties which would have to be bridged.

35. Ms. ZHANG Yuejiao (China) said that, in paragraph 33, the phrase "should not be sent by telefax" should be rewritten. When confidentiality was an issue in the sending of telefaxes, the parties concerned should take measures to ensure such confidentiality, either by not using telefax or by encrypting their messages; that did not mean, however, that their confidentiality would not be maintained by using telefax.

36. Paragraph 35 should emphasize the fact that an arbitral tribunal could receive documents both through electronic means and in paper-based form. If it could accept both, it should establish which was the controlling one. In paragraph 36, concerning the procedures to be followed when a message was lost or the communication system otherwise failed, language should be added to the effect that parties and tribunals should reach agreement with the other parties, when adopting such measures, as perhaps the costs of arbitration would be increased.

37. Mr. BURMAN (United States of America) said that it might be better to condense paragraphs 34-36 into a couple of sentences and not focus on the detail of the methods of communication, as those methods were not an integral part of arbitration and were not especially necessary in a document dealing with issues involving international commercial arbitration.

#### Section 9

38. Mr. HOLTZMANN (United States of America), referring to the title of the section, said that parties wanted to know if one or more exchanges of documents would be permitted. In his view, a more general title such as "Arrangements for written submissions" might be preferable. In regard to the third sentence of paragraph 37, the present formulation seemed to be weighted against the idea of organizing procedures. The sentence should be redrafted to reflect the fact that while some tribunals might prefer to leave the extent and timing of the various exchanges to be decided in the light of developments, others might wish, at an early stage in the proceedings, to determine the number of exchanges of written submissions permitted and then to schedule the first exchange.

39. Mr. SZURSKI (Poland) expressed his agreement with the representative of the United States, but felt that the term "exchange" would be more objective than "arrangements".

40. Mr. HOLTZMANN (United States of America) said that the word "exchange" was not entirely satisfactory, since the submissions concerned were not always exchanges. In some cases, the tribunal might ask one party to make a written submission in order to explain a particular point.

41. Mr. FOUCHARD (France) said that the title should simply be "Written communications", which would cover every case. On other points he agreed with the representative of the United States, though the latter's suggestion was somewhat novel and

designed to satisfy countries in which the exchange of writings was essential. Though he had some misgivings, he could accept the formulation.

42. Mr. OLIVENCIA (Spain) said that the word "timing" in the title of section 9 underlined the great importance of the chronological factor. It was not just a question of dates, but of phases in the procedure: the section was concerned not just with the exchange of writings, but also with the time when that exchange took place. The claims, allegations and evidence referred to in paragraph 37, for example, were phases or sequences of acts in the procedure. He could go along with changing the word "timing" on condition that the concept of time and of distinct phases in the procedure was retained.

43. Mr. HOLTZMANN (United States of America) pointed out that the paragraphs on written submissions included nothing about post-hearing submissions. The parties themselves might have different expectations as to whether such post-hearing submissions would be permitted or not and might come from countries with very different practices in the matter. He therefore suggested the inclusion of a paragraph 39 *bis* that would point out the existence of such differences in expectations and practices and draw attention to how useful it might be for arbitral tribunals to ask the various parties whether they expected post-hearing submissions to be allowed. In some cases, the desirability of post-hearing submissions would not be known until a later stage in the proceedings. Consequently, an early decision on the subject would not always be appropriate. Moreover, if such a decision were made at an early stage in the proceedings, it should be open to subsequent revision in the light of developments.

44. Mr. ABASCAL ZAMORA (Mexico) expressed his agreement with the representative of the United States regarding the insertion of a paragraph 39 *bis*. It was quite common for the parties to have different expectations regarding the possibility of making submissions after the hearings had taken place.

45. The CHAIRMAN said that the Secretariat would include a provision along those lines.

#### Section 10

46. Mr. GRIFFITH (Australia) said that the title of section 10 appeared to suggest a change in style. In his view, it might be preferable to delete the words in brackets. As for the examples given, he suggested that they include a reference to the storage of documents.

47. Mr. SEKOLEC (Secretariat) said that titles would not normally be drafted in such detail, but that in the present case it had been thought that the title could serve as a useful check-list and give an indication of the kind of topics that arbitrators should bear in mind. The Secretariat would in any case review all titles after the present discussion by the Commission.

48. Mr. GRIFFITH (Australia) welcomed the idea of a review of the titles, which should be designed to make the check-list easier to use.

49. Mr. FOUCHARD (France) expressed his agreement with the representative of Australia. In his view, paragraph 40 was alarming in its excess of details. It could lead the arbitrator to oblige the parties to concern themselves with minor formalities that were irrelevant to their dispute, while overlooking the most important aspect, namely, respect for the equality principle and the right of defence. Forcing inexperienced arbitrators to impose such rules might lead to violations of the right of defence when a party, for material reasons, could not meet the requirements laid down. It might be useful to make such arrangements in some

arbitrations, but, that did not in any way make them suitable for all.

50. Mr. ABASCAL ZAMORA (Mexico) said that paragraph 40 was too complex, too detailed and too regulatory. If it were retained, it should be simplified and couched in more general terms.

51. Mr. MELIS (Observer for the International Council for Commercial Arbitration) disagreed with the representative of Mexico, because arbitrators, especially non-professional ones, needed guidance. He was happy with paragraph 40 as it stood, since it dealt with a real problem, namely, that of finding a satisfactory way of organizing the documents. Indeed, he thought that the list of items could be expanded. For instance, arbitrators might need to decide the language or languages of submissions and, once the languages were agreed, whether annexes would be permitted in other languages. In regard to translations, it might be necessary to distinguish between documents requiring official translations and other documents where an ordinary translation would suffice.

52. Mr. HOLTZMANN (United States of America) agreed with the previous speaker. Such detailed advice would help the rights of the defence by making it easier for the arbitrator to find the documents concerned. Regarding the other complaint by the representative of France, he said he would have no objection to including the phrase "in some cases" after the words "it may be helpful" in the *chapeau* to paragraph 40 so as to make the text less comprehensive than it was at present. Concerning the observations on languages made by the previous speaker, he was under the impression that the subject had already been covered during the discussion of paragraphs 17-19.

53. Mr. CHOUKRI SBAI (Observer for Morocco) said that paragraph 40 was by no means binding and that the suggestions it made might indeed be helpful. Some arbitrations involved a great many documents, which might be submitted at different moments in time. The organization of such materials could be beneficial to the arbitration proceedings. He therefore agreed with the observer for the International Council for Commercial Arbitration that the paragraph should be retained.

*The meeting was suspended at 11.20 a.m.  
and resumed at 11.50 a.m.*

#### Section 11

54. Mr. ABASCAL ZAMORA (Mexico) referred to paragraph 43, which mentioned the possibility that the tribunal might decide to make awards in a specific order. He would urge caution: arbitrators might be well advised not to commit themselves prematurely to rendering judgements in a specific order, since that might in the end complicate the procedure and take up too much time. It would be preferable for arbitrators to retain their freedom: it was one thing to say that they could render awards in a particular order and another to say that they should.

55. Mr. FOUCHARD (France) agreed with the representative of Mexico. It might be dangerous to establish the possibility of making partial awards and lay down an order in advance. It might also be dangerous to draw up a list of the points at issue in all cases. At the time when the list was drawn up, the parties might not always be aware of all aspects of the case and all possible developments. Such a list might prevent the arbitrator from dealing with additional subjects that arose in the course of the proceedings. That could create many difficulties, and a number of arbitral institutions had been reluctant to take that path. The terms of the dispute should not be frozen at the outset.

56. Mr. HOLTZMANN (United States of America) agreed with the representative of France that paragraph 41 could be usefully modified to make it clear that any list of the points at issue, whenever it was prepared, might be subject to revision as the case developed. He pointed out that the UNCITRAL Rules required the points at issue to be stated at the earliest stage. However, there should be no attempt to exclude arbitration rules that might limit the possibility of changing the points at issue as the case proceeded. He was in favour of the French suggestion that paragraph 41 be made more flexible. It might be useful to state, at the end of the paragraph, that the terms of reference required under certain arbitration rules served the same purpose as the list suggested in paragraph 41.

57. Mr. SZURSKI (Poland) agreed with the previous three speakers. He drew attention to the third sentence of paragraph 43 and pointed out that the terms "partial" or "interim" could not be used to describe decisions, but only awards. Moreover, some legislations did not provide for the possibility of awards of such a nature.

58. Mrs. GREINER (Observer for Switzerland) said that although she would prefer to delete the whole of section 11, she realized that that might not have majority support. She therefore suggested that the section be redrafted in a more balanced form to take account of the points raised by the representatives of France, Mexico and Poland.

59. The CHAIRMAN requested the Secretariat to revise section 11 to take account of the comments made.

60. Mr. HOLTZMANN (United States of America) said that he hoped that in redrafting section 11 the Secretariat would also consider giving in flexible terms a definition of the relief or remedy sought by the parties. Under article 18 of the UNCITRAL Arbitration Rules, that definition had to be included in the statement of claim, and such a definition had in fact been included in the previous version of the text under discussion without objection.

61. Mr. SEKOLEC (Secretariat) confirmed that the earlier version had indeed included a paragraph to the effect that there existed different practices as to the level of detail of the relief or remedy sought by parties. However, the secretariat had felt that that touched upon the substance of the matters in dispute and thus went beyond the organizational matters with which the draft Notes were concerned. It had therefore deleted the paragraph, but could of course prepare a draft text for the next review of the Notes by the Commission the following year.

#### Section 12

62. The CHAIRMAN noted that there were no comments on section 12.

#### Section 13

63. Mr. LEBEDEV (Russian Federation) suggested that in paragraph 45 it might be useful to indicate, in accordance with article 27 of the Model Arbitration Law, that the arbitrators could at that stage clarify the intention of the parties to request assistance from a court in taking evidence. That might well be inferred from the present drafting, but it should be spelt out.

64. Moreover, in paragraph 47 some redrafting might be needed, at least in the Russian version, to make it clear that the absence of a protest was not proof of a document having been received.

65. Mr. ABASCAL ZAMORA (Mexico) suggested that paragraph 49 should contain a reference to the various electronic means of transmitting documents listed in paragraph 36.

66. Paragraph 50 referred to the possibility of one party having to transmit certain documents to the other, reflecting the practice of "discovery" used in common law countries. Mention should also be made of the analogous but different practices used in other legal systems whereby on-the-spot inspections of documents within the control of one party could be made.

67. Mr. FOUCHARD (France) congratulated the secretariat for having streamlined the text, but considered that even more could be done in that direction. Paragraphs 45 and 46 were very useful, but practically all of the rest of the section might be deleted. Paragraphs 47-49 gave over-detailed and not particularly useful advice, and paragraphs 50-54 were downright dangerous. He agreed with the Mexican representative that those paragraphs introduced into the arbitration procedure a watered-down version of the common-law procedure of "discovery", little used in civil law countries. It was not for UNCITRAL to recommend one evidential system rather than another—a system moreover which the United States and the United Kingdom delegations were not trying to impose in international arbitration because of the difficulties and expense involved. True, the system was optional, but it was very complex. Moreover, paragraph 51 was worded in such an abstract manner as to be incomprehensible. He therefore suggested that only paragraphs 45 and 46 and the last sentence of paragraph 54 should be retained.

68. Mr. OLIVENCIA (Spain) agreed with the views on the "discovery" system expressed by the representatives of France and Mexico. Since the Notes referred to peremptory norms of

arbitral law procedures, they might have the force of public policy for parties to arbitration. The issue must therefore be dealt with very sensitively: any ambiguity in the text might introduce a practice completely foreign to certain legal systems, thus affecting the arbitration procedure itself.

69. Mr. SZURSKI (Poland) endorsed the views of the French representative.

70. Mr. HOLTZMANN (United States of America) said that paragraphs 50-54 did not reflect the common-law system with regard to documentary evidence and would read quite differently if they did. The secretariat should be congratulated on producing a carefully worded text.

71. In his view, paragraphs 45-49 were useful. He could probably accept the drafting amendments to paragraph 47 suggested by the representative of the Russian Federation. He would also prefer to retain paragraphs 50-53 in the secretariat's more complete formulation, but could accept a shorter definition on the lines of article 24(3) of the UNCITRAL Arbitration Rules and paragraph 54 of the present draft.

72. With regard to the issue of the powers of an arbitral tribunal to order a party to disclose an internal document, the UNCITRAL Arbitration Rules provided for such powers and there was no limitation on the kind of evidence an arbitral tribunal might request. However, since the wording of the last phrase of paragraph 52 might imply that the arbitral tribunal did not have such powers, it should be redrafted if the paragraph was to be retained.

*The meeting rose at 12.35 p.m.*

## Summary record (partial)\* of the 576th meeting

Monday, 22 May 1995, at 2 p.m.

[A/CN.9/SR.576]

Chairman: Mr. GOH (Singapore)

*The meeting was called to order at 2.10 p.m.*

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT  
NOTES ON ORGANIZING ARBITRAL PROCEEDINGS  
(continued) (A/CN.9/396 and Add.1, A/CN.9/410)

### Section 13 (continued)

1. Mr. ABASCAL ZAMORA (Mexico), referring to the statement he had made at the previous meeting, explained that his idea was not that the paragraphs on documentary evidence should exclude wording which reflected the common law principle of discovery, but that they should include some reference to the civil law tradition on the subject as well. By that, he meant the tradition as it related to arbitration proceedings, not to civil procedure as such. Mexico's arbitration rules, for example, gave arbitrators discretion to deal with evidential matters flexibly, thus allowing room for meeting the differing expectations of the two sides in international proceedings which involved parties from countries with dissimilar legal traditions. That flexibility was what the text should seek to promote.

2. Mr. HOLTZMANN (United States of America), referring to the comments made by the representative of France on paragraphs 47-53, said that his own delegation drew a distinction between paragraphs 47-49, which dealt with mechanical matters and whose general content it approved, and paragraphs 50-54, which related to production of documents. While his delegation would prefer paragraphs 50-53, as well as paragraph 54, to remain more or less as they stood, it could also accept a text based on article 24(3) of the UNCITRAL Rules and the present paragraph 54.

3. Mr. FOUCHARD (France) suggested, as a compromise, the deletion of paragraphs 50-53 and their replacement by a text based on article 24(3) of the UNCITRAL Rules.

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission accepted the suggestion just made by the representative of France.

5. *It was so agreed.*

\*No summary record was prepared for the rest of the meeting.

### Section 14

6. The CHAIRMAN noted that there were no comments on section 14.

### Section 15

7. Mr. HOLTZMANN (United States of America) proposed the deletion of paragraph 63 because of the threat it posed to the enforceability of awards. Since it was a basic principle of justice that witnesses should be heard, where an arbitral tribunal refused to hear a witness for lack of the requisite notice, that refusal might, under some legal systems, render the resulting award unenforceable.

8. Mr. FOUCHARD (France) agreed. He had even more concern about paragraphs 60-62, because they expressed a clear preference for a situation in which discussions would take place before the hearing between witnesses and the lawyers acting for the party presenting the witnesses—in other words, a situation in which the witnesses would be “prepared” for the hearing. That was contrary to civil law practice. He could accept paragraph 60, since it was reasonable for the tribunal to have advance notice of details such as the witnesses’ names and addresses, but paragraphs 61-63 should be deleted.

9. Mr. SZURSKI (Poland) endorsed the comments made by the French representative. Arbitrators should not be encouraged to require the parties to provide witness statements in advance, because inevitably the statements would be prepared by the parties’ lawyers and merely signed by the witnesses. At the same time, the practice of advance submission of statements should not be ruled out altogether. He therefore suggested that paragraphs 61 and 62 should be redrafted so as to remove the emphasis in favour of advance submission and that paragraph 63 should be deleted.

10. Mr. MELIS (Observer for the International Council for Commercial Arbitration) said it was true that, from the civil law point of view, the matter of witness requirements in the pre-hearing stage was covered adequately by paragraph 60, but paragraphs 61 and 62 reflected a different approach. He recommended their retention in order that the text should cater for the many international arbitrations in which parties and their counsel came from countries with differing legal systems.

11. He agreed with the United States representative about the risk inherent in paragraph 63. It should either be deleted, or be modified to express the idea that the tribunal’s right to refuse to hear a witness was limited to the situation in which the witness failed to appear, in which case the tribunal would not allow the witness to be called at a second hearing.

12. Mr. HOLTZMANN (United States of America) endorsed the observations made by the previous speaker with regard to paragraphs 60-62. Paragraphs 61 and 62 reflected an established practice in many international commercial arbitrations and one which was recommended in the International Bar Association’s supplementary rules dated 28 May 1983 governing the presentation and reception of evidence in such arbitrations. In commenting on those two paragraphs, the French representative had alluded to the issue of witness interviews at the pre-hearing stage. That was dealt with in paragraph 68, which he approved as it stood.

13. With regard to paragraph 63, he had already drawn attention to the danger it represented. The alternative wording suggested by the previous speaker might share that defect.

14. Mr. LEBEDEV (Russian Federation) said that the content of section 15 was useful in drawing attention to issues which might arise in the course of the arbitration. However, the text should

avoid giving the impression—which he believed it might on a strict reading—that where arbitrators required the parties to submit full signed witness statements before the hearing, failure to meet that requirement would preclude a witness from giving oral evidence at the hearing itself. Furthermore, the submission of a full written statement should depend on the wish of the arbitrators, not on the wish or consent of the party concerned.

15. Mrs. GREINER (Observer for Switzerland) said that she could accept the French suggestion to delete paragraphs 61 and 62. However, a compromise solution, which might meet the wishes of both the French and the United States delegations in regard to the text on witness requirements in the prehearing stage, and ensure a certain balance, might be to add a sentence making it clear that, in addition to the practice reflected in those paragraphs, there was another equally common practice.

16. Mr. CHOUKRI SBAI (Observer for Morocco) said that his country’s legal system allowed only for oral testimony in the presence of the parties, lawyers and so on. Either paragraphs 61 and 62 should be deleted or paragraph 61 should be amended to say that parties “might agree” to allow summaries of the statements of witnesses or full signed statements to be submitted.

17. Mr. FOUCHARD (France) agreed that the problem might be solved by redrafting as suggested by Switzerland; however, the passage could not remain as it stood. As paragraph 68 said, the preparation of witnesses was considered improper in some legal systems. To obtain statements from them in advance also seemed inadvisable. Witnesses were often employees and would anyway tend to depict circumstances in a certain light. They should testify freely without preparation so that the tribunal could assess their sincerity; otherwise their testimony would be of little value. Paragraphs 61 and 62 should be redrafted and it should be stated that the preparation of the full text of witnesses’ statements in advance was not the only possible practice and was not always either legal or advisable.

18. The CHAIRMAN said he took it that the Commission was ready to leave the Secretariat to redraft the passage along the lines suggested by Switzerland.

19. Mr. ABASCAL ZAMORA (Mexico) asked what would be the consequence if a party did not submit witnesses’ statements in advance. Would it mean that the witnesses would not be heard? That might lead to problems in enforcing an award where a party’s witness had not been heard because a statement had not been submitted in advance, perhaps because that practice was illegal or not usual in the party’s country, and it might plead that it had consequently not had a fair hearing.

20. The CHAIRMAN said he was not quite sure what would happen. However, in Singapore, as far as court proceedings were concerned, written testimony was now taken and the witnesses were cross-examined on the basis of that testimony. The new system was generally welcomed.

21. Mr. ABASCAL ZAMORA (Mexico) said that he was not criticizing the system but merely pointing out that the present text was not clear.

22. Mr. HOLTZMANN (United States of America) said that it was illegal everywhere for a lawyer to “suborn perjury” but that he doubted whether it was illegal anywhere for an arbitrator or a lawyer to tell a witness to write out beforehand what he would say in court.

### Section 16

23. The CHAIRMAN noted that there were no comments on the section.

### Sections 17 and 18

24. Mr. FOUCHARD (France) said that the question of multi-party arbitration was of great complexity and that attempts to solve the problem had either failed or led to ineffective measures. He suggested that section 18 be deleted.

25. Mr. SZURSKI (Poland) suggested that a phrase be added at the end of paragraph 83 in section 17 referring to the possibility that statements might be written down by a qualified secretary present at the hearing and read through afterwards if requested by the parties to ensure that they had been recorded correctly.

26. Section 18 as it stood did not reflect existing practice in international commercial arbitration. Attention should be drawn to the possibility that parties might call in other parties, sometimes referred to as "interpleaders".

27. The CHAIRMAN, after inviting delegations to indicate their attitude to the Polish suggestion to add a new sentence to paragraph 83, noted that there was no objection to it.

28. Mr. MELIS (Observer for the International Council for Commercial Arbitration) suggested that paragraphs 87 and 88 should be deleted as being outside the topic of organizing arbitral proceedings.

29. The CHAIRMAN, after inviting delegations to indicate their attitude, noted that there was no objection to the deletion of paragraphs 87 and 88.

30. Mr. FOUCHARD (France) suggested that paragraphs 89 and 90 should also be deleted.

*The discussion covered in the summary record was suspended at 3.10 p.m. and resumed at 3.40 p.m.*

31. Mrs. GREINER (Observer for Switzerland) supported the suggestion to delete paragraphs 89 and 90.

32. Mr. RENGGER (Germany) said his delegation would be very reluctant to accept that suggestion. It believed that paragraphs 89 and 90 deserved inclusion.

33. Mr. GRIFFITH (Australia) suggested that the Secretary of the Commission be asked for his advice on the suggestion.

34. Ms. BUURE-HÄGGLUND (Finland) said her delegation would have some hesitation over deleting the whole section on multi-party arbitration. There should at least be a mention in the Notes that the possibility of such arbitration existed, although she would not oppose deletion of the detailed advice set out in paragraphs 89 and 90.

35. The CHAIRMAN wondered whether a paragraph might be included simply alerting the arbitrator to the possibility of multi-party arbitration.

36. Mr. HERRMANN (Secretary of the Commission) said he could envisage that some problems might arise in regard to paragraph 89, but not in regard to paragraph 90, which simply said that multi-party proceedings could be complicated and a number of factors ought to be taken into consideration when organizing them. Paragraph 90, perhaps with the addition of an introductory sentence, could either remain in its present position in the text or be inserted near the beginning, in the section dealing with the organization of arbitration proceedings. He himself would prefer the second alternative.

37. Mr. FOUCHARD (France) agreed that paragraph 90 posed no dangers. He endorsed the Secretary's view that mention should

be made of the problems that could arise in multi-party arbitration, and that that was best done earlier in the Notes. It would be sufficient to state that, where more than two parties were involved, certain problems could arise, and that accordingly even more care should be taken in deciding certain matters.

38. CHOUKRI SBAI (Observer for Morocco) said that paragraph 90 was unnecessary, since it contained nothing new, and merely listed the same problems as could arise in an arbitration involving only two parties. All the existing paragraphs relating to multi-party arbitration should either be redrafted or deleted altogether.

39. Mr. SZURSKI (Poland) found the solution suggested by the Secretary very reasonable. The paragraph proposed could perhaps take the place of the existing paragraph 87.

### Section 19

40. Mr. SZURSKI (Poland) proposed that paragraph 92 be deleted, since it was obvious that registration would be carried out by the winner in the dispute as the party with an interest in the enforcement of the award.

41. Mr. HOLTZMANN (United States of America) said he could not support that proposal because in practice it might be difficult to know which party was the winner: there might be subsequent counter-claims, or the party granted the award might not be satisfied with it. Some laws in fact required the arbitration tribunal to file the award. The wording of paragraph 92 was broad enough to cover all those possibilities, and he urged that it be retained.

42. Mrs. GREINER (Observer for Switzerland) said she had some difficulty in understanding the need for section 19, which in her view had nothing to do with organizing an arbitration.

43. Mr. HERRMANN (Secretary of the Commission) reminded the Commission that an award did not always signal the end of arbitration proceedings, because partial or interim awards might well be made. Section 19 had been included since it dealt with one of the organizational issues that might have to be addressed by an arbitral tribunal.

44. The CHAIRMAN, after inviting delegations to indicate their attitude to the proposal to delete paragraph 92, noted that there was a majority in favour of retaining the paragraph.

*The meeting was suspended at 4 p.m. and resumed at 4.30 p.m.*

### Section 2 (continued)

45. Mr. GRIFFITH (Australia) said that one point had been passed over in connection with paragraph 15 in section 2. Recalling the discussion that had taken place at the 574th meeting, he proposed that, to guard against any misunderstanding and avoid giving any impression that UNCITRAL was hostile to arbitration institutions, the phrase "(e.g. the UNCITRAL Arbitration Rules or another set of rules)" in the first sentence should be deleted, and the following text inserted after the second sentence: "The UNCITRAL Arbitration Rules may readily be applied. Alternatively, the parties may wish to adopt the rules of an arbitration institution. In this case, it would be necessary to ascertain and stipulate terms under which the arbitration could proceed as an administered arbitration".

46. Mr. MELIS (Observer for International Council for Commercial Arbitration) supported that amendment.



47. Mr. LEBEDEV (Russian Federation) said that he found it difficult to conceive of a situation in which parties would agree to ad hoc arbitration proceedings without any arbitration rules. In such a case, the proceedings would be subject to the law of the State in which they took place. Under the amendment proposed by the representative of Australia, however, the parties, at the arbitrator's suggestion, would agree to subordinate the proceedings to institutional arbitration rules with all associated forms of control. That would amount to a radical change in the nature of the proceedings and also in the original content and purpose of the paragraph.

48. Mr. SZURSKI (Poland) said that he understood the misgivings of the representative of the Russian Federation. He suggested that the second sentence should be amended along the following lines: "In such a case, they may (a) accept regularly applicable UNCITRAL Arbitration Rules or (b) adopt the rules of an administered arbitration institution". The last sentence would be deleted.

49. Mr. GRIFFITH (Australia) said that the amendment suggested by the representative of Poland placed more emphasis on the second option than had been intended. The UNCITRAL Arbitration Rules should be given first choice. The second option gave rise to technical difficulties: the institution would have to be consulted, its rules would have to be adapted and there might have to be a waiver of rules that had not been complied with to date.

50. Mr. ABASCAL ZAMORA (Mexico) said that if an arbitral tribunal had been set up without an agreement on arbitration rules, there would inevitably be an ad hoc arbitration. The UNCITRAL Arbitration Rules were the only universally recognized rules applicable in such cases. Any attempt to apply the rules of an arbitration institution to the proceedings of a tribunal that was already operating would raise serious problems and could not therefore be recommended as an equally valid alternative.

51. Mr. CHOUKRI SBAI (Observer for Morocco) thought that the Polish text, setting out two alternatives, might restrict the freedom of the parties.

52. Mr. LEBEDEV (Russian Federation) said that a proposal by arbitrators in favour of institutional arbitration might prove unacceptable and indeed illegal inasmuch as such a proposal would run counter to the institutional arbitration rules concerned. To opt for an institution in spite of its rules would be quite unacceptable.

53. Mr. HERRMANN (Secretary of the Commission) said that the original intention of paragraph 15 had not been to take a stand in favour of ad hoc proceedings or of proceedings based on institutional arbitration rules. The idea was that it might be useful to draw inspiration from certain rules in addressing some of the procedural issues that arose in the conduct of proceedings. The paragraph could perhaps be redrafted to suggest that consideration might be given to agreeing on rules governing the conduct of proceedings, as contained, for example, in section III of the UNCITRAL Arbitration Rules, entitled "Arbitral proceedings".

#### *General observation*

54. Mr. ABASCAL ZAMORA (Mexico) said that, after reviewing the whole draft, he would like to suggest that an emphatic statement should be inserted, perhaps at the beginning of the Notes, urging prospective users to exercise caution and to refrain from seeking the answer to all questions in the document.

55. The CHAIRMAN said that the secretariat would be asked to take care of that point, perhaps under paragraph 9 or 10.

*The meeting rose at 5.05 p.m.*

### **Summary record (partial)\* of the 577th meeting**

**Tuesday, 23 May 1995, at 9.30 a.m.**

[A/CN.9/577]

*Chairman:* Mr. GOH (Singapore)

*The meeting was called to order at 9.50 a.m.*

#### **INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL MEETINGS** (continued) (A/CN.9/410)

##### *Section 2 (continued)*

1. The CHAIRMAN asked whether a compromise solution had been found to the drafting of section 2 of the draft Notes (A/CN.9/410 para. 15).

2. Mr. HOLTZMANN (United States of America) submitted a joint proposal on behalf of the delegations of Australia, the Russian Federation and the United States of America to reword paragraph 15 as follows:

"15. Sometimes parties who have not included in their arbitration agreement a stipulation that a set of arbitration rules will govern the arbitral proceedings might wish to do so after the arbitration has begun. If that occurs, the UNCITRAL

Arbitration Rules may be used without modification. In the alternative, the parties may wish to adopt the rules of an arbitration institution. In that case, it would be necessary to secure the agreement of that institution and to stipulate the terms under which the arbitration could be carried out in accordance with the institution's rules. However, caution is advised, as consideration of a set of arbitration rules might delay the proceedings, or give rise to unnecessary controversy."

The Secretariat might undertake any minor drafting changes needed.

3. Mr. GRIFFITH (Australia) said that in any commentary it should be noted that great care ought to be taken in adopting institutional rules.

4. Ms. BRELIER (France) considered that the proposed new wording was rather imprecise, very long and uncertain in its implications. Her delegation wished it to be made clear that the adoption of arbitration rules was not a prior condition for arbitration.

\*No summary record was prepared for the rest of the meeting.



5. The CHAIRMAN said that the joint proposal did not change, but merely clarified and elaborated the meaning of the present paragraph 15.

6. Mr. CHOUKRI SBAI (Observer for Morocco) asked the United States representative to explain why the agreement of an arbitration institution was necessary when the parties freely chose to adopt the rules of that institution. If the institution's agreement were delayed, the arbitration process would be adversely affected.

7. Mr. OLIVENCIA (Spain), observing that it would have been better for the proposal to be submitted in writing, proposed that the words "without modification" should be deleted from the reference to the UNCITRAL Arbitration Rules, since the Rules themselves stated that they could be used with amendments agreed by the parties.

8. On the point raised by the observer for Morocco, he said that for a full conversion to administered arbitration the agreement of the arbitration institution would be needed, but if the parties simply referred to the rules of an institution that would not be necessary. Mere reference to such rules would not convert the arbitration into an administered arbitration.

9. His delegation was not in entire agreement with the proposed new wording, but in any case the Notes were practical suggestions and were not binding. They must, however, be quite clear and not result in any misunderstanding for the parties.

10. Ms. ZHANG Yuejiao (China) thought that the new text would affect the freedom of parties to sign an agreement. She agreed that the UNCITRAL Arbitration Rules allowed parties discretion in selecting their arbitral procedure. Since the UNCITRAL Rules applied to international arbitration, and the Notes applied to both international and domestic arbitration, it should be made clear that the parties to international arbitration could choose the UNCITRAL Rules. Parties were not obliged to

choose the rules of an arbitration institution or the UNCITRAL Rules, but could also adopt ad hoc rules. She therefore considered that the second part of the proposed new wording could be simplified and amended to read: "Without prior decision on the procedural rules, undue delay in the procedure might result."

11. Mr. HOLTZMANN (United States of America) suggested that the words "without modification" might be changed to "with or without modifications" to take account of the objections raised.

12. Replying to the question from the observer for Morocco as to the need for agreement by an arbitration institution, he explained that the rules of such institutions generally provided for a function to be performed by the institution, which might be unwilling to perform that function in a case that had already begun unless it was paid a fee. Hence it might require an agreement. The proposed wording was designed to alert parties to that possibility.

13. Mr. CHOUKRI SBAI (Observer for Morocco) said that in view of that explanation he could support the joint proposal. He endorsed the Spanish proposal to delete the words "without modification".

14. Mr. ABASCAL ZAMORA (Mexico) also endorsed the joint proposal, subject to minor drafting changes by the Secretariat, and the Spanish proposal to delete the words "without modification".

15. The CHAIRMAN suggested that the joint proposal be accepted with the deletion of the words "without modification" and subject to minor drafting changes by the secretariat. A final version of the text would be submitted to the Commission at its next annual session.

16. *It was so agreed.*

*The discussion covered in the summary record ended at 10.20 a.m.*

### Summary record (partial)\* of the 578th meeting

Tuesday, 23 May 1995, at 2 p.m.

[A/CN.9/SR.578]

Chairman: Mr. GOH (Singapore)

*The meeting was called to order at 2.15 p.m.*

*The discussion covered in the summary record began at 4.50 p.m.*

#### ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW (continued)

##### Report of the drafting group (A/CN.9/XXVIII/CRP.5 and Add.2)

1. The CHAIRMAN said that he would invite Ms. Clift (Australia) to introduce the report.

2. Ms. CLIFT (Australia) said that, in document A/CN.9/XXVIII/CRP.5, the change made to article 1 reflected the Commission's decision to have a more general provision covering sphere of application, with a footnote. Two alternative texts were suggested in the footnote, because the drafting group had found it difficult to decide whether a limiting phrase or a more inclusive

phrase was needed. The only change made to article 3 had been to replace "source" by "origin", which seemed better in most languages. No change had been made to articles 4, 5 or 6. In article 7, paragraph (1), the words "or retained" had been added after "presented", and the order of the two subparagraphs had been reversed. Subparagraph (a) now only required assurance as to the integrity of the information from the time of generation. In subparagraph (b) the words "where it is required that information be presented" had been added at the beginning of the sentence, and the words "capable of being" added before "displayed". In paragraph (2)(b) the word "composed" had been replaced by "generated". In the title of article 8, the word "value" had been replaced by "weight". Paragraph (3) of the article had been deleted. The *chapeau* of paragraph (1) now referred to the "admissibility" of a data message, and in subparagraph (a) the word "sole" had been inserted before "ground".

\*No summary record was prepared for the rest of the meeting.

3. The redrafted versions of articles 9-11 were contained in document A/CN.9/XXVIII/CRP.5/Add.2 (which superseded A/CN.9/XXVIII/CRP.5/Add.1). Changes had been underlined. Paragraph (1) of article 9 had been changed in order to align the text with previous articles, and the other changes in articles 9 and 10 reflected decisions of the Commission. She wished to suggest in addition that, in paragraph (2) of article 9, the words "retain information" should be replaced by "retain documents, records or information", in line with the wording used at the beginning of the article. Changes made to article 11 reflected the Commission's decision to adopt the substance of the proposal put forward by Australia, the United Kingdom and the United States of America (A/CN.9/XXVIII/CRP.7), as amended. In paragraphs (4)(b), (5) and (6), the drafting group had preferred the phrase "knew or should have known" to "knows or would know", and in paragraph (4)(a) the words "notice within a reasonable time" had been substituted for "reasonable notice".

4. Mr. ABASCAL ZAMORA (Mexico) said he had no objection to the report, but pointed out that those representatives who were experts on electronic data interchange and who had taken part in discussions on the text were no longer present. When those representatives came to read the report, they might not find the proposed text acceptable: some, for instance, had objected to the word "activities" that now appeared in article 1. He was not sure

whether it was right for representatives who had not participated in the original discussions to take the final decision on the text, and therefore proposed that the Commission should simply take note of the report, and that its adoption should be deferred to the Commission's next session.

5. The CHAIRMAN said that, at the Commission's next session in New York, the same experts would not necessarily be attending as members of the delegations of their respective countries. The Commission could, of course, decide at that session to make further changes to the text, but he urged that the drafting group's report should be adopted at the current session so as to set out what had been accomplished.

6. Mr. BURMAN (United States of America) said that in general the drafting group had done good work in reflecting the Commission's decisions. Before the report was adopted, however, he would suggest that the wording proposed for article 10(2) be reconsidered. The point was that parties might have rights under other law to modify certain aspects of chapter II, not that parties had the right to modify a rule of law. It might be preferable to substitute the word "matters" for "rule of law".

*The meeting rose at 5.05 p.m.*

### Summary record (partial)\* of the 579th meeting

Wednesday, 24 May 1995, at 9.30 a.m.

[A/CN.9/SR.579]

Chairman: Mr. GOH (Singapore)

*The meeting was called to order at 9.40 a.m.*

#### ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW (continued)

##### Report of the drafting group (continued) (A/CN.9/XXVIII/CRP.5 and Add.1 and 2)

1. Mr. BURMAN (United States of America) said that his delegation withdrew the comments it had made at the previous meeting casting doubt on the language used in the report of the drafting group concerning article 10, paragraph (2). After verification, it was clear that the wording it had chosen was correct. The United States of America still had reservations as to the appropriateness of the language, but would take up that issue at the next session.

2. Mr. SORIEUL (Secretariat), referring to the suggestion made at the previous meeting that it might not be possible to adopt the drafting group's report and that all issues would have to be discussed further in 1996, said that the drafting group had not sought to discuss substantive issues but simply to make sure that the Commission's decisions were reflected faithfully in the text. If the report of the drafting group, with any amendments that might be made, were not adopted, all the work done at the present session would have been wasted. It was important to adopt a text in order to provide a basis for discussion at the next session. The text submitted by the drafting group was, of course, not perfect and did not resolve all issues, but the Commission could if it so wished reopen the discussion at the next session, especially in regard to definitions.

3. Mr. RENGGER (Germany) said that, following the clarification given by the Secretariat, he felt easier about the situation and able to accept the text as a basis for discussion at the next session. However, he strongly supported the views expressed by the representative of Mexico at the previous meeting. He did not question the work of the drafting group, but Germany could not agree that a final decision had been taken on the adoption of the text, because it had serious objections to article 11 and had put forward other proposals. Germany would not be able to accept the text if further discussion were excluded. It accepted the report of the drafting group as reflecting the discussions in the Commission, but reserved its right to reopen discussion on substantive issues at the next session.

4. Mr. SORIEUL (Secretariat) said that there appeared to be two issues. Firstly, the Commission had to decide whether the report of the drafting group faithfully reflected the decisions taken by the Commission, since there could be no doubt that decisions had indeed been taken. The second question was to establish whether, at the next session, discussion could be reopened on an article or articles in the draft text. He pointed out, in regard to article 11, that certain parts of the text had been enclosed in square brackets. In other words, they had not been adopted and would therefore be discussed at the next session.

5. The CHAIRMAN pointed out that he had given an assurance that the issues could be discussed further. He suggested that article 11 be adopted for the time being. In his view, a full discussion of article 11 would be necessary, since a number of delegations were unhappy with certain provisions.

\*No summary record was prepared for the rest of the meeting.

6. Mr. GRIFFITH (Australia) said that the function of the drafting group was simply to express the decisions taken by the Commission. It had no right to decide matters of policy or substance. In his view, it had carried out its task faithfully and the proposed text should be adopted. In regard to the reopening of the discussion on certain issues that had been discussed at length in the Working Group, representatives were clearly entitled to do so if they wished. However, it was important to achieve a consensus that resulted in a text on EDI. Australia would be extremely concerned if no result were achieved at the twenty-ninth session. In that case, UNCITRAL would have to admit failure and vacate the field of EDI. He recognized the existence of problems in regard to article 11 and realized it would need to be discussed further, especially after re-examination of the definitions in article 2. In his view, the reluctance of certain representatives to adopt the report arose from confusion between two separate issues, the report as a true reflection of what had been agreed by the Commission and the fact that certain countries had reservations in regard to certain questions which they would like to be discussed further at the next session.

7. Mr. SHIMIZU (Japan) did not question the accuracy of the report by the drafting group and had no objection to its being adopted, but thought that article 11(3)(a)(ii) should be in square brackets, since, in his recollection, the indicative vote taken on that subparagraph had been evenly divided.

8. The CHAIRMAN said that article 11(3)(a)(ii) had been correctly retained following a decision by the Commission. He hoped that the lack of square brackets could be accepted on the understanding that the question would be discussed further at the next session.

9. Mr. ABASCAL ZAMORA (Mexico) said that the proposal he had made at the previous meeting had not been intended to delay decisions or raise problems regarding the work of the drafting group. As he had stated at the previous meeting, representatives not in fact present at the meeting concerned might be unsure as to whether a text had been agreed on or not. What he wanted was a clear indication as to whether the decisions taken by the Commission in regard to the drafting group's report would be binding at future sessions of the Commission. He wondered whether it would be possible to discuss in the future not only certain articles but the entire text submitted by the drafting group.

10. The CHAIRMAN emphasized that the present task of the Commission was to approve the report of the drafting group, and in so doing simply to make sure that the decisions taken by the Commission had been faithfully reflected in the text. It should not seek to reopen the discussion on policy. That could be done at the next session, since the Commission had not in fact adopted a model law at the present one.

11. Mrs. BRELIER (France) said that, after the explanation given by the secretariat, she was willing to accept the report of the drafting group so long as it would be possible for the Commission to reopen the discussion at a future date.

12. She wished to suggest one minor amendment, namely, to replace the word "*initiateur*" in article 6(1)(a) and elsewhere by the word "*expéditeur*", which was the only word that would be comprehensible in French.

13. Mr. SORIEUL (Secretariat) said that the proposed amendment would not affect the English version of the text.

14. Ms. ZHANG Yuejiao (China) said that the wording of article 10(2) in the report of the drafting group was not the wording that she had understood the Commission to approve. The paragraph should be amended to read: "Paragraph (1) does not affect

any right that may exist to modify by agreement any provision referred to in chapter II permitted by rule of law", or alternatively "Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law which is not mandatory referred to in chapter II". The Commission had agreed that any mandatory rule of law in chapter II would not be affected.

15. Article 11(3)(a)(ii) should be put into square brackets, as previously agreed. As to how the result of the session should be reflected in the report, she suggested that the wording "The present text basically reflects the result of the discussion during the session" would allow some leeway for delegations to come up with new wording at the next session.

16. Mr. HERRMANN (Secretary of the Commission) said that the secretariat had checked its notes on article 10(2) and found that the wording in the drafting group's report did correspond to the wording suggested by the United Kingdom representative. The question of whether the provision could apply to a non-mandatory rule of law was one of substance, whereas the Commission was now adopting the report of the drafting group and merely had to check whether the group had implemented its decision faithfully.

17. The CHAIRMAN endorsed those views and pointed out that the Commission should not take over the functions of the drafting group. He urged delegations not to submit proposals of substance. According to his own notes, article 10(2) had indeed been adopted.

18. Mr. BURMAN (United States of America) agreed with the Secretary, the Chairman and the representative of Australia. Any clarification of the language would have to be done at the next session. However, he hoped that the discussion on the whole text would not be reopened at the next session and that delegations would raise only those points on which they had reservations or strong differences of opinion.

19. Mr. BONELL (Italy) agreed in principle with the remarks of the representatives of Australia and the United States, but observed that each session of the Commission followed its own course. In any case, a number of delegations believed that not just the two pending articles, but the whole structure of the Model Law required further consideration, and many provisions were interlinked.

20. His delegation had full confidence that the Commission's proceedings had been properly recorded by the secretariat and agreed that the present meeting was not the right place to reopen discussion on the matter of substance raised by the representative of China. That also applied to the point raised by the representative of France.

21. Mr. CHOUKRI SBAI (Observer for Morocco) suggested that the Commission should concentrate on the report of the drafting group. The Commission had not concluded its debate on the Model Law and would have a chance to discuss it again at its next session.

22. Mr. CHAY (Singapore) suggested that the Commission should decide expressly whether at the next session all the articles might be open for discussion both as to substance and drafting, or whether the discussion should be confined to certain articles. Leaving the matter open would pave the way to reopening the discussion on every single article.

23. Since a decision had been made to adopt articles 1, 3-9 and 12, with amendments faithfully reproduced by the drafting group, he suggested that at the next session the discussion on substance be restricted to articles 10 and 11, discussion on the other articles being confined to drafting matters.

24. The CHAIRMAN pointed out that it was not for the present session to tell the next session what it could or could not do. He himself shared the view of the German and United States representatives that some of the provisions of the Model Law were not very satisfactory and should be reviewed.

25. He invited the Commission to adopt the report of the drafting group, amended in the French version through the replacement of "*initiateur*" by "*expéditeur*".

26. Mr. PELICHET (Observer for the Hague Conference on Private International Law) said that the French proposal involved a question of substance. "*Expéditeur*" and "*initiateur*" were not at all the same in the context of electronic data interchange. He therefore proposed that the French version of the text should be maintained, even if that would mean reopening the discussion at the next session.

27. Ms. ZHANG Yuejiao (China) asked for confirmation that delegations would have a chance to discuss the points they wished at the next session.

28. Mr. GRIFFITH (Australia) reminded members of the Australian proposal that article 9(2) be reworded as follows: "An

obligation to retain documents, records or information ..." to make it conform with the wording in article 9(1). That was a drafting point but one that had to be decided by the Commission.

29. Mrs. BRELIER (France) said that her amendment was not a matter of translation but of the correct use of the French language.

30. Mr. CHOUKRI SBAI (Observer for Morocco) considered that the word "*initiateur*" (originator), a new term relating to the creation, storage or transmission of a data message, was broader than "*expéditeur*" (sender).

31. The CHAIRMAN suggested that the text should remain as it stood, that the matter raised by the French representative should be discussed at the next session, and that the Australian proposal on article 9(2) should be adopted.

32. *It was so agreed.*

33. *The report of the drafting group, as amended, was adopted.*

*The discussion covered in the summary record ended at 10.35 a.m.*

# IV. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF UNCITRAL:<sup>1</sup> NOTE BY THE SECRETARIAT

(A/CN.9/429) [Original: English]

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## ANNEX

## Short and full titles of UNCITRAL legal texts

<i>Short title</i>	<i>Full title</i>
Hamburg Rules (1978)	United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) <sup>a</sup>
Limitation Convention (1974/1980)	Convention on the Limitation Period in the International Sale of Goods, 1974 (New York) <sup>b</sup> and Protocol amending the Convention on the Limitation Period in the International Sale of Goods, 1980 (Vienna) <sup>c</sup>
UNCITRAL Arbitration Rules (1976)	Arbitration Rules of the United Nations Commission on International Trade Law (1976) <sup>d</sup>
UNCITRAL Conciliation Rules (1980)	Conciliation Rules of the United Nations Commission on International Trade Law (1980) <sup>e</sup>
UNCITRAL Credit Transfer Law (1992)	Model Law on International Credit Transfers (1992) <sup>f</sup>
UNCITRAL Model Arbitration Law (1985)	Model Law on International Commercial Arbitration (1985) <sup>g</sup>
UNCITRAL Model Procurement Law (1994)	UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) <sup>h</sup>
United Nations Sales Convention (1980)	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) <sup>i</sup>

## Notes

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<sup>b</sup>Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974 (United Nations publication, Sales No. E.74.V.8), part I.

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## V. CHECK-LIST OF UNCITRAL DOCUMENTS

<i>Document symbol</i>	<i>Title of description</i>	<i>Location in present volume</i>
<b>A. List of documents before the Commission at its twenty-eighth session</b>		
<b>1. General series</b>		
A/CN.9/404	Provisional agenda	Not reproduced
A/CN.9/405	Report of the Working Group on International Contract Practices on the work of its twenty-second session	Part two, I, A
A/CN.9/406	Report of the Working Group on Electronic Data Interchange (EDI) on the work of its twenty-eighth session	Part two, II, A
A/CN.9/407	Report of the Working Group on Electronic Data Interchange (EDI) on the work of its twenty-ninth session	Part two, II, C
A/CN.9/408	Report of the Working Group on International Contract Practices on the work of its twenty-third session	Part two, I, C
A/CN.9/409 A/CN.9/409/Add.1-4	Draft Model Law on legal aspects of Electronic Data Interchange (EDI) and related means of communication: compilation of comments by Governments and international organizations	Part two, II, E
A/CN.9/410	Draft Notes on Organizing Arbitral Proceedings: report of the Secretary-General	Part two, III
A/CN.9/411	Draft Convention on Independent Guarantees and Stand-by Letters of Credit: note by the Secretariat: Draft final clauses for the draft Convention on Independent Guarantees and Stand-by Letters of Credit	Part two, I, D
A/CN.9/412	Assignment in receivables financing: discussion and preliminary draft of uniform rules: report of the Secretary-General	Part two, IV, C
A/CN.9/413	Cross-Border Insolvency: report on UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency: note by the Secretariat	Part two, V, A
A/CN.9/414	Build-operate-transfer projects: note by the Secretariat	Part two, IV, B
A/CN.9/415	Training and technical assistance: note by the Secretariat	Part two, VI
A/CN.9/416	Status of Conventions: note by the Secretariat	Part two, V
A/CN.9/429	Bibliography of recent writings related to the work of UNCITRAL	Part three, IV

### 2. Restricted series

A/CN.9/XXVIII/CRP.1 and Add/1-22	Draft Report of the United Nations Commission on International Trade Law on the work of its Twenty-eighth session	Not reproduced
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<i>Document symbol</i>	<i>Title of description</i>	<i>Location in present volume</i>
A/CN.9/XXVIII/CRP.2 and Add.1-5	Report of the Drafting Group	Not reproduced
A/CN.9/XXVIII/CRP.3	Proposals on article 19	Not reproduced
A/CN.9/XXVIII/CRP.4	Draft report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session	Not reproduced
A/CN.9/XXVIII/CRP.5 and Add.1 and 2	Report of the Drafting Group	Not reproduced
A/CN.9/XXVIII/CRP.6 and 7	Draft UNCITRAL Model Law on legal aspects of electronic data interchange (EDI) and related means of data communication	Not reproduced

### 3. Information series

A/CN.9/XXVIII/INF.1/ Rev.1	List of participants	Not reproduced
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## B. List of documents before the Working Group on International Contract Practices on the work of its twenty-second session

### 1. Working papers

A/CN.9/WG.II/WP.82	Provisional Agenda	Not reproduced
A/CN.9/WG.II/WP.83	Working paper submitted to the Working Group on International Contract Practices at its twenty-second session: Independent guarantees and stand-by letters of credit: newly revised articles of draft Convention: note by the Secretariat	Part two, I, B

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## C. List of documents before the Working Group on International Contract Practices on the work of its twenty-third session

### 1. Working papers

A/CN.9/WG.II/WP.84	Provisional agenda	Not reproduced
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### 2. Restricted series

A/CN.9/WG.II/XXIII/CRP.1 and Add.1-7	Draft Report of the Working Group on International Contract Practices on the work of its twenty-third session	Not reproduced
A/CN.9/WG.II/XXIII/CRP.2 and Add. 1-4	Report of the Drafting Group	Not reproduced
A/CN.9/WG.II/XXIII/CRP.3	Alternative to current article 24 bis suggested by the Secretariat	Not reproduced

<i>Document symbol</i>	<i>Title of description</i>	<i>Location in present volume</i>
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**D. List of documents before the Working Group on the Electronic Data Interchange on the work of its twenty-eighth session**

**1. Working papers**

A/CN.9/WG.IV/WP.61	Provisional agenda	Not reproduced
A/CN.9/WG.IV/WP.62	Working paper submitted to the Working Group on Electronic Data Interchange at its twenty-eighth session: newly revised draft model statutory provisions on the legal aspects of electronic data interchange (EDI) and related means of data communication: articles 1 to 10	Part two, II, B

**2. Restricted series**

A/CN.9/WG.IV/XXVIII/CRP.1 and Add.1-10	Draft Report of the Working Group on Electronic Data Interchange on the work of its twenty-eighth session.	Not reproduced
A/CN.9/WG.IV/CRP.2 and Add.1-3	Report of the Drafting Group	Not reproduced

**3. Information series**

A/CN.9/WG.IV/XXVIII/INF.1	Provisional list of participants	Not reproduced
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**E. List of documents before the Working Group on the Electronic Data Interchange on the work of its twenty-ninth session**

**1. Working papers**

A/CN.9/WG.IV/WP.63	Provisional agenda	Not reproduced
A/CN.9/WG.IV/WP.64	Draft Guide to enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication: note by the Secretariat	Part two, II, D, 1
A/CN.9/WG.IV/WP.65	Proposal by the Observer for the International Chamber of Commerce: note by the Secretariat	Part two, II, D, 2
A/CN.9/WG.IV/WP.66	Proposal by the United Kingdom of Great Britain and Northern Ireland: note by the Secretariat	Part two, II, D, 3
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